

**NOTE**  
**WHAT A BOARD WANTS, WHAT A BOARD  
NEEDS: A NEW WAY TO EVICT A PROPERTY  
OWNER FOR BAD BEHAVIOR IN COMMON  
INTEREST COMMUNITIES**

I. INTRODUCTION

Imagine a scenario where a property owner becomes outraged at having to replace their heating or cooling system, to the point where they are in clear distress—thus, severely alarming their neighbors.<sup>1</sup> Whenever you encounter him, he is always screaming obscenities, destructing property, and getting into physical altercations with members of your community.<sup>2</sup> Now, imagine a scenario where you are living in the same building as this property owner, who begins to harass and insult members within the building relentlessly for several months due to his anger.<sup>3</sup> If you are living in the common interest communities of a condominium or homeowners association, there is no solution to getting rid of this property owner—you will be forced to deal with this behavior, no matter how extreme or alarming it may become.<sup>4</sup>

This is reality for some of the seventy-three million Americans that live in common interest communities.<sup>5</sup> There are three main kinds of common interest communities—condominiums, homeowners associations (“HOAs”), and cooperatives (“co-ops”).<sup>6</sup> Common interest

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1. See *Harassment in HOAs: Defining and Preventing Unacceptable Behavior*, ALTITUDE CMTY. L. (Sept. 24, 2011), <https://altitude.law/resources/newsletter/harassment-hoas-defining-and-preventing-unacceptable-behavior> [<https://perma.cc/X2CN-QJ4M>].

2. *Id.*

3. *Id.*

4. See *infra* note 144 and accompanying text.

5. Community Associations Institute, *More Americans Are Choosing to Live in Homeowners Associations and Condominium Communities*, GLOBE NEWSWIRE (Aug. 1, 2019, 8:47 AM), <https://www.globenewswire.com/news-release/2019/08/01/1895590/0/en/MORE-AMERICANS-ARE-CHOOSING-TO-LIVE-IN-HOMEOWNERS-ASSOCIATIONS-AND-CONDOMINIUM-COMMUNITIES.html> [<https://perma.cc/MU8A-U3P3>].

6. *Common Interest Communities*, PUB. HEALTH L. CTR., <https://www.publichealthlawcenter.org/topics/commercial-tobacco-control/smoke-free-tobacco-free-places/housing/common-interest-communities> [<https://perma.cc/6ALP-FLWK>] (last visited Apr. 1, 2023).

community properties are managed by governing documents, which typically include the Declaration of Covenants, restrictions and conditions, bylaws, and rules and regulations.<sup>7</sup> Such communities are generally managed by a board of directors who are elected by the owners within the community.<sup>8</sup> Typically, the board of directors has the responsibility of managing the common property of the community and has the power to levy assessments, or payments, against property owners to pay for the functions assigned to the property by the governing documents.<sup>9</sup>

While condominiums, HOAs, and co-ops are all categorized as common interest communities, there are several similarities and differences among the three.<sup>10</sup> Condominiums and HOAs are the most similar, while co-ops differ greatly from the two.<sup>11</sup> There are many advantages to living in a common interest community—such as sharing resources and the cost of amenities like clubhouses, tennis courts, playgrounds, pools, security guards, and more.<sup>12</sup> There are, of course, some downsides as well.<sup>13</sup>

One of the main features of living in a condominium or HOA is that the owner of the unit or property owns their real estate in fee simple.<sup>14</sup> The unit or property owner also has an undivided interest,<sup>15</sup> together with the rest of the community, in the common elements of the community.<sup>16</sup> Condominiums require you to pay a monthly charge for common

7. Susan F. French, *Making Common Interest Communities Work: The Next Step*, 37 URB. LAW. 359, 362 (2005).

8. *Id.*

9. *Id.*

10. See *Condominium, Co-op, and HOA—What's the Difference?*, PROLICENSE FLA., <https://www.flcaa.com/post/condo-coop-hoa-what-difference> [<https://perma.cc/RX2J-XMG9?type=image>] (last visited Apr. 1, 2023).

11. See generally *id.* (describing how those who reside in condominiums or homeowners associations (“HOAs”) own their parcel themselves and share amenities with the community, while those in cooperatives (“co-ops”) do not actually own their unit).

12. Jonas (Instructor), *A Primer on Community Association Living*, AACC ONLINE (July 19, 2016), <https://onlinecamcourses.com/2016/07/a-primer-on-community-association-living> [<https://perma.cc/RM92-P42V>].

13. See *infra* Part III.

14. N.Y. REAL PROP. LAW § 3:178 (McKinney 2018). Fee simple ownership is ownership of the full estate without any condition imposed on the property that would cause ownership to revert to the grantor of the estate or to a third party. Robert Wilcox, *Fee Simple and Fee Tail Estate*, in 1 PATTON AND PALOMAR ON LAND TITLES § 203 (3d ed. 2021).

15. § 3:178. An undivided interest is an ownership right to possess and use property that is shared by two or more co-owners. *Undivided Interest*, LEGAL INFO. INST., [https://www.law.cornell.edu/wex/undivided\\_interest](https://www.law.cornell.edu/wex/undivided_interest) [<https://perma.cc/933M-WZQY>] (last visited Apr. 1, 2023). In this case, an individual co-owner does not have exclusive right to any portion of the property. *Undivided Interest, supra*.

16. § 3:178; *Community Associations—What Realtors and Home Buyers Need to Know*, RADOM & WETTER (Jan. 8, 2019), <https://www.radomandwetter.com/community-associations-what-realtors-and-home-buyers-need-to-know> [<https://perma.cc/Y6CB-PFVM>]. Common elements

elements, otherwise known as the common charges.<sup>17</sup> HOAs are similar in that each property owner must pay assessments, which can be defined as proportionate shares of expenses incurred which fund the HOA's business and governmental services.<sup>18</sup> Condominiums and HOAs are operated by governing documents such as bylaws, rules, and regulations.<sup>19</sup> Condominiums and HOAs differ greatly from co-ops in that the property owner's relationship with the board of the condominium or HOA is not a typical landlord-tenant relationship, like the relationship a co-op has with its tenant.<sup>20</sup> Because of this, one of the only ways a unit or property owner can be evicted from their respective condominium or HOA is by placing a lien<sup>21</sup> on their unit or property for their failure to pay unpaid fines, assessments, or common charges, and eventually foreclosing on the property.<sup>22</sup> On the other hand, a co-op has great leniency in evicting a tenant, or shareholder, due to their landlord-tenant-like relationship that is bound together by a proprietary lease.<sup>23</sup>

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are the shared spaces in and around the building that are collectively owned by all owners in the building. *Three Things New Condo Owners Need to Know About Common Elements*, TARION (Aug. 22, 2017), <https://www.tarion.com/blog/62502/three-things-new-condo-owners-need-know-about-common-elements> [<https://perma.cc/SUF6-T6K5>]. Common elements generally include hallways, lobbies, laundry rooms, gardens, walkways, and steps to building entrances, utility systems, fitness rooms, pools, and elevators. *Three Things New Condo Owners Need to Know About Common Elements*, *supra*.

17. See Eliza Theiss, *What Are Common Charges?*, PROP. SHARK (Oct. 30, 2018), <https://www.propertyshark.com/Real-Estate-Reports/2018/10/30/what-are-common-charges> [<https://perma.cc/XU2V-CYZU>].

18. See Gemma Giantomasi, *A Balancing Act: The Foreclosure Power of Homeowners' Associations*, 72 FORDHAM L. REV. 2503, 2509-10 (2004).

19. See *id.* at 2506; § 3:178.

20. See *Can Homeowners Associations Evict Homeowners and Tenants?*, ROCKET LAW., <https://www.rocketlawyer.com/blog/can-homeowners-associations-evict-homeowners-and-tenants-929554> [<https://perma.cc/3HP7-PHNZ>] (last visited Apr. 1, 2023); Benny L. Kass, *Condos vs. Co-ops: What's the Difference?*, WASH. POST (Apr. 26, 2013), [https://www.washingtonpost.com/realestate/condos-vs-co-ops-whats-the-difference/2013/04/25/f673e29c-a5e6-11e2-b029-8fb7e977ef71\\_story.html](https://www.washingtonpost.com/realestate/condos-vs-co-ops-whats-the-difference/2013/04/25/f673e29c-a5e6-11e2-b029-8fb7e977ef71_story.html) [<https://perma.cc/2UZ9-8XYH>].

21. *Can Homeowners Associations Evict Homeowners and Tenants?*, *supra* note 20. A lien is "a legal claim against a piece of property that is recorded with the local county, giving the lienholder a legal interest in a property." Dock David Treece, *Liens: What They Are and How They Work*, FORBES ADVISOR (Mar. 29, 2021, 4:26 AM), <https://www.forbes.com/advisor/mortgages/liens-what-they-are-and-how-they-work> [<https://perma.cc/Y7YU-BX8U>]. Liens protect the interests of creditors and others to whom a property owner may owe money. Treece, *supra*. Liens can prevent property owners from borrowing against or selling their property and can even lead to foreclosure. Treece, *supra*.

22. See *Can Homeowners Associations Evict Homeowners and Tenants?*, *supra* note 20; GARY A. POLIAKOFF, *Statutory Authority for Lien*, in 1 LAW OF CONDOMINIUM OPERATIONS § 5:23 (2022).

23. See 15B AM. JUR. 2D § 73 (2021).

While one of the main features of living in a condominium or HOA is that the unit or property owner owns their parcel in fee simple, this also creates issues for the board of a condominium or HOA when dealing with unruly residents.<sup>24</sup> For example, if there is a unit or property owner who continuously disturbs the community by making threats, getting into physical altercations, or exhibiting nuisance-like behavior, the board does not have the ability to evict that unit or property owner, no matter how disturbing this behavior may be.<sup>25</sup> This is because of the fee simple ownership of the unit or property.<sup>26</sup> While condominiums, HOAs, and co-ops are all common interest communities, one of the major differences is that co-ops have the ability to evict a tenant/shareholder for exhibiting such behavior, because a tenant/shareholder living in a co-op does not own their unit in fee simple and is instead bound by a proprietary lease which can authorize termination of a tenancy.<sup>27</sup>

When dealing with an objectionable unit or property owner living in a condominium or HOA, the board of a condominium or HOA, unfortunately, does not have many choices.<sup>28</sup> They may be able to fine the unit or property owner, but the only way they would be able to evict that owner is if they do not pay that fine, the board places a lien on the unit, and then the board eventually forecloses on that unit.<sup>29</sup> Those living in a condominium or HOA may need a faster and more efficient solution when dealing with such an unruly resident in order to protect the community at large.<sup>30</sup>

This Note argues that what is needed is a bylaw, or an amendment to the bylaws, that gives the board the ability to evict a unit or property

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24. See Bruce A. Cholst & Mary L. Kosmark, *Overcoming Limitations of Condo Boards in Dealing with Unruly Residents*, N.Y. L.J. (Mar. 13, 2012), [https://www.andersonkill.com/Custom/PublicationPDF/PublicationID\\_1407\\_Overcoming-Limitations-of-Condo-Boards-In-Dealing-With-Unruly-Residents.pdf](https://www.andersonkill.com/Custom/PublicationPDF/PublicationID_1407_Overcoming-Limitations-of-Condo-Boards-In-Dealing-With-Unruly-Residents.pdf) [https://perma.cc/H4JX-5SQ3].

25. See generally *id.* (stating that the board of a condominium does not have the power to evict unit owners from the community no matter how atrocious their behavior might be).

26. See *id.*; see *Can Homeowners Associations Evict Homeowners and Tenants?*, *supra* note 20 (describing how HOAs cannot evict a property owner the same way a landlord can evict a tenant because the HOA does not own the home).

27. See Cholst & Kosmark, *supra* note 24.

28. See *id.* Boards are not completely without legal remedy, but the remedies that are available are flawed. *Id.*

29. Beth Holliday, *Cause of Action to Enforce Condominium or Homeowners' Association Assessment or Fees*, in 89 CAUSES OF ACTION 2D SERIES § 27 (2019).

30. See generally Cholst & Kosmark, *supra* note 24 (describing how, in such a tightly knit community such as a condominium, any departure from the rules or norms by even one resident negatively affects every other resident's quality of living, and that this kind of disruption upsets the equilibrium of the community and results in disruption throughout the building).

owner for bad behavior.<sup>31</sup> This newly proposed bylaw would state that a resident whose behavior regularly “disturbs the quiet and peaceful enjoyment of other residents’ homes frequently enough, or to such an extent that quality of life in the community is negatively impacted,” may be evicted upon a vote from the board.<sup>32</sup> The vote to evict the objectionable resident will be successful upon seventy-five percent of the board approving to evict the resident.<sup>33</sup> This proposed bylaw will allow for the board of a condominium or HOA to have a real and effective solution when dealing with a resident whose behavior is egregious or is a threat to the community.<sup>34</sup>

Part II of this Note discusses the history and background of the three main kinds of common interest communities<sup>35</sup>—condominiums, HOAs, and co-ops.<sup>36</sup> Part III discusses the serious issue that the boards of condominiums and HOAs face when dealing with an egregious property owner.<sup>37</sup> Lastly, Part IV proposes a legal solution for the boards of condominiums and HOAs when dealing with such an owner.<sup>38</sup>

## II. COMMON INTEREST COMMUNITIES

Part II of this Note delves into the history, functions, and operations of condominiums.<sup>39</sup> It then discusses the history and operations of HOAs.<sup>40</sup> Lastly, it examines the history and functions of co-ops.<sup>41</sup>

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31. See A.J. Sidransky, *When It's Time to Evict an Owner or Tenant from a Condo*, COOPERATOR NEWS N.Y. (May 29, 2019), <https://cooperatornews.com/article/when-its-time-to-evict-or-eject-a-owner-or-tenant-from-a-condo/full> [<https://perma.cc/AW87-49HL>] (stating that unless something is explicitly stated in the governing documents, it is extremely difficult to eject an owner).

32. See *infra* Part IV; Cooperator Staff, *Dealing with the Disruptive*, COOPERATOR NEWS N.J., <https://nj.cooperatornews.com/article/dealing-with-the-disruptive/full> [<https://perma.cc/LW4B-3U7N>] (last visited Apr. 1, 2023) (defining a truly disruptive resident as “someone whose behavior disturbs the quiet and peaceful enjoyment of other residents’ homes frequently enough, or to such an extent that quality of life in the community is negatively impacted”).

33. See *infra* Part IV; *Cf.* Cholst & Kosmark, *supra* note 24 (suggesting a provision in a condominium’s bylaws compelling a unit owner’s sale of their unit upon a finding by the super majority vote of both the board and the unit owners that their occupancy is objectionable).

34. See Cholst & Kosmark, *supra* note 24 (contending that their proposed solution in dealing with unruly residents offers the board a powerful option when dealing with serious situations for which they currently do not have a remedy).

35. See *infra* Part II.

36. *Common Interest Communities*, *supra* note 6; French, *supra* note 7, at 362.

37. See *infra* Part III.

38. See *infra* Part IV.

39. See *infra* Part II.A.1-2.

40. See *infra* Part II.B.1-2.

41. See *infra* Part II.C.1-2.

### A. Condominiums

The following Subpart discusses the history and main functions of condominiums.<sup>42</sup> It provides a brief history on the development of condominiums and how they came to be a prevalent form of living in the United States.<sup>43</sup> It also details key concepts of condominiums and how they operate.<sup>44</sup>

#### 1. History of Condominiums

Condominiums have been present in Europe as a kind of ownership in differing forms since the end of the Middle Ages.<sup>45</sup> Condominium ownership began to appear in the United States near the end of the nineteenth century and tends to be popular in crowded urban areas.<sup>46</sup> Before the arrival of the condominium, the cooperative was the only form of community living that gained broad acceptance throughout the first half of the twentieth century.<sup>47</sup>

The very first condominium building was built in New York City in 1881, which had eight units and was built to assist city dwellers who did not have the ability to pay for a single-family home, but at the same time, did not want to be renters.<sup>48</sup> Although the first condominium building in New York City has since been demolished, in the beginning of the twentieth century, Puerto Rico passed the first modern condominium statute, which provided a legal framework for purchasers and developers when dealing with issues in ownership and maintenance of common elements.<sup>49</sup> Soon after, American developers began to incorporate this concept and thus built Graystone Manor in 1960—cited as the first modern condominium building in the United States.<sup>50</sup> Florida, with the help of developers who had seen the concept of condominiums flourish in Puerto Rico, began to offer such buildings whose units could be owned

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42. See *infra* Part II.A.1-2.

43. See *infra* Part II.A.1.

44. See *infra* Part II.A.2.

45. See The Editors of Encyclopaedia Britannica, *Condominium Building*, BRITANNICA, <https://www.britannica.com/topic/condominium-building> [https://perma.cc/E2BR-HRDY] (last updated Sept. 26, 2022).

46. See *id.*

47. Michael R. Fierro, *Condominium Association Remedies Against a Recalcitrant Unit Owner*, 73 ST. JOHN'S L. REV. 247, 247-48 (1999).

48. See Andrew S. Fortin, *A Brief History of the Condo*, ASSOCIA, <https://hub.associaonline.com/blog/a-brief-history-of-the-condo> [https://perma.cc/H4BY-NARC] (last visited Apr. 1, 2023). A journalist named Junius Henri Browne was traced to be the first buyer in the building. *Id.*

49. *Id.*

50. See *id.*

outright.<sup>51</sup> Bankers in Florida welcomed the idea of mortgages for the units, which simplified the financing.<sup>52</sup> The legal structure of condominiums also made it easier for owners to resell their units.<sup>53</sup> The Federal Housing Administration then began to allow funding for condominiums, which opened the floodgates for these types of buildings.<sup>54</sup> Now, there are more than thirty million condominium units in North America.<sup>55</sup>

## 2. How Condominiums Operate

Condominium ownership is a form of joint ownership of real property where a person or legal entity individually owns a unit in a multi-unit piece of property and “owns an undivided interest in the common areas and the facilities that serve the property”—otherwise known as the “common elements.”<sup>56</sup> Each unit owner has two different property interests—fee simple ownership of their individual unit, and “an undivided interest, together with all of the other unit owners in the project,” in the common elements.<sup>57</sup>

Condominiums require that each owner strictly comply “with the bylaws and with the rules, regulations, resolutions, and decisions adopted pursuant to the bylaws.”<sup>58</sup> The bylaws are a self-governing document that includes how the board of the condominium administers its policies according to the bylaws and how the board oversees the administration

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51. Mary Umberger, *Chronicling How U.S. Condo Ownership Went Through the Roof*, L.A. TIMES (Mar. 1, 2013, 12:00 AM), <https://www.latimes.com/la-xpm-2013-mar-01-la-fi-umberger-20130303-story.html> [<https://perma.cc/T6M6-BART>].

52. *Id.*

53. *Id.*

54. Fortin, *supra* note 48. On August 15, 2019, the Federal Housing Administration added two new sections, entitled “Condominiums” and “Condominium Project Approval,” and incorporated new project approval policy guidance for condominiums. *Condominium Mortgage Insurance*, U.S. DEP’T OF HOUS. & URB. DEV., [https://www.hud.gov/program\\_offices/housing/sfh/ins/sfh\\_ins\\_condominiums](https://www.hud.gov/program_offices/housing/sfh/ins/sfh_ins_condominiums) [<https://perma.cc/5748-DJ24>] (last visited Apr. 1, 2023). Section 203(b) of the National Housing Act gives authority to insure a mortgage for a one-family unit in a project with an undivided interest in the common areas and facilities within the project. *Condominium Mortgage Insurance*, *supra*. The Federal Housing Administration insures loans for condominiums for up to thirty-year terms to refinance or purchase a unit in an approved condominium. *Condominium Mortgage Insurance*, *supra*.

55. *See* Fortin, *supra* note 48.

56. N.Y. REAL PROP. LAW § 3:178 (McKinney 2018).

57. *Id.* The basic ownership of property under English Common Law was known as fee simple absolute. GERRY W. BEYER & JAMES M. KOSAKOW, *Specific Characteristics of Ownership*, in 1 REVOCABLE TRUSTS 5th § 4:2 (2022). Fee simple absolute under English Common Law provided that possession of real estate “was unlimited and absolute to the individual and their heirs and assigns” for an unlimited duration of time with no conditions or limitations. BEYER & KOSAKOW, *supra*.

58. § 3:178.

and maintenance of the condominium.<sup>59</sup> Reasonable amendments to condominium bylaws can be made in accordance with the declaration,<sup>60</sup> a master deed,<sup>61</sup> statutes, or bylaws.<sup>62</sup> The power of the board of a condominium to make amendments to the bylaws “is limited by a determination of whether the amendment is arbitrary, capricious, unreasonable, or discriminatory.”<sup>63</sup> If an amendment to the bylaws serves a legitimate purpose, and if the means the board adopts to amend such bylaws are rationally related to achieve that purpose, a constitutional challenge to the amendment will be withstood.<sup>64</sup>

As there are many shared amenities in condominiums, the common charges are a form of payment that each unit owner must make, which cover all the shared costs of services and amenities that are available within the condominium.<sup>65</sup> Common charges may include payment for operating costs, management fees, amenities, and staff salaries.<sup>66</sup> They do not include taxes.<sup>67</sup> Further, the payment of common charges is made in addition to any mortgage payments a unit owner may have.<sup>68</sup> Payment of common charges is an important obligation that each unit owner has,

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59. Lisa Iannucci, *Changing the Rules*, COOPERATOR NEWS N.Y., <https://cooperatornews.com/article/changing-the-rules/full> [https://perma.cc/U2RF-VW2D] (last visited Apr. 1, 2023).

60. 31 JAMES BUCHWALTER & LONNIE E. GRIFFITH, JR., *Amendment of Condominium Bylaws*, in C.J.S. ESTATES § 237 (2022). A declaration is a legal document which establishes the ownership and rules of a property within the condominium. Matt Daimler, *What Are Condo Declarations and House Rules?*, STREETEASY READS (Jan. 1, 2015), <https://streeteasy.com/blog/condo-declarations-and-house-rules> [https://perma.cc/N9JZ-N784]. Declarations are filed with the condominium’s local governing authority. Daimler, *supra*.

61. BUCHWALTER & GRIFFITH, JR., *supra* note 60. A master deed is a fundamental document which establishes the condominium’s existence and also dictates the maintenance and use of the property. *Condominium Declaration*, PROP. SHARK, <https://www.propertyshark.com/mason/text/infopages/Real-Estate-Glossary/condominium-declaration.html> [https://perma.cc/PQ3S-3GK4] (last visited Apr. 1, 2023).

62. BUCHWALTER & GRIFFITH, JR., *supra* note 60.

63. *Id.*

64. *Id.* An amendment may implicate state constitutional challenges, which can include equal protection and due process concerns. *Franklin v. Spadafora*, 447 N.E.2d 1244, 1245 (Mass. 1983). For example, one may raise equal protection and due process concerns when an amendment to the bylaws is passed that limits the number of units any one person may own to two units. *Franklin*, 447 N.E.2d at 1245; see also *infra* Part IV.C.2, for a discussion of due process concerns.

65. See Theiss, *supra* note 17.

66. See *id.* Things that are covered by common charges vary from condominium to condominium, but it is typical to find common charges that cover the cost of such things like heat, gas, snow removal, hot water, electric bills for common areas like hallways and lobbies, parking, landscaping, garbage disposal, and plumbing. See *id.*

67. See *id.*

68. See *id.*



in that failure to do so may result in serious consequences for that unit owner.<sup>69</sup>

If a unit owner fails to pay common charges, the board of the condominium is entitled to have a lien on such unit for the unpaid common charges, with interest.<sup>70</sup> A lien for unpaid common charges cannot include unpaid fines.<sup>71</sup> Such liens can typically be satisfied through a foreclosure proceeding against the unit within the condominium association.<sup>72</sup> In a foreclosure proceeding, the unit owner must pay reasonable rental fees for the unit for the period prior to the sale of the condominium unit, if this is provided for in the bylaws.<sup>73</sup> The board of the condominium is entitled to the appointment of a receiver<sup>74</sup> to collect such reasonable rental payments, however, such appointment is only authorized to collect rent from the unit owner, and not from a third party whom the unit was rented to.<sup>75</sup> Additionally, the board of the condominium has the power (unless prohibited in the bylaws) to put the unit up for bid in a foreclosure sale “and to acquire and hold, lease, mortgage, and convey” such unit.<sup>76</sup>

The authority that a condominium association has to impose a lien on the unit depends on compliance with the governing statute.<sup>77</sup> This includes provisions that require that a claim for a lien give a description of the property and the lien, and that the lien is authorized in the governing documents of the condominium.<sup>78</sup> Once the board has placed a lien on a condominium unit for unpaid common charges, it has the ability to foreclose on the unit, which is essentially the only way to “evict” a unit owner.<sup>79</sup>

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69. See generally 19A N.Y. JUR. 2D *Condominiums, Etc.* §§ 121, 126 (2019) (discussing particular consequences that could occur in failing to pay common charges).

70. *Id.* § 121. The board’s lien has priority over all other liens except for liens for taxes on the unit, sums unpaid on a first mortgage, and sums unpaid on a subordinate mortgage. *Id.*

71. *Id.*

72. POLIAKOFF, *supra* note 22, § 5:23.

73. 19A N.Y. JUR. 2D § 126.

74. *Id.* A receiver is “an unbiased third party that the court appoints to protect the property from damage or lost rental income.” *The Role of a Receiver in a Commercial Foreclosure*, ALLLAW, <https://www.alllaw.com/articles/nolo/foreclosure/role-receiver-commercial-foreclosure.html> [<https://perma.cc/78HW-F3MG>] (last visited Apr. 1, 2023). The receiver is usually an individual person. *Id.*

75. 19A N.Y. JUR. 2D § 126.

76. *Id.*

77. POLIAKOFF, *supra* note 22, § 5:23.

78. *Id.* A lien procedure must also ensure that the process contains the due process safeguards, such as notice and a hearing, found in condominium acts. *Id.*

79. See generally Fierro, *supra* note 47, at 260-61 (stating that one of the remedies available to a condominium when dealing with a recalcitrant unit owner is to place a lien against the property for unpaid common charges, which could end in foreclosure).

### B. Homeowners Associations (HOAs)

The following Subpart of this Note discusses the history of HOAs and how they came to be.<sup>80</sup> It also discusses the main functions of HOAs and the driving forces behind them.<sup>81</sup> This Subpart also incorporates the similarities and differences between HOAs and condominiums.<sup>82</sup>

#### 1. The History of HOAs

The origin of the HOA stems from the creation of the property owners' association ("POA"), which was created through the common law of servitudes.<sup>83</sup> The development of the POA has been traced back to the eighteenth century, whose classification includes organizations that have been created by covenants<sup>84</sup> or servitudes that run with the land and "whose membership consists of owners of units in that subdivision."<sup>85</sup> The oldest known POA in the United States was established in 1844, which consisted of twenty-eight homes in Boston.<sup>86</sup> POAs began to appear more commonly throughout the next century, especially in New England and the area surrounding New York City.<sup>87</sup> By the 1970s, POAs were prevalent for many American homeowners.<sup>88</sup>

The HOA is a kind of POA.<sup>89</sup> Starting with the 1960s, owners who had detached and attached single-family homes<sup>90</sup> and shared common facilities usually did so through an HOA.<sup>91</sup> This was due in part to the

80. See *infra* Part II.B.1.

81. See *infra* Part II.B.2.

82. See *infra* Part II.B.2.

83. See Giantomasi, *supra* note 18, at 2503-04. A servitude is a legal tool which is used to create a right or obligation in land. Fredric L. Shenkman, *Servitudes: Restrictions on the Use of Land*, MARTINDALE (Apr. 1, 2019), [https://www.martindale.com/legal-news/article\\_cooper-levenson-pa\\_2516306.htm](https://www.martindale.com/legal-news/article_cooper-levenson-pa_2516306.htm) [<https://perma.cc/ATB5-3JVX>]. Generally, it is the right to use or enjoy another's land or to place a restriction on the use of land. Shenkman, *supra*.

84. Giantomasi, *supra* note 18, at 2504-05. A covenant is similar to a servitude in that it also runs with the land. *Covenant That Runs with the Land*, LEGAL INFO. INST., [https://www.law.cornell.edu/wex/covenant\\_that\\_runs\\_with\\_the\\_land](https://www.law.cornell.edu/wex/covenant_that_runs_with_the_land) [<https://perma.cc/9QV8-CA7U>] (last visited Apr. 1, 2023). It is an agreement between two or more parties about how a piece of real property is to be used. *Covenant That Runs with the Land*, *supra*.

85. See Giantomasi, *supra* note 18, at 2504-05.

86. See *id.* at 2505.

87. See *id.*

88. See *id.*

89. See *id.*

90. See *id.* at 2506. A detached residence is one that sits on its own lot without sharing any walls with another building or home. Trudy Brunot, *What Does Detached Mean in Real Estate?*, POCKET SENSE, <https://pocketsense.com/detached-mean-real-estate-5210.html> [<https://perma.cc/VK69-ZGD8>] (last updated Oct. 17, 2018). On the other hand, an attached residence "shares walls on both sides with another home." Brunot, *supra*.

91. See Giantomasi, *supra* note 18, at 2506.

federal government's encouragement of an increase in residential developments and the immense migration to the suburbs.<sup>92</sup> As more communities were developed, the HOA model was adjusted to accommodate for the wants and needs of residents.<sup>93</sup> One of the main purposes of developing HOAs was to enforce covenants, as well as create new rules as needed.<sup>94</sup> *Neponsit Property Owners' Association v. Emigrant Industrial Savings Bank*<sup>95</sup> was one of the first cases where the power of an HOA was formally recognized, in which the court held that a covenant that required homeowners to pay fees in order to maintain common areas did touch or concern the land.<sup>96</sup> Therefore, the obligation to pay fees was enforceable by the HOA and would pass to future property owners—thus recognizing the enforceability of an HOAs' covenant.<sup>97</sup> Today, there are more than one in five Americans living in HOAs, and there are more than 5,000 new HOA communities being built each year.<sup>98</sup>

## 2. The Functions of HOAs

An HOA is an organization created by a real estate developer in order to develop and manage a community of condominium units, town homes, and/or homes.<sup>99</sup> It has the authority to enforce the restrictions, covenants, and conditions, and to manage the common elements of the association.<sup>100</sup> Similar to condominiums, HOAs are governed by specific documents that are akin to state constitutions or codes.<sup>101</sup> The basic governing instrument is the declaration, but the bylaws describe how the HOA truly operates.<sup>102</sup> The bylaws are the set of rules that the HOA adopts which provide for its government and internal management.<sup>103</sup> These “contain the rules and regulations that govern members of the

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92. See *History of HOAs*, SPECTRUM ASS'N MGMT., <https://spectrumam.com/a-history-of-hoas> [<https://perma.cc/ZW2G-YZQE>] (last visited Apr. 1, 2023).

93. See *id.*

94. See Rebecca Crooker, *Hey, Neighbor: Homeowners' Associations, Super-Priority Liens, and the Need for Balanced Rights in Nevada*, 19 NEV. L.J. 313, 315 (2018).

95. 15 N.E.2d 793 (N.Y. 1938).

96. See Crooker, *supra* note 94, at 315; *Neponsit*, 15 N.E.2d at 797.

97. See Crooker, *supra* note 94, at 315.

98. See *History of HOAs*, *supra* note 92.

99. See *Homeowners Associations (HOAs)*, N.Y. ATT'Y GEN., <https://ag.ny.gov/real-estate-finance-bureau/hoa> [<https://perma.cc/DYW8-2522>] (last visited Apr. 1, 2023).

100. See *id.*

101. See *supra* note 58 and accompanying text; see Giantomasi, *supra* note 18, at 2506. Such governing documents include articles or certificates of incorporation, a declaration, bylaws, and covenants. Giantomasi, *supra* at 2506.

102. See *id.* at 2506-07.

103. See *id.* at 2507.

HOA.”<sup>104</sup> Also similar to condominiums is the HOA’s ability to enforce bylaws as long as they are reasonable.<sup>105</sup>

Just as condominiums require unit owners to pay common charges, HOAs are similar in that they require property owners to pay assessments.<sup>106</sup> Individuals must pay their share of assessments—the expenses used to fund the association’s business and governmental services—“as long as [the] assessments are put towards a legitimate use.”<sup>107</sup> Along with the requirement that the assessments are for a reasonable purpose is the requirement that the collection procedure for assessments is lawfully enforced pursuant to the HOA’s governing documents and the applicable state law.<sup>108</sup> So long as it is provided by state law, an HOA has the ability to collect assessments in any way.<sup>109</sup>

Neither payment at the discretion of the homeowner nor payment of assessments is voluntary.<sup>110</sup> Courts have mostly struck down arguments made by defendants who have failed to pay assessments that they should be excused from making payment because they are not satisfied with the actions, or inactions, of the HOA.<sup>111</sup> Instead, “payment of assessments is an independent obligation that is not tied to an association’s commissions or omissions.”<sup>112</sup>

As assessments are the sole source of income that cover an HOA’s expenses, ensuring that each property owner pays their assessments is critical in that nonpayment can negatively impact an HOA’s purpose.<sup>113</sup> Similar to condominiums, an HOA is permitted, provided that it is in the association’s covenants, to place a lien on the property of an owner who fails to pay their assessments.<sup>114</sup> When placing a lien on the property, an HOA is generally permitted to include charges for past-due assessments, fines, late charges, interest, and attorneys’ fees and costs.<sup>115</sup> Once the lien is in place, HOAs have the ability, under state law or in its

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104. *See id.*

105. *See id.* at 2508; *see* BUCHWALTER & GRIFFITH, JR., *supra* note 60.

106. *See* Giantomasi, *supra* note 18, at 2510; Theiss, *supra* note 17.

107. *See* Giantomasi, *supra* note 18, at 2510. An HOA can collect assessments for items and services that are reasonably necessary. *See id.*

108. *See id.*

109. *See id.*

110. *See id.* at 2511.

111. *See id.*

112. *See id.*

113. *See id.* at 2512. If property owners fail to pay their assessments, HOAs would face problems in planning, budgeting, and meeting expenses, as an HOA’s budget is calculated based on the assumption that each property owner will successfully pay their assessments. *Id.*

114. *See id.* at 2516.

115. Amy Loftsgordon, *New York HOA and COA Foreclosures*, NOLO, <https://www.nolo.com/legal-encyclopedia/new-york-hoa-coa-foreclosures.html> [<https://perma.cc/VF36-25T6>] (last visited Apr. 1, 2023).

governing documents, to foreclose on the property for failure to pay assessments.<sup>116</sup> Foreclosing on an individual's property for their failure to pay assessments is one of the only ways an HOA can "evict" a property owner.<sup>117</sup>

### C. Cooperatives (Co-ops)

The following Subpart delves into the background and history of co-ops.<sup>118</sup> It also discusses how co-ops function.<sup>119</sup> This Subpart further develops the distinction of co-ops from condominiums and HOAs.<sup>120</sup>

#### 1. History of Cooperatives

The development of the co-op in the United States stems from the Industrial Revolution in England throughout the years of 1750 to 1850.<sup>121</sup> During this time period, many workers were forced to move to cities where they were confronted with low wages and harsh working conditions, and many small farmers were driven off their lands and into towns and cities, searching for employment.<sup>122</sup> "Friendly society" organizations were created to help the conditions many were facing, and contributed to business ideas of developing the cooperative.<sup>123</sup> What followed was a wave of co-ops that were part of a larger vision where "social needs could be met through cooperative action."<sup>124</sup>

The first known cooperative housing community was built in Chicago in 1909.<sup>125</sup> Early co-ops were geared towards those in high-income brackets who desired the advantages and economies of owning an

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116. Giantomasi, *supra* note 18, at 2517. For example, New York law provides that an HOA may foreclose for unpaid assessments by suit that is authorized by and brought by the board, on behalf of the unit owners. N.Y. REAL PROP. LAW § 339-aa (McKinney 2021).

117. *See generally Can Homeowners Associations Evict Homeowners and Tenants?*, *supra* note 20 (stating how an HOA cannot evict a property owner in the same way that a landlord can evict a tenant, but that if a property owner fails to pay assessments, the HOA may have the ability to foreclose on that owner's property).

118. *See infra* Part II.C.1.

119. *See infra* Part II.C.2.

120. *See infra* Part II.C.2.

121. Lynn Pitman, *History of Cooperatives in the United States: An Overview*, UW CTR. FOR COOPERATIVES 1, 1 (Dec. 2018), [https://resources.uwcc.wisc.edu/History\\_of\\_Cooperatives.pdf](https://resources.uwcc.wisc.edu/History_of_Cooperatives.pdf) [<https://perma.cc/6RLV-N3VF>].

122. *Id.*

123. *Id.*

124. *Id.*

125. *A History of Housing Cooperatives*, NAT'L COOP. L. CTR. 2, <https://nationalcooperativelawcenter.com/national-cooperative-law-center/the-history-of-housing-cooperatives> [<https://perma.cc/DQ3W-J6K4>] (last visited Apr. 1, 2023).

individual home, but without all of the responsibilities.<sup>126</sup> By 1925, co-ops existed in sixteen cities in the United States, with most of them being high-income.<sup>127</sup> However, the National Housing Act of 1959 accelerated the development of low and moderate income communities throughout the 1960s and 1970s, which helped form affordable co-ops.<sup>128</sup> Although co-op development was mainly concentrated in New York and Chicago, it began to develop in other states.<sup>129</sup> Condominium homeownership quickly became the main form of multi-family development across the country, but housing cooperatives remained present for low and moderate income residents, as well as the highly wealthy in New York.<sup>130</sup>

## 2. How Cooperatives Operate

Co-ops are corporations that are established “for the purpose of owning and operating real property for [their] residents.”<sup>131</sup> The corporation owns multi-family property that is occupied by members of the co-op.<sup>132</sup> To become a member of the co-op, residents must purchase shares in the cooperative, which provides them co-ownership in the real property that is owned by the co-op.<sup>133</sup> The shares represent portions of stock in the corporation which the co-op unit owner, or shareholder, acquires through actual certificates of stock.<sup>134</sup> Co-ops differ from condominiums in that a member of a co-op does not actually own their unit, and therefore “does not directly own real property.”<sup>135</sup> Instead, the shares represent the member’s ownership right, which is laid out in the proprietary lease—the document that allows a person to reside in the building.<sup>136</sup>

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126. *Id.*

127. *Id.*

128. *Id.* at 4; see 12 U.S.C.A. § 1715z(a)(1) (2018).

129. Julie D. Lawton, *Unraveling the Legal Hybrid of Housing Cooperatives*, 83 UMKC L. REV. 117, 124 (2014).

130. *Id.* at 124.

131. *See id.* at 118.

132. *See id.*

133. *See id.*

134. Elizabeth Lent, *Share and Share Alike*, COOPERATOR NEWS N.Y., <https://cooperatornews.com/article/share-and-share-alike/full> [<https://perma.cc/7Q6C-KNSE>] (last visited Apr. 1, 2023). While the shareholders receive the actual certificates of stock, they may only see them at closing. *Id.* The certificate is held by the bank, and the owner does not see the certificate again until they pay off the security agreement. *Id.*

135. *See* Lawton, *supra* note 129, at 118.

136. Lent, *supra* note 134.

The proprietary lease is the occupancy agreement entered into between the co-op member and the co-op itself.<sup>137</sup> This document consists of the terms and conditions for a co-op member who occupies a unit within the co-op.<sup>138</sup> The proprietary lease also lists which unit a shareholder can reside in, who can live in the unit, the term of the proprietary lease, and the monthly fees that each shareholder must pay.<sup>139</sup> The proprietary lease gives the board of a co-op many rights and powers, including the right to terminate, or evict, a shareholder's proprietary lease.<sup>140</sup> Further, the majority of proprietary leases also contain a process for termination and eviction of occupants from their unit on the ground of "objectionable conduct" by the shareholder or their guests or sub-tenants, and also provides that the co-op can cancel the shareholder's stock certificate in the corporation.<sup>141</sup> This is what separates co-ops from condominiums and HOAs—co-op boards have a great amount of freedom in deciding whether to evict a tenant for bad behavior.<sup>142</sup>

### III. CONDOMINIUMS' AND HOAS' INABILITY TO EVICT AN OWNER FOR EGREGIOUS BEHAVIOR

As previously stated, those who reside in condominiums or HOAs own their property in fee simple.<sup>143</sup> This makes it extremely difficult for the board of a condominium or HOA to evict a property owner for bad behavior.<sup>144</sup> The lack of power a board of a condominium or HOA has in evicting unit owners creates a serious issue when dealing with a property owner who is a severe disturbance or threat to the community—as there

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137. See Lawton, *supra* note 129, at 126.

138. See *id.*

139. See *id.* These monthly fees are called "maintenance fees," which are similar to a condominium's common charges in that the fees cover building operating costs, upkeep, and amenities. See *Common Charges vs. Maintenance Fees: Is There a Difference?*, LOCALIZE (Oct. 15, 2020), <https://www.localize.city/blog/common-charges-vs-maintenance-fees-is-there-a-difference> [<https://perma.cc/LR8P-7734>].

140. *Co-ops & Proprietary Leases*, JULES MARTIN HAAS ATTORNEY AT LAW, <https://www.juleshaasattorney.com/co-ops-proprietary-leases.html> [<https://perma.cc/UVG6-SVC2>] (last visited Apr. 1, 2023).

141. See Cholst & Kosmark, *supra* note 24.

142. *Co-ops, Condos, & Lofts*, N.Y.C. BAR, <https://www.nycbar.org/get-legal-help/article/landlord-tenant/co-ops-condos-and-lofts> [<https://perma.cc/L8DS-E8KG>] (last visited Apr. 1, 2023).

143. See *supra* note 14 and accompanying text.

144. See Cholst & Kosmark, *supra* note 24 (stating that since a condominium unit is owned in fee simple, the board of a condominium is not in a landlord-tenant relationship with the unit owners and therefore does not have the power to evict unit owners for bad behavior); see generally *Can Homeowners Associations Evict Homeowners and Tenants?*, *supra* note 20 (explaining that an HOA "cannot evict a property owner the same way that a landlord can evict a tenant" because the HOA does not own the home—the property owner does).

is almost no remedy to evict them.<sup>145</sup> The following Subparts provide examples of egregious behavior in common interest communities and the differences in eviction power condominiums and HOAs have from co-ops.<sup>146</sup>

#### A. Egregious Behavior in Condominiums and HOAs

When the behavior of a property owner affects the entire community, a board of a condominium can ask the courts to intervene.<sup>147</sup> One such example of a property owner whose behavior affects the entire common interest community is an owner in a condominium who became outraged when the board approved a large assessment to finance the replacement of a heating and cooling system.<sup>148</sup> The unit owner would attend board meetings and shout obscenities at the board, would continue to insult the board president after the meetings would end, and would block the door to prevent the president from leaving the room.<sup>149</sup> Additionally, he would shout at the president every time he saw them and would send the president grim e-mails, including messages that a bedpan “could do a better job of managing the association’s affairs.”<sup>150</sup> This behavior was not just displayed over a short period of time, but continued for over four months.<sup>151</sup> This is an instance where the board does not have the authority to evict such unit owner, even though he continued to threaten the president and cause a disturbance over an extended period of time.<sup>152</sup> Alternatives to eviction in this instance include writing the offending individual a letter explaining that they have violated the association’s covenants and stating that the individual will be fined or face sanctions if the behavior does not stop.<sup>153</sup> If it does not appear that the behavior may be stopped by writing a letter, an association can seek a civil restraining order in court.<sup>154</sup> The board may also file criminal

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145. See Cholst & Kosmark, *supra* note 24.

146. See *infra* Part III.A-B.

147. See *Focus: When Can Court Force Condo Owners to Sell?*, L. TIMES (Jan. 13, 2014), <https://www.lawtimesnews.com/news/legal-analysis/focus-when-can-court-force-condo-owners-to-sell/261143> [<https://perma.cc/6EX8-QEVA>]. Condominium boards do not have the legal authority to evict unit owners, so they may go to the courts as a last resort after other efforts to resolve the situation have failed. *Id.* However, the proposed remedy within this Note would allow the board of a condominium or HOA to evict a property owner on their own discretion, without going to the courts for relief. See *infra* Part IV.A.

148. See *Harassment in HOAs: Defining and Preventing Unacceptable Behavior*, *supra* note 1.

149. See *id.*

150. See *id.*

151. See *id.*

152. See *supra* note 147 and accompanying text.

153. *Harassment in HOAs: Defining and Preventing Unacceptable Behavior*, *supra* note 1.

154. *Id.*



charges.<sup>155</sup> However, the board still cannot utilize eviction as a remedy against this kind of owner.<sup>156</sup>

Another illustration of a unit owner whose objectionable behavior affects the entire community can be shown in *4215 Harding Road Homeowners Association v. Harris*.<sup>157</sup> In this case, a unit owner violated several provisions of the master deed and bylaws “due to grossly unsanitary conditions in the defendant’s unit and extremely offensive odors that emanated from her unit into common areas.”<sup>158</sup> There were four provisions that were violated.<sup>159</sup> One provision was included in the master deed, which stated, “[t]he use, maintenance and operation of the Common Elements shall not be obstructed, damaged or unreasonably interfered with by an Unit Owner.”<sup>160</sup> Another provision that was violated was contained in the association’s bylaws, which stated,

No unlawful noxious or offensive activities shall be carried on in any Unit or elsewhere on the Property, nor shall anything be done therein or thereon which shall constitute a nuisance or which shall in the judgment of the Board cause unreasonable noise or disturbance to others. Each Unit Owner shall maintain his Unit in good condition and in good order and repair, at his own expense.<sup>161</sup>

An additional section of the bylaws was violated as well, which provided that “trash, garbage and other waste shall be kept only in sanitary containers, and shall be disposed of in a clean and sanitary manner.”<sup>162</sup> Lastly, a provision of the Rules and Regulations was violated, which provided that, “residents shall not cause or permit unreasonable disturbance to others.”<sup>163</sup>

The unit owner’s foul behavior was ongoing for several years and caused residents to file many complaints to the board.<sup>164</sup> Residents complained of a “noxious and offensive odor” coming from the unit owner’s unit, which was so pervasive it led a resident to request that their parking spot be relocated because the odor was so abhorrent they did not want to walk down the hallway where the defendant’s unit was.<sup>165</sup> The manager and several professional services entered defendant’s unit numerous

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155. *Id.*

156. *See supra* note 144 and accompanying text.

157. 354 S.W.3d 296 (Tenn. Ct. App. 2011).

158. *Id.* at 298.

159. *See id.*

160. *Id.*

161. *Id.*

162. *Id.*

163. *Id.*

164. *See id.* at 299.

165. *Id.*

times in order to assist in remedying the situation, in which they were exposed to overpowering smells, gnats, extensive amounts of trash, mold, rotten food on the furniture and floors, and a bathroom with an accumulation of urine and scum.<sup>166</sup> Several letters were sent to the defendant to notify her that she was in violation of the master deed and bylaws and that action must be taken to rectify the situation.<sup>167</sup> After the defendant made no attempts to amend the situation, the board initiated an action against her pursuant to the provisions in the association's Master Deed.<sup>168</sup>

A more disturbing example of an egregious property owner includes an owner who continuously harassed his association's manager.<sup>169</sup> This owner followed and stalked the manager of an HOA for over a year.<sup>170</sup> The owner was apparently determined to "either have the manager terminated" or to leave the manager with no other option but to quit in order to avoid the abuse.<sup>171</sup> He secretly recorded the manager with a camera, set up a derogatory website, and hacked into other people's e-mails.<sup>172</sup> The board even obtained a restraining order, but the owner ignored the order and continued to harass and stalk the manager.<sup>173</sup> Even in this instance, the board had no remedy to evict the property owner.<sup>174</sup> However, the board was able to bring a contempt charge against the owner for violating the restraining order, and after a trial, "the judge found the owner in contempt and sentenced him to five days in jail."<sup>175</sup> The court gave the owner the option to pay a fine and face three years of strict probation rather than being subjected to five days in jail, with the probation requiring the owner to remain a "substantial distance away from the manager at all times" and to lose his rights to utilize the common areas of the association and his right to visit the manager's office.<sup>176</sup>

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166. *See id.* at 299-300.

167. *See id.* at 299-303.

168. *See id.* at 303. The association requested relief in the form of "damages, an injunction, specific performance, and the right to sell the unit for violating the provisions" of the Bylaws and the Master Deed. *Id.* at 303-04. The court granted the judicial sale of the unit. *Id.* at 308. While the association was granted relief in this case, the proposed remedy in this Note would not require a given association to go to the court to seek a judicial sale of a unit; rather, it would allow for an association to evict an owner on their own discretion. *See infra* Part IV.A.

169. *Homeowner Harasses HOA Manager—and Pays the Price*, HOA LEADER, <https://www.hoaleader.com/public/304.cfm> [<https://perma.cc/8ZD4-Q4MP>] (last visited Apr. 1, 2023).

170. *Id.*

171. *Id.*

172. *Id.*

173. *Id.*

174. *See supra* note 147 and accompanying text.

175. *Homeowner Harasses HOA Manager—and Pays the Price*, *supra* note 169.

176. *Id.*

### B. Egregious Behavior in Co-ops

As stated, co-ops have much more leniency than condominiums and HOAs in evicting a tenant for objectionable behavior.<sup>177</sup> This can be shown in *40 West 67th Street v. Pullman*,<sup>178</sup> where a co-op successfully brought an action to evict a shareholder-tenant for his “objectionable” conduct.<sup>179</sup> The defendant engaged in behavior, described below, that over the course of his residency at the co-op, became “increasingly disruptive and ultimately became intolerable.”<sup>180</sup> The defendant complained about his elderly upstairs neighbors who lived in their respective co-op for two decades.<sup>181</sup> He sent sixteen letters to the board in the month of October 1999 alone, accusing the couple of things that, upon an investigation by the board, were proven to be false.<sup>182</sup> The defendant and the husband of the couple got into a physical altercation, after which the defendant gave out flyers to residents where he made derogatory accusations about the couple.<sup>183</sup> The board called a special meeting where, by a vote of 2,048 shares to zero, the shareholders declared defendant’s conduct “objectionable” and directed the board to cancel his shares and terminate his proprietary lease.<sup>184</sup> When the defendant ignored his notice of termination, the co-op brought suit, where the court held that the co-op’s decision was protected under the business judgment rule.<sup>185</sup>

The business judgment rule is a common law doctrine in which the court defers to the “good faith decisions made by boards of directors in business settings.”<sup>186</sup> In *Levandusky v. One Fifth Avenue Apartment Corp.*,<sup>187</sup> the court established a standard of review akin to the corporate business judgment rule for a decision made by a residential co-op corporation that is challenged by a shareholder-tenant.<sup>188</sup> In co-op settings, the business judgment rule protects decisions made by a cooperative board

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177. See Cholst & Kosmark, *supra* note 24.

178. 790 N.E.2d 1174 (N.Y. 2003).

179. *Id.* at 1181.

180. *Id.* at 1177.

181. *Id.*

182. *Id.*

183. *Id.*

184. *Id.* at 1177-78.

185. *Id.* at 1178.

186. *Id.* at 1179. For a more detailed explanation of the business judgment rule, see *infra* Part IV.B.1.

187. 553 N.E.2d 1317 (N.Y. 1990).

188. *40 W. 67th St.*, 790 N.E.2d at 1179. *Levandusky* involved a co-op board who “issued a stop work order for a shareholder-tenant’s renovations” that were in violation of the proprietary lease. *Id.* When the shareholder-tenant initiated an action to set aside the stop work order, the court upheld the co-op’s action, concluding that the business judgment rule balances collective and individual interests that are at stake in a residential co-op setting. *Id.*

as long as the board acts for the co-op, in good faith, and in the scope of its authority.<sup>189</sup> The rule allows co-ops to evict tenants as long as they meet such standard, which provides co-ops with a significant amount of leniency to evict those who are disruptive to the community.<sup>190</sup>

An additional example of a situation where the board of a co-op had the authority to evict a tenant/shareholder can be shown in *London Terrace Towers, Inc. v. Davis*.<sup>191</sup> In this case, the board was forced to send Davis, a tenant-shareholder, a letter banning him from the health club, laundry room, and sundeck because “he allegedly stole from residents who used these facilities.”<sup>192</sup> Further, many members of the co-ops’ staff made numerous complaints about Davis.<sup>193</sup> Davis’s objectionable conduct continued for eleven years, with some of the more disturbing instances including him allowing two fires to ignite in his unit, and engaging in loud fights with guests in his apartment to the point where the police had to be called.<sup>194</sup> The board eventually voted to terminate Davis’ lease, and when the co-op brought suit to take possession of his unit, the court upheld the board’s decision, again using the business judgment rule.<sup>195</sup>

These examples prove the leniency co-ops have when evicting a tenant-shareholder.<sup>196</sup> While the tenant-shareholders’ conduct in these cases may not be so extreme, it shows that the board does have the authority to evict a tenant-shareholder for being a mere disturbance to the cooperative.<sup>197</sup> As condominiums and HOAs do not have such authority, the residential communities within those associations may not be protected from disturbing or abusive property owners, essentially forcing those in the community to be “stuck” with such a disturbing owner.<sup>198</sup> This is extremely problematic for those who want to feel safe within

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189. *Id.*

190. *See id.* While granting co-ops such leniency to evict tenants creates a risk of abuse through malicious or arbitrary decision-making, the purpose of the business judgment rule is to protect the interests of the community at large. *Id.* The rule also protects decisions made by co-ops from unnecessary court involvement and “judicial second-guessing.” *Id.*

191. 790 N.Y.S.2d 813 (N.Y. Civ. Ct. 2004).

192. *Id.* at 816.

193. *See id.*

194. *See id.*

195. *Id.* at 825. The court stated, “[h]ere, as in *Pullman*, the ‘cooperative unfailingly followed the procedures contained in the [proprietary] lease to terminate [respondent’s] tenancy.’” *Id.*

196. *See generally* 40 W. 67th St. v. *Pullman*, 790 N.E.2d 1174, 1182 (N.Y. 2003) (terminating a tenant-shareholder’s lease for only a few instances of objectionable behavior); *London Terrace Towers*, 790 N.Y.S.2d at 825 (holding that a co-op’s decision to evict a tenant/shareholder is protected under the business judgment rule).

197. *See* 40 W. 67th St., 790 N.E.2d at 1182; *London Terrace Towers*, 790 N.Y.S.2d at 825.

198. *See* Cholst & Kosmark, *supra* note 24.

their own homes.<sup>199</sup> There must be an easier solution in place when dealing with egregious property owners in common interest communities.<sup>200</sup>

#### IV. A NEW BYLAW TO PROVIDE A REMEDY FOR THE BOARD AGAINST EGREGIOUS PROPERTY OWNERS

This Part focuses on the proposed remedy that should be available to the board of condominiums and HOAs, and the process for incorporating this remedy into the board's bylaws.<sup>201</sup> Specifically, it discusses the two standards that courts may use when analyzing a bylaw—the business judgment rule and the reasonableness test.<sup>202</sup> Lastly, it considers counterarguments, such as due process concerns.<sup>203</sup>

##### *A. What Is Needed—The Disruptive Resident Bylaw*

One of the driving forces of a condominium or HOA is the association's bylaws.<sup>204</sup> Since the bylaws set out the rules and guidelines that every property owner must follow, what is needed is an amendment to the bylaws, or a provision in the bylaws, if it is a new governing body, that would allow the board of a condominium or HOA to evict a property owner for bad behavior.<sup>205</sup> This proposed bylaw would allow the board of a condominium or HOA to evict a disruptive property owner for bad behavior upon a seventy-five percent approval from the board.<sup>206</sup>

The bylaw would define a disruptive property owner as “someone whose behavior disturbs the quiet and peaceful enjoyment of other residents’ homes frequently enough, or to such an extent that the quality of life in the community is negatively impacted.”<sup>207</sup> A disruptive resident

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199. *Cf. Can I Break My Lease If I Don't Feel Safe?*, CARETAKER, <https://caretaker.com/learn/breaking-a-lease-early/can-i-break-my-lease-if-i-dont-feel-safe> [<https://perma.cc/4AJL-TTH3>] (last updated Apr. 27, 2020) (stating that in rental apartments, landlords are typically required “to protect tenants from other tenants”).

200. *See infra* Part IV.A (proposing a solution to condominiums’ and HOAs’ inability to evict egregious property owners).

201. *See infra* Part IV.A.

202. *See infra* Part IV.B.1-3.

203. *See infra* Part IV.C.

204. *See* N.Y. REAL PROP. LAW § 3:178 (McKinney 2018); Giantomasi, *supra* note 18, at 2506-07.

205. *See generally* Cholst & Kosmark, *supra* note 24 (describing how any departure from the rules or norms by even one resident in a condominium or HOA can disrupt the entire community’s equilibrium).

206. *Cf. id.* (proposing a bylaw that would allow the board of a condominium to conduct a forced sale of a unit owner’s property upon a super majority vote by the board and unit owners within the condominium that the unit owner’s behavior is objectionable).

207. *See* Cooperator Staff, *supra* note 32. Quiet enjoyment can be defined as “[t]he right of a property owner or tenant to enjoy his or her property without interference.” Kaycee Miller, *A Rent-*

often engages in behavior that affects several people or continues for a long period of time.<sup>208</sup> The insertion of this bylaw will allow the board of a condominium or HOA to have a viable remedy when dealing with objectionable residents and will also give notice to all members within the condominium or HOA that if their behavior is disruptive enough, they can be evicted.<sup>209</sup>

### B. Enforceability of the Disruptive Resident Bylaw

An amendment to the bylaws usually must be passed by a majority of the unit owners.<sup>210</sup> However, the association's bylaws may allow the board alone to amend the bylaws, rather than requiring an approval of an amendment from other unit owners.<sup>211</sup> Further, the power of the board of a condominium or HOA to make amendments to the bylaws "is limited by a determination of whether the action is unreasonable, arbitrary, capricious, or discriminatory."<sup>212</sup> An amendment to the bylaws "should not create invidious classifications or unfairly diminish the rights" of some property owners for the benefit of others.<sup>213</sup> If an amendment to the bylaws is proposed, it may be evaluated under several standards.<sup>214</sup> What follows is a brief explanation of how to amend an association's bylaws, including several standards that must be evaluated when an association makes an amendment to its bylaws.<sup>215</sup> This includes the business judgment rule and the reasonableness test.<sup>216</sup>

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*er's Right to the Implied Warranty of Quiet Enjoyment*, RENTEC DIRECT (Mar. 19, 2021), <https://www.rentecdirect.com/blog/quiet-enjoyment> [<https://perma.cc/W5LU-CPAA>]. If quiet enjoyment is disturbed, it may be considered to be a legal nuisance. Miller, *supra*. The frequency of the disturbance of quiet enjoyment can be measured by individual instances, or a disturbance that lasts for a significant amount of time. See 4215 Harding Road Homeowners Ass'n v. Harris, 354 S.W.3d 296, 299 (Tenn. Ct. App. 2011) (showing a circumstance where a unit owner's objectionable behavior continued for over a year).

208. Cooperator Staff, *supra* note 32.

209. See generally *How to Change HOA Bylaws, Covenants, and Rules*, HOA MGMT., <https://www.hoamanagement.com/how-to-change-hoa-bylaws> [<https://perma.cc/F4AR-LK4P>] (last visited Apr. 1, 2023) (stating that the board must provide notice of an amendment to the bylaws within a specific time period).

210. 15B AM. JUR. 2D *Community Property to Condominiums and Cooperative Apartments* § 12 (2021).

211. *Id.*

212. *Id.*; see also *infra* Part IV.C.2 for a discussion on a board of a condominium or HOA acting in an unreasonable, capricious, arbitrary, or discriminatory manner.

213. *Community Property to Condominiums and Cooperative Apartments*, *supra* note 210, § 12.

214. See discussion *infra* Part IV.B.1-2.

215. See *infra* Part IV.B.1-2.

216. See *infra* Part IV.B.2-3.

## 1. Judicial Review

The business judgment rule is a standard of review that certain jurisdictions use to determine whether the actions of the board of a condominium or HOA were so unreasonable that they require judicial intervention.<sup>217</sup> The business judgment rule treats the specific associations as corporations, and the board of managers is treated as a board of directors.<sup>218</sup> Under this rule, the bylaw or provision in question is valid as long as the board acted “in good faith and in furtherance of the legitimate interests” of the association.<sup>219</sup> Absent a showing of fraud, self-dealing, or unconscionability, the court’s inquiry into the provision is limited and will not question the wisdom or soundness of the business decision.<sup>220</sup>

Generally, the business judgment rule is a presumption in favor of managers’ or a board’s decisions and provides a safe harbor for such decisions if the requirements named above have been met.<sup>221</sup> The two main formulations of the business judgment rule come from Delaware state law and the American Law Institute (“ALI”).<sup>222</sup> The ALI formulation states:

- (c) a director or officer who makes a business judgment in good faith fulfills the [duty of care] if the director or officer:
  - (1) is not interested in the subject of his business judgment;
  - (2) is informed with respect to the subject of the business judgment to the extent the director or officer reasonably believes to be appropriate under the circumstances; and
  - (3) rationally believes that the business judgment is in the best interests of the corporation.<sup>223</sup>

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217. See Fierro, *supra* note 47, at 255; see Douglas M. Branson, *The Rule That Isn’t a Rule—The Business Judgment Rule*, 36 VAL. U. L. REV. 631, 631 (2002) (describing the business judgment rule as a standard of review consisting of only slight review of business decisions).

218. See Fierro, *supra* note 47, at 255.

219. See *id.* at 255-56.

220. See *Schoninger v. Yardarm Beach Homeowners Ass’n, Inc.*, 523 N.Y.S.2d 523, 529 (N.Y. App. Div. 1987) (holding that a condominium board who hired qualified employers to carry out its repair plan acted in good faith and honest judgment and thus there was no claim of fraud, self-dealing, unconscionability, or other misconduct under the business judgment rule).

221. Branson, *supra* note 217, at 632.

222. *Id.* at 634.

223. *Id.* at 634-35. Essentially, the American Law Institute (“ALI”) formulation provides that a director’s decision is protected from a legal challenge if they made a decision or judgment, those making the decision did not have a conflict of interest, the director(s) exercised a form of care in informing themselves on the matter that has been decided, and the director(s) had a rational basis for their decision. *Id.* at 635.

In Delaware, the business judgment rule is the presumption that when directors of a corporation make a business decision, those directors acted on an informed basis, in good faith, and with the honest belief that the decision made was in the corporation's best interests.<sup>224</sup> The difference in Delaware's formulation from the ALI formulation is that, because Delaware treats the business judgment rule as a presumption, the plaintiff has the burden of proof in rebutting the business judgment rule.<sup>225</sup> On the other hand, the ALI formulation provides directors with a safe harbor—the directors have the burden of showing that they met the rule's elements.<sup>226</sup>

Since condominiums and HOAs are typically conducted by a management association, the governing body has a fiduciary obligation to those residing in the community “similar to that of a corporate board to its shareholders.”<sup>227</sup> As such, the decisions that the board of a condominium or HOA make, when analyzed by a court, should be reviewed using the same business judgment rule that is applied to other types of corporate directors' decisions.<sup>228</sup> Courts have applied the business judgment rule to decisions made by the board of a condominium or HOA in many instances.<sup>229</sup>

In *Olszewski v. Cannon Point Association, Inc.*,<sup>230</sup> the business judgment rule did not protect a decision made by the board of a condominium association to approve a set of rules and regulations that enforced several limitations and restrictions on condominium unit owners who sought to lease their property.<sup>231</sup> The court held that the restrictions imposed by the rules and regulations violated the condominium's bylaws, which stated “that ‘[a]ny [h]ome may be conveyed or leased by its . . . [o]wner free of any restrictions’—provided the common charges or

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224. *Id.*

225. *Id.* A plaintiff can rebut the business judgment rule presumption by demonstrating that the board was disabled by conflicts of interests or can offer evidence that the directors did not make a truly valid judgment in their decision. *Id.* at 635-36.

226. *Id.* at 636.

227. George L. Blum, Annotation, *Application of Business Judgment Rule to Decisions by Real Estate Condominium or Cooperative Corporations*, 9 A.L.R. 7th Art. 5 § 2 (2016).

228. *Id.*

229. See generally *Olszewski v. Cannon Point Ass'n, Inc.*, 49 N.Y.S.3d 571, 577 (N.Y. App. Div. 2017) (holding that the business judgment rule did not protect an HOA board's unauthorized actions); *Renauto v. Board of Directors of Valimar Homeowners Ass'n, Inc.*, 780 N.Y.S.2d 483, 492 (N.Y. Sup. Ct. 2004) (applying the business judgment rule to decisions made by the board of a condominium and HOA).

230. 49 N.Y.S.3d 571 (N.Y. App. Div. 2017).

231. *Id.* at 574. Some of the restrictions included a requirement that no unit could be rented “for a period of less than two weeks[,]” and a prohibition on granting renters access to the Manor House—the association's club house. *Id.* Further, those who rented a condominium unit for less than ninety days could not have any pets or guests on the property. *Id.*



HOA expenses assessed against such unit have been paid.”<sup>232</sup> Further, the court held that the board exceeded its authority by adopting such rules and regulations without an amendment to the current bylaws.<sup>233</sup> The board can adopt reasonable rules and regulations that relate to the business and/or property of the association, the court described, provided those rules and regulations do not conflict with or hinder any right expressly granted to property owners by the association’s bylaws.<sup>234</sup> Lastly, the court held that since there was not an appropriate amendment to the association’s governing documents, the proposed rules and regulations were an impermissible exercise of the board’s powers, and thus, were not protected by the business judgment rule.<sup>235</sup>

Another case where the court applied the business judgment rule, but held that the decision made by the board of an HOA was protected by the rule, is *Renauto v. Board of Directors of Valimar Homeowners Association, Inc.*<sup>236</sup> The HOA in this case required that each property owner agree that their property is subject to the rules and covenants included in the Declaration and the Bylaws, which limited “homeowners’ ability to make alterations to their home . . . without first obtaining prior written approval” from the board.<sup>237</sup> The petitioner in this case installed handrails on his property without first obtaining the required written consent from the board.<sup>238</sup> When the matter was brought before the board, the board unanimously disapproved of the handrails, as its style was not approved.<sup>239</sup> The court held that the business judgment rule was the applicable standard of review in this case, and further held that all requirements under the rule had been met—reasoning that the board’s decision to disapprove the installation of the handrails was made with the welfare of the association in mind, and was made based on the board’s desire to enforce the rule requiring approval for every alteration on one’s property.<sup>240</sup> Further, the board acted within its scope of authority in denying the installation of the handrails because such installation was an exterior alteration that required approval from the board.<sup>241</sup>

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232. *Id.* at 574, 576-77.

233. *Id.* at 577.

234. *Id.* at 576.

235. *Id.* at 577.

236. 780 N.Y.S.2d 483 (N.Y. Sup. Ct. 2004).

237. *Id.* at 484-85.

238. *Id.* at 485, 487.

239. *See id.* at 488.

240. *Id.* at 491-92.

241. *Id.* at 493. By failing to obtain written approval from the board, the petitioner breached “the Declaration, By-Laws, and guidelines,” and thus the board was justified in requiring the handrails to be removed. *Id.*

Finally, the court reasoned that the board's decision was made in good faith, as the burden to prove that such a decision was not made in good faith was on the petitioner, who failed to meet this burden.<sup>242</sup> Thus, the board's decision was protected under the business judgment rule.<sup>243</sup>

If the proposed bylaw within this Note is subjected to the business judgment rule, the board would have to enact the bylaw in good faith and in furtherance of the interests of the condominium or HOA, there must not have been any fraud, self-dealing, or unconscionability present, the bylaw must not conflict with any right set out in the current governing documents, and the board must have acted within the scope of their authority when enforcing such a bylaw.<sup>244</sup> So long as those requirements are met, the board's decision to enforce such a bylaw, as well as utilize this proposed bylaw, should be protected under the business judgment rule.<sup>245</sup> Lastly, any claim against the board for its decision to enforce such a bylaw would place the burden of proof on the moving party to rebut the presumption that the board's decision is protected, should such jurisdiction utilize the Delaware formulation of the business judgment rule.<sup>246</sup>

## 2. The Reasonableness Test

Decisions made by the board of a condominium or HOA may also be evaluated by the courts under the reasonableness test.<sup>247</sup> A provision will be considered reasonable by courts if it "is enacted for the good of the 'health, happiness and enjoyment of life of various unit owners.'"<sup>248</sup> Other courts may decide if the provision is reasonable by considering the "contractarian nature" of the agreement between the association and the property owner.<sup>249</sup>

It is essential that the bylaws be "reasonable and not arbitrary or oppressive."<sup>250</sup> When an amendment to the bylaws is made, or there is a

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242. *Id.* The burden was on the petitioner to prove that the board's action "ha[d] no legitimate relationship to the welfare of the [association], deliberately single[d] out individuals for harmful treatment, [was] taken without notice or consideration of the relevant facts, or [was] beyond the scope of the board's authority." *Id.*

243. *Id.* at 492.

244. *See supra* notes 219, 220, 234, 242 and accompanying text.

245. *See Fierro, supra* note 47, at 255-56; *Schoninger v. Yardarm Beach Homeowners Ass'n, Inc.*, 523 N.Y.S.2d 523, 529 (N.Y. App. Div. 1987).

246. *See Renauto*, 780 N.Y.S.2d at 493; *Branson, supra* note 217, at 635-36.

247. *See generally Fierro, supra* note 47, at 253 (stating that under the reasonableness test, courts will enforce restrictions that are deemed "reasonable").

248. *See id.* at 254.

249. *See id.*

250. 8 *Unreasonable, Arbitrary or Oppressive Bylaws*, in FLETCHER CYCLOPEDIA OF THE LAW OF CORPORATIONS § 4191 (2022).

new bylaw, such bylaw or amendment must comply with those requirements.<sup>251</sup> The bylaw itself must be reasonable, and it must also be reasonable in its application.<sup>252</sup> The reasonableness of the bylaw is a factual analysis that is determined on a case-by-case basis.<sup>253</sup> Further, the reasonableness of the bylaw may depend on the association's purpose, and may also depend on whether the association was within its power to adopt the specific bylaw in question.<sup>254</sup> A bylaw must clearly appear to be unreasonable before it is declared invalid.<sup>255</sup> Further, if the bylaw does appear to be reasonable, this alone will not "sustain the validity of a bylaw" if it is objectionable on other grounds.<sup>256</sup>

The court in *Laguna Royale Owners Association v. Darger*<sup>257</sup> utilized a reasonableness standard when analyzing a decision made by a condominium association to refuse a transfer of an owner's interest to another.<sup>258</sup> The court held that,

[t]he criteria for testing the reasonableness of an exercise of such a power by an owners' association are (1) whether the reason for withholding approval is rationally related to the protection, preservation or proper operation of the property and the purposes of the Association as set forth in its governing instruments and (2) whether the power was exercised in a fair and nondiscriminatory manner.<sup>259</sup>

The court also held that another consideration under the reasonableness standard may be the severity and nature of the consequences of applying the proposed rule or restriction.<sup>260</sup> Further, when analyzing the facts at hand, the court stated that to determine whether an association's actions were reasonable, it is necessary to consider the reason(s) for its actions individually.<sup>261</sup>

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251. *Id.*

252. *Id.* While the bylaw and its application must be reasonable, a bylaw that is inconvenient or embarrassing in its administration does not mean that the bylaw is unreasonable and should be invalidated. *Id.*

253. *Id.*

254. *Id.* Examples of unreasonable bylaws include a bylaw requiring an illegal act and a bylaw that infringes on a member's constitutional or statutory rights. *Id.*

255. *Id.*

256. *Id.* Such grounds may include a bylaw that is reasonable but was adopted without power. *Id.*

257. 174 Cal. Rptr. 136 (Cal. Ct. App. 1981).

258. *Id.* at 144. See also *infra* notes 308-312, for a discussion of this case under due process standards.

259. *Darger*, 174 Cal. Rptr. at 144.

260. *Id.* at 145. The court ultimately decided that the association's action was "clearly unreasonable" under the first reason of three that the association provided for disapproval. *Id.* The court further concluded that the additional reasons the association provided for disapproval were insufficient under the reasonableness standard. *Id.* at 146.

261. *Id.* at 145.

Another example in which the reasonableness standard was utilized can be found in *Scottsdale Condominium v. Talaroc*.<sup>262</sup> In this case, the condominium that the defendant resided in banned animals generally, but the governing documents provided that the “approval of household pets, such as dogs, ‘will not be unreasonably withheld.’”<sup>263</sup> After the defendant moved in with her two dogs, she received a notice that she was violating the no pets rule, and after a hearing where the defendant attempted to explain “her side of the story,” the board unanimously decided that it would not honor her request to keep the dogs on the premises.<sup>264</sup> The court applied a reasonableness standard, and ultimately held that denying the defendant’s request to keep her dogs was unreasonable as a matter of law.<sup>265</sup> The court held that discretionary decisions made by a condominium or HOA are subject to a reasonableness standard, and under this standard, such communities are required to treat those residing in the community “fairly and act reasonably in the exercise of their discretionary powers.”<sup>266</sup> The court went on to say that a member has the burden of establishing that the applicable association’s acts were unreasonable, and that when the action made by the association is within its discretion, the member additionally has the burden of proving that the action of the association caused, or threatens to cause, injury to such member or to the interests of the community at large.<sup>267</sup>

The proposed bylaw within this Note may be subject to the reasonableness test.<sup>268</sup> When analyzed under such test, the bylaw must be enacted for the happiness, health, and enjoyment of property owners, it must not be arbitrary or oppressive, and it must be enforced fairly and reasonably.<sup>269</sup> The proposed bylaw would be enacted for the happiness and safety of those residing within the community, as it is designed to protect against those who display intolerable behavior.<sup>270</sup> Further, such a bylaw is not arbitrary or oppressive, as such bylaw will only be enforced if a member of the community displays the type of behavior defined within Part IV.A over several occurrences or incidents.<sup>271</sup> Lastly, such bylaw will be enforced fairly and reasonably, as it requires an approval of seventy-five percent of the board in order to evict such a member, and

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262. No. 1 CA-CV 08-0197, 2009 WL 791294 (Ariz. Ct. App. 2009).

263. *Id.* at \*1.

264. *Id.*

265. *Id.* at \*4.

266. *Id.*

267. *Id.*

268. See Fierro, *supra* note 47, at 253.

269. See *supra* notes 249, 250, 266 and accompanying text.

270. See *supra* notes 207-209 and accompanying text.

271. See *supra* Part IV.A.

such member must meet the requirements laid out in the proposed bylaw.<sup>272</sup>

### C. Objections to the Proposed Remedy

The following Subpart considers counterarguments to the proposed remedy within this Note.<sup>273</sup> It first considers an argument regarding fee simple ownership.<sup>274</sup> It then considers due process concerns regarding the proposed remedy.<sup>275</sup>

#### 1. Fee Simple Ownership

While the proposed legal solution in this Note provides the board of a condominium or HOA with a legal solution when dealing with unruly residents, some may be opposed to such a remedy.<sup>276</sup> As stated, those residing in a condominium or HOA own their unit in fee simple and, therefore, own their property for an unlimited duration of time with no conditions attached to the property that would terminate ownership.<sup>277</sup> Many may choose to live in a condominium or HOA, rather than a typical apartment building or co-op, based on this reason.<sup>278</sup> Those who live in a condominium or HOA may choose to reside in one of the two in order to have the comfortability that they will not be evicted from their property, compared with how a landlord may evict one in an apartment.<sup>279</sup> Therefore, some may not approve of a bylaw that would allow the board of a condominium or HOA to evict a property owner.<sup>280</sup>

However, this proposed remedy will allow not only the board, but also other property owners residing in the community, to have a real solution when dealing with a property owner whose behavior is

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272. See *supra* Part IV.A.

273. See *infra* Part IV.C.1-2.

274. See *infra* Part IV.C.1.

275. See *infra* Part IV.C.2.

276. See generally Cholist & Kosmark, *supra* note 24 (stating that a proposed remedy of a forced sale of a condominium unit for bad behavior is clearly not an appropriate remedy for every objectionable conduct situation in every condominium).

277. See N.Y. REAL PROP. LAW § 3:178 (McKinney 2018).

278. See generally Jennifer Bradley Franklin, *Condo vs. Apartment: Which Is Best for You?*, BANKRATE (Apr. 19, 2021), <https://www.bankrate.com/real-estate/condo-vs-apartment> [<https://perma.cc/7H4R-M3D2>] (describing that the biggest difference between a condominium and an apartment is that an apartment is rented, while a condominium unit is owned, and that this factor should be taken into account when choosing where to live).

279. See generally *id.* (discussing that when one is choosing between living in a condominium or an apartment building, the applicable rules of such building will be a factor—including those about behavior).

280. See *supra* note 276 and accompanying text.

unacceptable.<sup>281</sup> It will also provide a form of protection to those residing in their respective community against those whose behavior is alarming or threatening to others.<sup>282</sup> This is arguably more important than the concept of fee simple ownership because when hundreds of people live in a tight-knit community and share common facilities every day, those lives become interdependent.<sup>283</sup> The intimacy that forms requires that each person residing in the community follow the established rules and regulations.<sup>284</sup> Any departure from the social norms created in the community, or failure to follow any of the rules and regulations, will adversely affect every other person's quality of living in their respective community, which ultimately results in disharmony throughout the association.<sup>285</sup> Therefore, it is extremely important for condominiums and HOAs to be able to have a solution when dealing with recalcitrant property owners whose behavior disturbs the community at large.<sup>286</sup>

## 2. Due Process Concerns

As stated, the power of the board of a condominium or HOA to make amendments to the bylaws is limited by a determination of whether the action is unreasonable, capricious, arbitrary, or discriminatory.<sup>287</sup> The boards of condominiums and HOAs must allow for both substantive and procedural due process.<sup>288</sup> In regards to substantive due process, an association is prohibited from enforcing a rule that is not included in their governing documents.<sup>289</sup> Therefore, if a homeowner or unit owner is to receive a notice of violation, they should read the association's

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281. See *supra* note 34 and accompanying text.

282. See generally Cholist & Kosmark, *supra* note 24 (arguing that providing a board with a "sword" to deal with objectionable behavior offers a potent option when confronted with serious situations).

283. *Id.*

284. *Id.*

285. *Id.*

286. See generally *id.* (explaining that providing condominiums with a remedy when dealing with objectionable unit owners offers the board a powerful option for dealing with serious situations which boards are currently powerless in remedying). Even if such a remedy is not utilized, the fact that the board does have such a remedy, which property owners would be aware of, may help the board to deter objectionable conduct presented by unit owners. *Id.*

287. See *Community Property to Condominiums and Cooperative Apartments*, *supra* note 210, § 12.

288. Tammy Y. Hayes, *HOA Violations: The Homeowner's Right to a Fair Due Process*, HOMEOWNERS PROTECTION BUREAU, <https://www.hopb.co/blog/homeowner-rights-due-process-hoa-violation> [<https://perma.cc/3LTU-VYXN>] (last visited Apr. 1, 2023). Substantive due process requires that the association's decisions be "fair, and not arbitrary or capricious." *Id.* Procedural due process, under the Fifth and Fourteenth Amendments of the Constitution, requires that "no one shall be 'deprived of life, liberty or property without due process of law.'" *Id.*

289. *Id.*

governing documents to ensure the rule the board claims has been violated is valid.<sup>290</sup> Additionally, an HOA or condominium must have reasonable rules and procedures within their governing documents and must also have enforcement policies that are applied equally to all property owners within the community.<sup>291</sup>

Procedural due process is also required of condominiums or HOAs.<sup>292</sup> While an HOA or condominium is not an entity of the state government, and, therefore, it is unlikely that the failure to provide for procedural due process would violate a property owner's fundamental rights, courts have required that HOAs and condominiums provide its members with due process because such associations function as a quasi-government.<sup>293</sup> This means that HOAs and condominiums must provide an owner accused of violating the applicable rules and regulations with adequate notice of the violation, an opportunity to be heard, an opportunity to defend themselves against the allegation, and an appeal, if such appeal is provided for in the governing documents.<sup>294</sup> Further, owners should make sure that the board's actions are related to the purposes of the HOA or condominium, are under the board's scope of authority, its application is reasonable, and the actions were carried out by applying at least the "minimum standards of procedural due process."<sup>295</sup>

One example of a situation where due process concerns may be raised can be found in *Castilian Hills Homeowners Association v. Chafins*.<sup>296</sup> In this case, the HOA initiated an action against the defendants for unpaid assessments.<sup>297</sup> Before the HOA initiated this action, however, several notices were sent to the defendants alerting them of their failure to pay their respective assessments.<sup>298</sup> The HOA mailed an initial notice to the defendants to inform them of the amount of their annual assessment.<sup>299</sup> When the defendants failed to pay the assessment, the HOA mailed a second notice that the annual assessment was due, which included a late fee and explained that "interest was accruing and . . . a lien would be filed if the assessment was not paid."<sup>300</sup> When the

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290. *Id.*

291. *Id.*

292. *See id.*

293. *Id.*

294. *Id.* When an owner is dealing with an alleged violation, they should check their respective association's governing documents, case law, and local statutes for guidance as to what their "legislature has determined to be a fair procedure" in the state in which they reside. *Id.*

295. *Id.*

296. No. 77389-5-1, 2018 WL 5252036 (Wash. Ct. App. 2018).

297. *Id.* at \*1-2.

298. *Id.* at \*1.

299. *Id.*

300. *Id.*

defendants still did not pay the assessment, a third notice was sent which advised that a lien would be filed.<sup>301</sup> When the HOA recorded a claim of lien against the defendants' property, it notified the defendants of the amount due and also informed the defendants that "if the matter was turned over to the HOA attorney, additional fees would be incurred and the lien could be foreclosed."<sup>302</sup> The HOA ultimately filed a complaint against the defendants, and after the trial court granted the HOA's motion for summary judgment, the defendants appealed, arguing that the HOA was required to provide the defendants with notice and an opportunity to be heard before filing a foreclosable lien against their property.<sup>303</sup> The court held that the applicable state statute gave the HOA discretion to establish its own procedures within their governing documents, and thus the HOA did not violate the Due Process Clause.<sup>304</sup> The court stated, "[b]ecause the CC & Rs<sup>305</sup> that control the Chaffins' property allow for the recording of a lien for past due assessments, interest, costs, and fees without notice and an opportunity to be heard, summary judgment in favor of the HOA was appropriate."<sup>306</sup> Thus, although due process concerns were raised, the court held that the HOA did not violate the Due Process Clause.<sup>307</sup>

Another example where due process concerns were raised is the case of *Laguna Royale Owners Association v. Darger*.<sup>308</sup> In this case, the defendants were the owners of a leasehold condominium, where they wished to assign three one-quarter undivided interests in their unit to three other couples without approval from the condominium association.<sup>309</sup> The association initiated an action contending that the assignments were invalid because a provision in the instrument by which the defendants obtained their property prohibited "assignment or transfer of interests in the property without the consent and approval" from the association.<sup>310</sup> The court held that the association must act reasonably and

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301. *Id.*

302. *Id.*

303. *Id.* at \*2.

304. *Id.* The applicable statute was § 64.38.020(11) of the Washington Revenue Code, which provides, "[u]nless otherwise provided in the governing documents, an association may: (11) impose and collect charges for late payments of assessments and, after notice and an opportunity to be heard . . . , levy reasonable fines . . ." WASH. REV. CODE ANN. § 64.38.020(11) (West 2021) (emphasis added).

305. *Chaffins*, 2018 WL 5252036, at \*3. CC & Rs is an abbreviation for covenants, conditions, and restrictions. *Id.* at \*1.

306. *Id.* at \*3.

307. *Id.* at \*2.

308. 174 Cal. Rptr. 136 (Cal. Ct. App. 1981).

309. *Id.* at 137-38.

310. *Id.* at 138.



exercise its power in a fair and nondiscriminatory way when approving or disapproving transfers or assignments, implicating due process.<sup>311</sup> Further, the court held that the association may only withhold approval for reasons “rationally related to the protection, preservation and proper operation of the property and the purposes of Association as set forth in its governing instruments.”<sup>312</sup> Courts have also held, regarding due process, that in order for an HOA’s or condominium’s rules and regulations to be enforceable, such rules and regulations must be within the association’s scope of authority under their governing documents, and the association must not abuse its discretion by attempting to enforce arbitrary and capricious rules and regulations that bear no relation to the association’s purposes.<sup>313</sup>

The remedy within this Note, one might argue, implicates due process concerns, and, therefore, requires there to be procedural safeguards to prevent abuse of citizens’ constitutional rights.<sup>314</sup> The amendment to the bylaws proposed in this Note will not be utilized unless and until the objectionable behavior has been repeated, even after the unit owner has received prior written notice of their unacceptable behavior.<sup>315</sup> Further, an eviction will only take place upon a vote of seventy-five percent of the board that the property owner’s behavior is unacceptable.<sup>316</sup> To protect the property owner’s constitutional rights, the owner will be allowed to attend meetings concerning his behavior, with counsel present, and provide evidence on his own behalf.<sup>317</sup> These procedural safeguards will ensure that the objectionable owner’s constitutional rights are not violated—the owner will have received adequate notice of their violation, they will have an opportunity to be heard, an opportunity to defend themselves, and these safeguards will also provide for an appeal, if such

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311. *Id.* at 142.

312. *Id.* The court held that the association’s restriction on the transfer of the property did not violate the defendants’ constitutional rights; however, the court did hold that the association’s refusal to consent to the transfers of the interest in the property was unreasonable as a matter of law. *Id.*

313. *Sainani v. Belmont Glen Homeowners Ass’n, Inc.*, 831 S.E.2d 662, 669 (Va. 2019). In this case, the court held that a restrictive covenant limiting homeowners use of holiday decorations was unenforceable because it was not within the HOA’s authority to enforce such a covenant. *Id.* at 664, 669. The court also held that discretionary design-control powers initiated by such an association that are not expressly authorized by statute or by an association’s declaration create a risk that property owners may be subject to arbitrary or discriminatory treatment, since there are no standards for which the appropriateness of use of such design-control power can be measured. *Id.* at 669.

314. *See generally* Cholst & Kosmark, *supra* note 24 (contending that due process concerns were considered when formulating their proposal of a forced sale of unit owner’s unit who displays objectionable behavior).

315. *See id.*

316. *See id.*

317. *See id.*

appeal is authorized.<sup>318</sup> Further, the proposed bylaw within this Note does not violate the Due Process Clause because it meets the requirements of substantive due process.<sup>319</sup> This proposed bylaw is reasonable, as discussed under the reasonableness test above, and is not discriminatory, as it would be applied to all property owners residing in their respective condominium or HOA.<sup>320</sup> Therefore, while there may be due process concerns, the requirements under the Due Process Clause are clearly met, and should not give cause to any worry.<sup>321</sup>

## V. CONCLUSION

The lack of a legal remedy when dealing with unruly residents in a condominium or HOA is a serious issue for common interest communities.<sup>322</sup> Condominiums and HOAs should be afforded a legal remedy when dealing with residents who are a true disturbance to the community in order to protect the entire association from such behavior.<sup>323</sup> If no remedy is granted to such condominiums and HOAs, they will only be able to utilize the tools at hand—resorting to the courts for the possibility of a forced sale of an objectionable unit owner, or other remedies like an injunction or restraining order, which still may not subside an owner's intolerable behavior.<sup>324</sup>

The proposed remedy within this Note will grant the board of a condominium or HOA discretion in evicting an objectionable property owner without resorting to the courts for relief.<sup>325</sup> Upon a seventy-five percent approval from the board, a condominium or HOA will have the ability to evict a unit owner who displays behavior that disturbs the quiet and peaceful enjoyment of other residents' homes frequently enough, or to such an extent that the quality of life in the community is negatively impacted.<sup>326</sup> This proposed bylaw will allow the board of a condominium or HOA to have a true and viable remedy when dealing with objectionable residents, which will ultimately protect not only the board, but also the common interest community as a whole, from such behavior.<sup>327</sup>

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318. See *supra* note 294 and accompanying text.

319. See *supra* notes 289-291 and accompanying text.

320. See *supra* Parts IV.A and IV.B.2.

321. See *supra* notes 315-318 and accompanying text.

322. See generally Cholst & Kosmark, *supra* note 24 (stating that condominium boards do not have the power to evict a unit owner no matter how egregious their misconduct is).

323. See *id.*

324. See Law Times, *supra* note 147; *Harassment in HOAs: Defining and Preventing Unacceptable Behavior*, *supra* note 1; *supra* note 168 and accompanying text.

325. See *supra* Part IV.A.

326. See *supra* note 207 and accompanying text.

327. See *supra* notes 30, 209 and accompanying text.

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