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**A BILL of RIGHTS for HOMEOWNERS in ASSOCIATIONS:**

**Basic Principles of Consumer Protection  
and  
Sample Model Statute**

by

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The AARP Public Policy Institute, formed in 1985, is part of the Policy and Strategy Group at AARP. One of the missions of the Institute is to foster research and analysis on public policy issues of importance to mid-life and older Americans. This publication represents part of that effort.

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## **Acknowledgements**

To the memory of Geneva Kirk Brooks and those who stood with her, and to all other homeowners who seek the truth and fight for their rights, I dedicate this proposal.

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## Foreword

Common-interest communities play a valuable role in modern America, and generally operate amicably to the mutual benefit of residents. Homeowner associations in a single-family development, for instance, are often able to provide a number of amenities (such as parks, pools, and club houses) that would be difficult to procure from many cash-strapped local governments. In addition, by setting architectural standards and maintenance requirements, they may help reassure residents that their investment in the community is well protected. Associations also frequently provide an opportunity for neighbors to meet and socialize as a consequence of regularly scheduled meetings, thus helping foster a sense of community. Some homeowner associations, particularly in gated communities, take responsibility for maintaining private streets, removing snow, and even collecting garbage. Local governments frequently welcome the relief from those burdens. Because associations often promote neighborhood infrastructure and social opportunities, they can be viewed as important players in promoting livable communities for people of all ages.<sup>1</sup> It is noteworthy that 46 percent of owners in single-family homeowner associations are over the age of 50, as are 56 percent of owners in condominium/coop communities (based on AARP Public Policy Institute analysis of the HUD/Census Bureau American Housing Survey).

The purpose of this publication is to outline a key set of ten principles (articulated as a “bill of rights”) that states can follow when developing laws and regulatory procedures for common-interest communities. Additionally, associations themselves can use these principles when developing or modifying their own governing documents. Thus, although this publication also contains a sample “model statute” to serve as an example for single-family homeowner associations, the issues addressed are applicable to all forms of common-interest communities. To develop these principles, the AARP Public Policy Institute contracted with David A. Kahne, an experienced attorney who has represented homeowners in a variety of cases, and who has also actively promoted homeowner rights in the Texas state legislature.

The guiding philosophy behind this publication is to promote healthy interaction between residents and their associations by avoiding conflict where possible and resolving it equitably when it occurs. Fair and balanced procedures for information sharing, governance, and dispute resolution make for better communities.

Andrew Kochera  
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<sup>1</sup> For related information on the concept of livable communities, see AARP’s website at [http://www.aarp.org/research/housing-mobility/indliving/beyond\\_50\\_communities.html](http://www.aarp.org/research/housing-mobility/indliving/beyond_50_communities.html).

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## INTRODUCTION

Americans grant broad protection for homeowner rights. As recognized by the United States Supreme Court, “special respect for individual liberty in the home has long been part of our culture and our law.”<sup>2</sup> From roots in our federal Constitution and in every state’s constitution, protections branch out in statutes and court decisions to ensure fairness when any agency regulates homeowners.

However, current laws do not adequately address many of the needs of the large and increasing number of homeowners regulated by associations in common-interest communities. The nature of such communities requires residents to give up some of their autonomy, becoming regulated by an elected association board of directors. Many residents who live in common-interest communities are satisfied with the trade-off between personal autonomy and the benefits of living in such a community. However, problems can arise for a variety of reasons, including misunderstandings of rights and responsibilities or inequitable implementation of policies or penalties by an association board.

A “common-interest community”--sometimes called a common-interest development (CID) or planned unit development (PUD)--often is established by a developer to administer land or a building that is owned “in common,” and also can be created to provide services or to enforce architectural rules or other regulations (with or without owning common property). Common-interest communities range from single-building condominiums and cooperatives to multi-use developments, including single family homes, apartments, retail sites, and sometimes commercial or industrial property. The principles of this report are deliberately broad to apply to a variety of residential settings, while the model statute is an example of how to apply those principles to the case of single-family subdivisions.

From a consumer protection standpoint, the core issues revolve around the fact that the governing documents of an association are generally non-negotiable, were originally drafted by the developer’s attorney, and can be lengthy (sometimes hundreds of pages) and frequently incomprehensible to a nonprofessional. In some geographic areas, purchasers (at least of new homes) may find it difficult to find a neighborhood that does not have an association.<sup>3</sup> Consequently, it is fair to consider whether many owners can be meaningfully said to have understood and consented to the terms of the association’s governing documents, or to have had realistic alternatives to living in a common interest development.

When conflicts do occur, residents have few practical options. This is because associations have the power to make rules (like a legislature), enforce rules (like an executive), and resolve disputes over rules (like a judge)--all through a board of volunteer directors, who may vary substantially in their knowledge, experience, and sometimes intent. In the absence of a separation of powers, homeowners lack vital checks and balances.

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<sup>2</sup> *City of Ladue v. Gilleo*, 512 U.S. 43, 58 (1994).

<sup>3</sup> A reporter recently concluded, “In fast-growing parts of the country, especially in the South and West, essentially all new development involves private community associations.” R. Nelson, “Home Is Where the Rules Are,” *Washington Post* (12/18/05) at B-2.

Often there is no impartial forum for an aggrieved homeowner other than a courtroom. Few jurisdictions have an effective alternative dispute resolution (ADR) system covering associations in common-interest communities, and few states have meaningful administrative oversight of these associations. Yet many owners cannot afford legal representation. Further, much of the existing law in this field was established by attorneys of developers and property managers, whose own perspective may differ from that of individual homeowners. Most existing laws predate awareness of the need, and of ways, to protect homeowner rights.

The bill of rights proposed in this paper distills crucial principles needed to balance the interests of an association and individual residents, and to foster equitable procedures in case of a dispute. The principles articulated in the bill of rights apply generally, to single-family subdivisions as well as to condominiums and cooperatives.<sup>4</sup> To illustrate how to make the bill of rights effective, a sample model statute (here, in the context of single-family subdivisions) is included. Following each section of the model statute is a discussion of the rationale and method of incorporating the principles. This discussion cites cases to illustrate the underlying issues, and also references existing statutes.

These principles are not the only important elements of consumer protection, nor is the sample model statute the only way to achieve consumer protection. State legislatures can use the model language as a recommendation, but individual associations also may find the principles and subsequent discussion useful as they review their own governing documents. Such a review can be very valuable for association boards that wish to streamline and improve their own procedures while also finding ways to minimize unnecessary legal costs from disputes. The model statute can also prove to be a valuable refresher for other residents regarding their rights and responsibilities. However, state legislatures play a unique role in guaranteeing basic rights for their homeowner constituents. This is because legislatures can clearly articulate a standard set of resident rights and responsibilities across communities.

An “association”--sometimes called a homeowner association (HOA), property owners association (POA), or community association--is the organization created to manage the affairs of the common interest community. A board of directors or trustees runs the association, often hiring a management company for day-to-day operations. Typically, a developer retains control in the early stages of the community, and as the community is built out the association’s members-- commonly homeowners, sometimes other property owners-- elect the board.

Associations usually charge their members annual “assessments,” mandatory dues to pay for maintenance of common property, services, and administration. Some also can charge “special assessments,” such as to repair common property (e.g., condominium roofs) or other capital projects. Well-run associations prepare budgets and maintain reserves to fulfill their charters.

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<sup>4</sup> Implementation of the principles should reflect differences in physical circumstances. For example, in condominiums and cooperatives the shared walls and physical plant, coupled with much larger annual assessments, may suggest different limits on homeowner rights, see *Restatement (3<sup>rd</sup>) of Property, Chapter 6 on Common-Interest Communities* at 144 (2000), as well as different protections, e.g., Cal. Civ. Code 1361.5 (protection against lockouts). See also *infra* n.39 (discussing the Restatement).

## Rapid Growth of Homeowner Associations

Professor Evan McKenzie has traced the history of homeowner associations and the rise of what he calls “residential private government,” emerging from English common law. In this country, homeowner associations initially were created on a case-by-case basis for unusual circumstances, such as Gramercy Park (in New York, 1831) and Louisburg Square (in Boston, 1844).<sup>5</sup> Today, associations operate under broadly applicable state laws that set the framework for single-family subdivisions and townhouses, condominiums, cooperatives, and the larger scale multiuse developments, some of which cannot be distinguished from towns or cities.

Under such statutes, associations have two critical attributes: homeowners must join, and legally binding deed restrictions empower associations to regulate homeowners’ use of their property. Associations typically require assessments (akin to taxation), set design and use restrictions for property (similar to, but often broader than, typical zoning rules), regulate voting for the board, and on issues of community concern, impose punishments (e.g., utility cutoffs or fines), and obtain power to foreclose on homesteads.

Estimates of how many households reside in a common-interest community vary. The Community Associations Institute (CAI) estimates that, in 2005, 22 million homes were in community associations, up from 700,000 in 1970.<sup>6</sup> AARP’s Public Policy Institute analyzed the 2003 American Housing Survey and found that about 11 million homeowners were required to pay fees to some type of association, compared with about 5 million in 1985.<sup>7</sup> While the two estimates differ, it is nonetheless clear that a very large and increasing number of households live in a common-interest community.

One of the fastest growing segments is the homeowner association in a single-family subdivision. In analyzing earlier American Housing Surveys, AARP’s Public Policy Institute estimates that over the past two decades construction of single-family homes in common-interest communities has exceeded construction of condominiums and cooperatives. Consequently, if one assumes the conservative figure of 11 million households in a common interest development,

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<sup>5</sup> E. McKenzie, *Privatopia: Homeowner Associations and the Rise of Residential Private Government* at 9 & 33 (Yale Univ. Press 1994).

<sup>6</sup> See [www.caionline.org/about/facts.cfm](http://www.caionline.org/about/facts.cfm), last visited 11/7/05. See also *Committee for a Better Twin Rivers v. Twin Rivers Homeowners Ass’n*, 383 N.J.Super. 22, 890 A.2d 947, 955 (App. Div.), *certif. granted* 2006 (as of 1999, some 42 million Americans lived in associations), citing C.Treece, COMMUNITY ASSOCIATIONS FACTBOOK 6 (Frank H. Spink ed. 1999).

<sup>7</sup> The American Housing Survey, conducted by the Census Bureau, included a question on whether homeowners were required to pay a condominium, cooperative, homeowner association, or mobile home fee. Based on this question, AARP estimated there were 11 million households paying such fees in 2003. If, in addition, any owner of a multifamily unit or single-family attached dwelling (e.g., townhouse or duplex) is assumed to be a member of some form of common-interest community (regardless of whether the respondent pays a mandatory fee), AARP’s estimate rises to 15 million in 2003. In both cases, however, the survey design will miss homes in which the unit is vacant or an absentee owner rents to another household. See [www.huduser.org/datasets/ahs.html](http://www.huduser.org/datasets/ahs.html) (public use microdata).

single-family homes governed by a homeowner association would now account for the majority (58 percent) of those units.<sup>8</sup>

## Increasing Concern for Denial of Homeowner Rights

Recent examples across the nation, described below, illustrate what many homeowner advocates perceive as the prelude to even greater conflict, absent legislative reform. Some of these cases have reached the national press, including television reports on 20/20 ABC News,<sup>9</sup> and articles in the *New York Times*,<sup>10</sup> *Christian Science Monitor*,<sup>11</sup> and *People Magazine*.<sup>12</sup> Many more cases can be found on Internet sites where homeowner advocates collect reports.<sup>13</sup> A radio show,<sup>14</sup> blogs,<sup>15</sup> newsletters,<sup>16</sup> and homeowner discussion groups<sup>17</sup> elaborate many homeowner frustrations.<sup>18</sup> Although details of the disputes between homeowners and their associations may vary, they frequently have a profound impact on homeowners.

### Foreclosure

The most visible controversies arise when associations foreclose against homeowners, often for disputes that start over small sums. For example:

- In California, retirees Anita and Thomas Radcliff lost their home in 2003 after missing a payment of \$120. Done by non-judicial foreclosure, no judge heard the dispute before the home sold for \$70,000, one-quarter of its appraised value.<sup>19</sup>

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<sup>8</sup> *Id.* CAI likewise estimates that “[h]omeowners associations and other planned communities account for 55-60% of the [22 million], condominiums for 35-40% and cooperatives for 5-7%.” [www.caionline.org/about/facts.cfm](http://www.caionline.org/about/facts.cfm), last visited 1/24/06. *Supra* n.7. A California study found more than 40 percent of single-family homes sold in the 1990s were in planned developments. Gordon, *Planned Developments in California: Private Communities and Public Life* 3 (Cal. Pub. Policy Inst., 2004); see also *Committee for a Better Twin Rivers*, *supra* n.7, 890 A.2d at 955 (in NJ, “40% of private residences and over 1,000,000 people governed by homeowners’ associations”).

<sup>9</sup> E.g., “Members of Homeowners Association Angrily Protest Rules” (April 19, 2002), [www.transcripts.tv/search/do\\_details.cfm?ShowDetailID=3812](http://www.transcripts.tv/search/do_details.cfm?ShowDetailID=3812), last visited 12/28/05.

<sup>10</sup> E.g., M. Rich, “Homeowner Boards Blur Lines of Just Who Rules the Roost,” *New York Times* (7/27/03), at 1.

<sup>11</sup> E.g., M. Sappenfield, “The Backlash Against Homeowners’ Groups,” *Christian Science Monitor* (10/14/04) at 1; see also T. Vanderpool, “But isn’t this my yard? Revolt against neighborhood rules,” *Christian Science Monitor* (8/19/99) at 2.

<sup>12</sup> E.g., R. Jerome, O. Jones, L. Stambler, S. Kapos, S. Morrissey, M. Nelson, and C. O’Connor, “Loathe Thy Neighbor,” *PEOPLE MAGAZINE* (10/4/04) at 123.

<sup>13</sup> E.g., [www.ccfj.net/HOAartmain.htm](http://www.ccfj.net/HOAartmain.htm), last visited 9/9/05 (collecting news articles from across the country). See also, e.g., [pages.prodigy.net/hoadata/](http://pages.prodigy.net/hoadata/), last visited 9/9/05 (from 1985 to 2001, more than 1,000 lawsuits each year sought foreclosure filed in just one Texas county, discussed below).

<sup>14</sup> See [www.onthecommons.com](http://www.onthecommons.com), last visited 9/9/05.

<sup>15</sup> E.g., [privatopia.blogspot.com](http://privatopia.blogspot.com) (Prof. McKenzie), last visited 11/6/05.

<sup>16</sup> E.g., [www.pvtgov.org](http://www.pvtgov.org), last visited 9/9/05.

<sup>17</sup> E.g., [www.ahrc.com/new/index.php](http://www.ahrc.com/new/index.php), last visited 9/9/05.

<sup>18</sup> See also, e.g., [www.onthecommons.com/llinks.htm](http://www.onthecommons.com/llinks.htm) (collecting links to other informational sites and to state-based homeowner advocacy groups), last visited 9/9/05.

<sup>19</sup> J. Wasserman, “California on verge of critical change in homeowner association laws,” *San Diego Union-Tribune* (8/8/04), [www.signonsandiego.com/news/state/20040808-1033-foreclosureshowdown.html](http://www.signonsandiego.com/news/state/20040808-1033-foreclosureshowdown.html), last visited 1/2/06. M. Kolber, “Couple’s Plight Raises Questions,” *Sacramento Bee* at A3 (4/18/04); C. Durso, “The War on Foreclosure,” *COMMON GROUND* at 16 (July-Aug. 2004, CAI pub.). After filing suit, the Radcliffs reportedly settled to buy back their house for \$82,000. [www.ahrc.com/new/index.php/src/news/sub/pressrel/action/ShowMedia/id/2152](http://www.ahrc.com/new/index.php/src/news/sub/pressrel/action/ShowMedia/id/2152), last visited 1/25/06.



- In a Nevada case involving disputed fines of \$700, late fees of \$35, and assessments of \$375, Judi Burns challenged the basis to foreclose and sell her house for \$10,100, less than one-tenth of its value. She appealed, but had to move out with her family in 2004 rather than buy a \$45,000 bond that would be forfeited if she lost.<sup>20</sup>
- Near Houston, widow Wenonah Blevins owed \$814.50 in back dues, and said she never knew she faced foreclosure until after the association had sold her \$150,000 home for \$5,000. CAI's former treasurer said the association "did everything right in the foreclosure, other than realize the lady is [82] years old."<sup>21</sup>
- In Florida, 74-year-old Anne Grove suffered foreclosure, then eviction, handcuffing, jailing for five days, and apparent theft of her belongings because of a \$1,200 debt to the association. Apparently she had not understood what was happening, and a law firm paid \$2,400 to buy her home appraised at more than \$150,000.<sup>22</sup>

Unfortunately, there also have been cases in which associations pursue foreclosure even after homeowners acknowledge they owe money and are in the process of trying to make catch-up payments on debts--sending checks that the associations cash.

- In Arizona, an association sought foreclosure in 2003 while cashing checks paid by Evelyn Lyles on an initial debt of \$393. While declining to comment on her particular case, the association's lawyer stated about some homeowners who fall behind: "While they think they're catching up on their dues, in fact they are getting further behind as the legal fees accrue." An anonymous donor saved Ms. Lyles and her children--after news reports of her ongoing battle with breast cancer.<sup>23</sup>
- In Florida, Theresa and Robert Denson's home had about \$100,000 in equity. They signed an offer to repay \$200 per month on their \$1,200 back dues, and submitted some checks that the association cashed. Still, the association completed foreclosure that forced the family of six from their home.<sup>24</sup>

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<sup>20</sup> J. Wasserman, "California on verge of critical change in homeowner association laws," *supra* n.20; D. Kulin, "Circumstances Force Woman from Her Home," *Las Vegas Sun* (2/9/04).

<sup>21</sup> C. Durso, "The War on Foreclosure," COMMON GROUND, *supra* n.20, at 21. Mrs. Blevins also sued to recover her house. *Id.*

<sup>22</sup> A. Miller, "Widow, back home, takes stock of her possessions", *Oscala Star-Banner* (5/6/00) & Editorial, "A sad lesson in compassion", *Oscala Star-Banner* (5/7/00), reprinted in [www.ccfj.net/Groveforecl.htm](http://www.ccfj.net/Groveforecl.htm), last visited 2/16/06. She got back her house after publicity of her plight. *Id.*

<sup>23</sup> C. Durso, "The War on Foreclosure," COMMON GROUND, *supra* n.20, at 16 & 19; M. Reinhardt, "HOA Battles Dying Woman Over Fees," *Arizona East Valley Tribune* (10/10/03); J. Wasserman, "California on verge of critical change in homeowner association laws," *supra* n.20.

<sup>24</sup> S. Boyd, Report Summary, [www.wpecnews12.com/engine.pl?station=wpec&id=8881&template=pagesearch.html](http://www.wpecnews12.com/engine.pl?station=wpec&id=8881&template=pagesearch.html), last visited 2/17/06.

Older persons face particular risks because often they have substantial home equity, having paid off their mortgage and often having a home whose value has appreciated substantially over a lifetime.<sup>25</sup>

### *Excessive Litigation*

Current laws permit some associations to use foreclosure litigation as a routine tactic, overwhelming homeowners even in cases of minor disputes. Court records from Harris County, Texas (surrounding Houston) illustrate both the extent of such litigation in one local area and the variation among associations. Focusing on communities of single-family detached homes, and counting only lawsuits seeking foreclosure, associations filed more than fifteen thousand cases from 1985 to 2001, about one thousand cases per year.<sup>26</sup>

The Harris County study may understate the problem, because the frequency of such lawsuits increased dramatically after 1988 and continued to increase after 1995.<sup>27</sup> Further, associations also often sue without expressly seeking foreclosure. Notably, this study did not count non-judicial foreclosures that many associations obtain.<sup>28</sup>

In addition, a recent study of five Northern California counties (Alameda, Contra Costa, San Mateo, Santa Clara, and Sacramento) found that associations filed about one of every eight foreclosures.<sup>29</sup> The California study noted that in “the lending industry foreclosure is generally the *least* preferred method of collections by most lenders who are not ‘predatory’”; thus, for foreclosures not filed by associations, the “median amount owed is \$190,000.”<sup>30</sup> In sharp contrast, “the median amount owed in homeowner association foreclosures was \$2,557,” including costs of collection such as attorney fees, so the underlying debts were “relatively infinitesimal.”<sup>31</sup> As that study’s authors noted, “[i]t is difficult to understand what ‘sound business practice’ would require such a high cost to collect such small amounts.”<sup>32</sup>

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<sup>25</sup> Many state laws currently may permit foreclosures for small sums, even when homeowners commit in writing to pay back dues accumulated during illness or family crisis.

<sup>26</sup> See [pages.prodigy.net/hoadata/](http://pages.prodigy.net/hoadata/), last visited 9/9/05.

<sup>27</sup> *Id.* “In 1988, there were fewer than 390 actions for foreclosure filed in the entire state” of Texas. M. Morones & W. Gammon, *Community Owners Associations, Their Dubious Power to Foreclose, and the Recent Legislation Curtailing That Power*, TEX. B. J. 218, 221 (March 2003).

<sup>28</sup> Non-judicial foreclosures take place without advance review by any judge, and thus pose special problems. When CAI asked which type is used more often--judicial or non-judicial--a leading Harris County lawyer for associations stated, “I’d say it’s a pretty good toss-up.” C. Durso, “The War on Foreclosure,” COMMON GROUND, *supra* n.20, at 21.

<sup>29</sup> Testimony by Stephen Cogswell, of Sentinel Fair Housing, to the California State Senate, Housing and Community Development Committee Hearing (2/17/04), at 3–4, also cited in Background Paper, *Homeowner Association Foreclosure: Does the Punishment Fit the Offense?*, prepared for the California State Senate, Housing & Community Development Committee Hearing (2/17/04) at 1–2.

<sup>30</sup> *Id.* at 3 (“least” is the study’s emphasis).

<sup>31</sup> *Id.* at 3–4.

<sup>32</sup> *Id.* at 4. The California report also found foreclosure by associations against Latino homeowners occurs at a rate three times their percentage in the population, even though “Latinos are *not* foreclosed against at this rate by lenders, other debtors, etc.” *Id.* The authors expressed concern about this “evidence supporting possible Fair Housing violations in the industry’s collection and foreclosure practices,” that is, discrimination. *Id.*

## *Expensive Litigation*

Many associations employ lawyers and staff, have repeated experience with the system, and face little risk if they lose. By contrast, homeowners typically cannot afford counsel; have little time, experience, or skills to understand court proceedings; and have everything at stake-- sometimes they must literally “bet the house.” Further, when associations sue homeowners and win, they are generally able to force homeowners to pay for the associations’ attorneys-- and fees increase rapidly.

- A Florida association sued George and Anna Andres for putting an American flag pole at their home, prevailed, and obtained an order to foreclose to collect attorney fees that reportedly exceeded \$20,000. The couple prevailed on appeal that vacated the foreclosure, but that appeal itself risked increasing the attorney fees due to the association.<sup>33</sup>
- In Arizona, Barbara (a retired paralegal) and Dan Stroia (a disabled construction worker) paid nearly \$8,000 to attorneys collecting what began as a \$66 debt. The Stroias had not known of a \$6 increase in quarterly charges, or a \$30 one-time assessment. A lawsuit first sought \$565. A month later, the Stroias tried to pay \$850, and ultimately had to pay more than \$7,000 more for disputing the fees. The association attorney blamed the family: “People just get emotional about things because it’s their home.... The Stroias, unfortunately, reacted very emotionally.”<sup>34</sup>

Having such powerful tools as foreclosure, unfortunately, provides adverse incentives for associations to sue homeowners regarding even minor matters easily addressed out of court.

Excessive, expensive litigation poses special danger to homeowners who are facing other serious economic loss, such as during grave illness or after job loss. Families must divert money otherwise needed for health care or sustenance to pay demands for association attorney fees.

## *Additional Issues Addressed Faced by Some Homeowners*

Homeowners suffer when an association increases charges or changes rules without clear notification and process.

Homeowner rights to self-expression, privacy, and equality merit specific protection. Some associations have sought to ban flags, political placards during election season, and “for sale” signs. Others have excessively regulated peaceful gatherings. For example, in Florida, one

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<sup>33</sup> *Andres v. Indian Creek Phase III-B Homeowner’s Ass’n*, 901 So.2d 182 (4<sup>th</sup> DCA 2005); P.Franceschina, “Flag-flying ex-Marine saved from foreclosure,” *Sun Sentinel* (5/24/03) at 1B & J. Barton (Associated Press), “Flag-flying ex-Marine has a chance to keep his home,” *Orlando Sentinel* (5/24/03) at B5; Jerome et al., “Loathe Thy Neighbor,” *supra* n.13, at 126.

<sup>34</sup> L. Roberts, “HOA gets \$8,000 from homeowner over a bill of \$66,” *The Arizona Republic* (5/1/04), at B10.

association banned front-yard “social gatherings,” applied to as few as three people.<sup>35</sup> Others have imposed unequal charges for use of common areas depending on the decisions of directors about the group that wants to use the common area.

Directors are sometimes able to deny critics the ability to review basic association records--even minutes and accounts--and sometimes entirely bar homeowners from speaking at--even attending-- monthly meetings. Homeowners attempting to make changes have been denied the right to call special meetings to recall directors, denied access to association newsletters and other communications channels (e.g., closed-circuit TV), and barred from common areas for meetings. States commonly provide some rights for homeowners to monitor association operations, but too often such statutes lack teeth.

Associations may also assert the power to deny homeowners the right to vote, based on small debts or claims of debts.

### **Recent Scholarship and Legislation to Protect Homeowners**

Recognizing the need for reform more than a decade ago, Professor Susan French encouraged each association to adopt their own homeowner bill of rights.<sup>36</sup> The leading trade group, the Community Associations Institute (including associations and the managers and lawyers who represent them), more recently urged its members to adopt a one-page statement of aspirations, “Rights and Responsibilities for Better Communities.”<sup>37</sup> Both these approaches depend on voluntary action.

Recently, after more than ten years of study by leading lawyers from private practice and government agencies, professors, and judges, Professor French led the American Law Institute to consensus on important legal principles for homeowner rights. These principles are articulated in the *Restatement (3<sup>rd</sup>) of Property, Chapter 6 on Common-Interest Communities* (2000) (“Restatement”).<sup>38</sup> In addition to judicial decisions from across the country, the Restatement considered existing legislation, including state statutes based on the older Uniform Common Interest Ownership Act (UCIOA), first approved in 1982. Professor French has concluded that UCIOA-based laws “can and should be improved upon,” taking into account the Restatement’s

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<sup>35</sup> See B.Grumet, “Three a crowd, condo group rules,” *St. Petersburg Times* (11/18/03) at 1; R. Raeke, “Condo doubles fine for front-yard socializing,” *St. Petersburg Times* (12/27/03) at 1.

<sup>36</sup> *The Constitution of a Private Residential Government Should Include a Bill of Rights*, 27 Wake Forest L. Rev. 345, 350-52 (1992).

<sup>37</sup> See [www.caionline.org/rightsandresponsibilities/rights.pdf](http://www.caionline.org/rightsandresponsibilities/rights.pdf), adopted 5/1/03, last accessed 11/6/04.

<sup>38</sup> The American Law Institute publishes the widely respected *Restatements of the Law* in many areas. Preparation of this Restatement began in 1987 and, as discussed in the foreword to the Restatement, at IX–X, prior law required significant reconsideration. The Restatement worked from the premise that, as homeowners, “many of us ... will give up some of our discretion” to obtain benefits of associations. *Id.* at IX. The Restatement also recognized “[t]he law of residential common-interest communities reflects [certain] tensions between protecting freedom of contract, protecting private and public interests in security of the home, both as a personal base and as a financial asset, and protecting the public interest in the ongoing financial stability of common interest communities. It also reflects the tensions between protecting the democratic process at work in common interest communities and protecting the interest of individual community members from imposition by those who control the association.” *Id.*, Chapter 6, at 68–69.

distillation of “a comprehensive statement of the general principles that should govern” associations.<sup>39</sup>

In response to controversies such as those just described, legislators in fast-growing states with many associations have held hearings, issued reports, and proposed and passed reforms to clarify homeowner rights and improve oversight and enforcement. This legislation provides additional pillars on which to build the proposals that appear in the bill of rights and sample model statute in this report. For example:

- Arizona in 2004: Banned foreclosure without judicial determination of unpaid assessments (HB 2402), secured homeowner rights to sue associations (SB 1137), and confirmed rights to post political signs in an election year (HB 2478).
- California in 2005: After enacting many bills in 2003 and 2004, added significant restrictions on the right to foreclose, including requirements to allow payment plans, to have a right of redemption, and to forestall foreclosure for one year unless unpaid assessments exceed \$1,800 (SB 137).<sup>40</sup>
- Florida in 2004: Created the Office of Condominium Ombudsman, extended important protection governing condominiums also to single-family homes, improved alternative dispute resolution, clarified rules for election and recall of directors, and limited the power of associations to fine and retaliate by suing homeowners (SB 1184 and 2984).
- Nevada in 2001, 2003 and 2005: Comprehensively updated older statutes based on UCIOA, including an ombudsperson to help homeowners (Nev. Rev. Stat. Titles 38 and 116).
- Texas in 2001: Gave homeowners rights to notice and a hearing before costly enforcement action, barred foreclosure for fines, and added a detailed right of redemption after foreclosure sale (Tex. Prop. Code Chapter 209).

However, problems continue despite new statutes and, while this publication is being finalized, legislators across the country continue to introduce additional bills to protect homeowners.

Every state starts with different legislation. Rather than assert a one-size-fits-all uniform act, the model statute applies the principles of its bill of rights to highlight important aspects of legal protection that homeowners need. The model statute aims to illustrate the range of issues that merit legislative attention. Even without new statutes, associations can implement many of these proposals and develop additional ways to secure fairness for homeowners.

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<sup>39</sup> *Scope of Study of Laws Affecting Common Interest Developments*, at 6–7 (Calif. L. Rev. Comm’n, Nov. 2000). The California Law Revision Commission commissioned this study, and prepared many reports (some of which are cited below), as part of a multiyear, ongoing process to update statutes governing homeowner associations.

<sup>40</sup> Discussed *infra* n.55.

## Legal Framework for the Homeowner Bill of Rights and Model Statutes

The need to protect rights of homeowners as individuals, and the governmental aspects of associations, suggest consideration of a bill of rights. Indeed, constitutional principles inform some of the following proposals. In addition, the proposed bill of rights takes into account principles of property and contract law, as well as equity, because all of these influence the doctrines of servitudes,<sup>41</sup> a complex body of law that sets the legal framework governing associations in common-interest communities. Land use law and the decision to structure most associations as nonprofit corporations add additional complexity to the legal protections needed by homeowners.

Associations differ significantly from other nonprofit corporations. Homeowners cannot quit the association without moving, a choice often precluded by practicalities. Moreover, members typically make small economic commitments to nonprofits, whereas the commitment to an association can be substantial, even without considering home equity.

Ultimately, homeowners expect their association to maintain the common areas and preserve property values without infringing on their basic rights. The goal of this proposal is to ensure such protection for the rights of homeowners.

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<sup>41</sup> “A servitude is a legal device that creates a right or an obligation that runs with the land or an interest in land.” Restatement § 1.1(1). “Running with land means that the right or obligation passes automatically to successive owners or occupiers of the land or the interest in land with which the right or obligation runs.” *Id.* § 1.1(a).

*The following “bill of rights” summarizes basic principles for legislation regarding consumer protection in common-interest communities. Where appropriate (for instance, encouraging alternative dispute resolution), associations can consider these principles for their governing documents.*

## **BILL OF RIGHTS FOR HOMEOWNERS**

To ensure amicable and equitable relations between homeowners and their associations, this bill of rights seeks fair resolution of disputes, specifies rights regarding rules and charges, ensures individual autonomy, and promotes oversight and voting. The bill of rights uses reasonability as the touchstone for all actions, and includes a state Office of Ombudsperson for Homeowners to facilitate resolution of disputes in a manner that strengthens communities.

### **I: The Right to Security against Foreclosure**

An association shall not foreclose against a homeowner except for significant unpaid assessments, and any such foreclosure shall require judicial review to ensure fairness.

### **II: The Right to Resolve Disputes without Litigation**

Homeowners and associations will have available alternative dispute resolution (ADR), although both parties preserve the right to litigate.

### **III: The Right to Fairness in Litigation**

Where there is litigation between an association and a homeowner, and the homeowner prevails, the association shall pay attorney fees to a reasonable level.

### **IV: The Right to Be Told of All Rules and Charges**

Homeowners shall be told--before buying--of the association’s broad powers, and the association may not exercise any power not clearly disclosed to the homeowner if the power unreasonably interferes with homeownership.

### **V: The Right to Stability in Rules and Charges**

Homeowners shall have rights to vote to create, amend, or terminate deed restrictions and other important documents. Where an association’s directors have power to change operating rules, the homeowners shall have notice and an opportunity, by majority vote, to override new rules and charges.

### **VI: The Right to Individual Autonomy**

Homeowners shall not surrender any essential rights of individual autonomy because they live in a common-interest community. Homeowners shall have the right to peaceful advocacy during elections and other votes as well as use of common areas.

**VII: The Right to Oversight of Associations and Directors**

Homeowners shall have reasonable access to records and meetings, as well as specified abilities to call special meetings, to obtain oversight of elections and other votes, and to recall directors.

**VIII: The Right to Vote and Run for Office**

Homeowners shall have well-defined voting rights, including secret ballots, and no director shall have a conflict of interest.

**IX: The Right to Reasonable Associations and Directors**

Associations, their directors and other agents, shall act reasonably in exercising their power over homeowners.

**X: The Right to an Ombudsperson for Homeowners**

Homeowners shall have fair interpretation of their rights through the state Office of Ombudsperson for Homeowners. The ombudsperson will enable state oversight where needed, and increases available information for all concerned.



*The following model statute illustrates how legislation can implement the principles discussed earlier. Other statutory forms also may fulfill those principles, and AARP encourages consideration of various proposals that meet those goals.*

## **SAMPLE MODEL STATUTE**

### **Section 100: Application and Definitions**

1. *Application.* This model statute applies to common-interest communities of single-family detached homes. The provisions protect homeowners with respect to actions by their association or its directors, officers, employees, managers, and other agents, but are not intended to alter the rights of homeowners or associations with respect to lenders, real estate agents, or developers.
2. *Definitions*
  - a. “Common-interest community” means a real-estate development or neighborhood in which individually owned lots or units are burdened by a servitude that imposes an obligation that cannot be avoided by nonuse or withdrawal:
    - i. to pay for the use of, or contribute to the maintenance of, property held or enjoyed in common by the individual owners, or
    - ii. to pay dues or assessments to an association that provides services or facilities to the common property or to the individually owned property, or that enforces other servitudes burdening the property in the development or neighborhood.
  - b. “Homeowner” means the owner of property burdened by a servitude described in ¶ 2a.
  - c. “Association” means an organization, including homeowners as members, created to manage the property or affairs of a common-interest community.
  - d. “Common property” means property rights of an identical or a similar kind held by the homeowners as appurtenances to their individually owned lots or units.
  - e. “Declaration” means the recorded document or documents containing the servitudes that create and govern the common-interest community.
  - f. “Governing documents” means the declaration and other documents, such as the articles of incorporation or articles of association, bylaws, architectural guidelines, and rules and regulations that determine rights or obligations of homeowners or that otherwise govern the management or operation of an association.

- g. “Corporate documents” means the declaration and other governing documents required to be filed or recorded under state law (such as articles of incorporation or articles of association), as well as other governing documents (such as bylaws) that state law requires an association to adopt even if not filed or recorded.
- h. “Operating rule” means any rule or regulation not stated in the corporate documents, whether adopted by the directors or by homeowners in a vote, that applies to the management or operation of the association or to the conduct of the business and affairs of the association, including (without limitation) user fees, charges for any violations of the governing documents of the association, and other fees or charges.
- i. “Rule change” means adoption, amendment, or repeal of an operating rule.
- j. “Directors” means the persons who constitute the association’s senior governing body, in articles of incorporation or articles of association, or in other governing documents.
- k. “Ombudsperson” means the chief executive of the state Office of Ombudsperson for Homeowners, or the designated representative.
- l. “Notice” means, with respect to any person, sending regular and certified mail (return receipt requested) to the person’s last known address. For homeowners, it means each address where the association sends its annual assessments, written in plain English.

### *Discussion*

The Application section of this model statute follows the American Law Institute's *Restatement (3<sup>rd</sup>) of Property, Chapter 6 on Common-Interest Communities* (2000) ("Restatement") § 6.1,<sup>42</sup> but focuses on single-family detached homes. Provisions of this model statute may be adapted for use by other common-interest communities, such as condominiums and cooperatives, as well as duplexes, row houses, or mixed-type communities.

Relationships with lenders and developers typically receive careful attention under existing state law, and these relationships are beyond the scope of this model statute. State law also typically addresses rights with respect to real estate agents separately. This model statute does anticipate that state law will clarify the duties of real estate agents concerning disclosures of association information during negotiation for home sales.

Definitions of "common-interest community," "common property," "association," "declaration," and "governing documents" track the American Law Institute's Restatement § 6.2 (1, 2, 3, 5, and 6). Careful study led to the Restatement formulation and use of common terms may reduce unintended consequences of definitional changes and facilitate related use for communities other than single-family detached homes. To the extent the Restatement provides guidance to legislators and the judiciary, use of common terms facilitates development of the law. This model statute does change one term, but not its meaning, using "homeowner" in place of "member" as defined in Restatement § 6.2(4).

The term "declaration" typically includes documents called Covenants, Conditions, and Restrictions (CC&Rs) or deed restrictions. These are the most important of the governing documents, and are always recorded with the deeds. "Governing documents" also include articles of incorporation (and articles of association). These are typically filed with the secretary of state. Bylaws, often not filed, typically are required by state law to set out the association's operational rules. The model statute follows standard practices regarding the relative importance of these types of documents. See the Right to Stability in Rules & Charges, Section 105 (§1).

Technical legal definitions should not obscure the main focus. This model statute focuses on situations where homeowners must join and remain members of an association.

The model statute uses "homeowner" rather than "member" to reflect the common sense that, at least for single-family detached homes, the primary perception remains homeownership rather than membership in an association. If an association initiates foreclosure, homeowners retain full rights under this model statute until the foreclosure concludes. After conclusion of foreclosure, this model statute grants homeowners limited rights, particularly to clarify the right to redemption. See the Section 101, Right to Security Against Foreclosure.

The model statute also regulates use of operating rules that associations may amend or repeal with less formality than provisions in corporate documents. Definitions of "operating rule" and "rule change" derive from California law,<sup>43</sup> to be consistent with that statute's framework. See the Section 105, Right to Stability in Rules and Charges.

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<sup>42</sup> See *supra* n.39.

<sup>43</sup> Cal. Civ. Code 1357.100 (a & b).

The definition of “ombudsperson” reflects the right to an ombudsperson for homeowners. The model statute does not address possible uses of electronic communications to provide notice.<sup>44</sup>

The model statute does not seek to reduce the force of other laws to protect homeowner rights. These include both federal laws, such as those ensuring fair housing and fair debt collection, and generally applicable state statutes, such as those governing consumer protection and nonprofit corporations generally.<sup>45</sup>

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<sup>44</sup> See, e.g., Fla. Stat. Ann. 720.306(5) (allowing “electronic transmission”).

<sup>45</sup> Federal laws include 42 U.S.C. 3601 *et seq.* (fair housing) and 15 U.S.C. 802 *et seq.* (fair debt collection). Many additional state statutes exist. See, e.g., *Statutory Clarification and Simplification of CID Law: Member Rights*, Memorandum 2005-32 (Calif. L. Rev. Comm’n 9/19/05) at 2–3 & 5 (listing generally applicable statutes that protect homeowner rights on matters such as sign display, solar energy systems, structures assembled in sections or modules, racial restrictions, accommodation of disabilities, home day care, and flags).

*I. An association shall not foreclose against a homeowner except for significant unpaid assessments, and any such foreclosure shall require judicial review to ensure fairness.*

## **Section 101: The Right to Security against Foreclosure**

1. *Limit on Creating Foreclosure Power.* No association may foreclose against a homeowner on any lien without express authority granted by the declaration. Foreclosure power cannot be added by amendment, except by unanimous homeowner vote.
2. *Non-Judicial Foreclosures, and Precipitate Foreclosures, Prohibited.* No association may foreclose against a homeowner on any lien unless, in addition to compliance with all other applicable laws, the association obtains a court order that specifies the assessments due, confirms the association followed proper procedure, and allows at least three months before the sale date for the homeowner to pay the court-specified debt.
3. *Predicates for Judicial Foreclosure.* No association may seek an order to foreclose against a homeowner on any lien unless, in addition to compliance with all other laws governing foreclosure of a mortgage on residential real estate, (a) the lien secures only a debt for an assessment authorized by a declaration recorded before the homeowner bought the home, (b) the directors by a two-thirds vote approve the foreclosure action, and (c) the assessment past due on the date of the vote exceeds \$2,500. Notwithstanding the foregoing, any lawfully recorded lien (including liens that do not themselves provide a suitable basis for foreclosure) may be enforced on conveyance of any interest in a home, including conveyance by otherwise proper foreclosure sale.
4. *Right to Cure.* Each association shall, in governing documents, establish rights to make payments that ensure the following:
  - a. Homeowners may at any time make full or partial payment on any amount due. Any homeowner payment shall be credited first toward any past due assessment or other amount due to avoid foreclosure.
  - b. At least for homeowners who suffer job loss, disability, divorce, or family medical expenses, the association shall without penalty allow a homeowner 30 days after an assessment to propose an installment plan. Upon receiving the homeowner's installment proposal, the directors shall designate a committee to meet with the homeowner privately, and the association shall provide a written response to the homeowner. If the association does not approve the request in full, the response shall allow the homeowner at least 15 days after denying the request to pay without incurring attorney fees. Nothing prohibits the directors from approving an installment plan more lenient than provided by existing rules, in which case the directors shall amend the existing rules so that all homeowners shall receive fair notice and equal treatment.

- c. Within five days after any vote by directors to seek foreclosure, the association shall give the affected homeowner notice of the vote, and include the ombudsperson's Notice of Foreclosure Rights. Within five days after filing any lawsuit seeking foreclosure, the association shall give the ombudsperson Notice of Foreclosure Filing.
  - d. If a homeowner pays all overdue assessments after directors properly vote to seek foreclosure, a court order nonetheless may permit foreclosure if (i) the homeowner has not paid all overdue late charges plus all attorney fees actually and reasonably incurred after the directors' vote; and (ii) the declaration authorizes foreclosure for such nonpayment.
  - e. Upon a homeowner's request, within three days, an association shall provide the amount due to avoid foreclosure, including past due assessments and any other amounts allowed by ¶ 4d or approved by court order under ¶ 2.
5. *Minimum Bid and Notice of Redemption Rights.* If an association forecloses against a homeowner, and sets the home for sale, the following provisions apply:
- a. A price below 75 percent of the equity, measured by appraised fair market value less senior liens subject to which the successful bidder takes title, makes the sale void.
  - b. Within 30 days after the sale, the association shall provide the homeowner notice including the date and time of sale, the buyer's name and purchase price, and the ombudsperson's Notice of Right of Redemption. Within ten days after sending this notice, the association shall record, in the real property records of the county where the home is located, an affidavit stating the date on which the association sent the notice and containing a legal description of the lot.
6. *Right of Redemption after Foreclosure.* Except to the extent that governing documents provide greater rights, after a foreclosure sale by an association the homeowner has
- a. a right of redemption not less than if a secured lender foreclosed; and,
  - b. at least 180 days, after recording of notice under ¶ 5b, to redeem the home.<sup>46</sup>

### *Discussion*

Homeowners expect reasonable protection against foreclosure. Some state constitutions and statutes strictly limit what circumstances can justify foreclosure, and specify protection in foreclosure proceedings.<sup>47</sup> State and federal bankruptcy law provides more homeowner protection. Recognizing the immense harm caused by even a threat of foreclosure, governments and lenders with the right to foreclose--even with great sums at risk--typically take extraordinary steps first to seek payment without foreclosure.

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<sup>46</sup> For an example of a statute securing a 180-day right of redemption, see Tex. Prop. Code 209.010 & .011.

<sup>47</sup> E.g., Tex. Const., art. XVI, § 50; Fla. Const., art. X § 4.

These protections, and hesitancy to seek foreclosure even when possible, reflect that “the home is not only the center of family life but also the family’s major financial asset.”<sup>48</sup> Even when homeowners fall into debt, society protects their home as the foundation on which to rebuild their lives.

Many associations respect the sanctity of the home, rarely if ever foreclose, and thrive. Appropriately, CAI calls for foreclosure to be the “last” resort.<sup>49</sup> Unfortunately, problems arise because some associations seek foreclosure over small amounts past due, in minor disputes, or to sell homes without going to court (non-judicial foreclosure).

The model statute starts from the basic American rule: creditors in almost all cases, no matter how legitimate or important their claims, do not deserve the immense power of foreclosing on a home—even if that means a creditor does not get paid because of bankruptcy. The most significant exception to the American rule allows foreclosure for nonpayment of taxes or home loans. Even for these exceptions, foreclosure typically requires judicial approval.<sup>50</sup>

The introduction describes some extreme cases of foreclosures. Some associations have a pattern of high foreclosure rates. For example, in Harris County, Texas, associations several times have filed foreclosure cases against more than 10 percent of their homeowners in a single year (and that does not include non-judicial foreclosures).<sup>1</sup> Additional foreclosure cases involve minor disputes.<sup>1</sup> To the extent that current statutes permit such foreclosure lawsuits, they underscore the need for restrictions and procedural protection.

In allowing foreclosure based on unpaid assessments (akin to taxes), but not otherwise, the model statute follows the trend of recent legislation. Assessments, regular or special, must be specified in the declaration and be imposed uniformly (in amount or percent of property value) on homeowners. The model statute does not permit characterization of fines or other charges as assessments, but includes a provision to collect on non-assessment liens upon conveyance of the home.<sup>51</sup>

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<sup>48</sup> M. Stivers, *Homeowner Association Foreclosure: Does the Punishment Fit the Offense?*, at 1 (Calif. Sen. Housing & Community Development Comm., Chief Consultant’s Background Paper 2/17/04)

<sup>49</sup> CAI, “Rights and Responsibilities for Better Communities,” *supra* n.38.

<sup>50</sup> The model statute would bar non-judicial foreclosure, to ensure neutral review and other safeguards for homeowner equity. The “non-judicial foreclosure process often” costs homeowners “a significant amount of their equity due to the small amounts at which the homes are sold in auction.” M. Stivers, *Homeowner Association Foreclosure: Does the Punishment Fit the Offense?*, *supra* n.49, at 3.

<sup>51</sup> E.g., Ariz. Rev. Stat. 33-1256A & 33-1807A (allows foreclosure for assessments as if mortgage on real estate, but for other charges liens may be created only by court judgment, may not be the basis for foreclosure, and are effective only upon conveyance of an interest in the property); see also Nev. Rev. Stat. 116.31162(4) (precludes foreclosure for liens based on fine or penalty, with limited exceptions); Cal. Civ. Code 1367 (distinguishes assessments from most charges for noncompliance with governing documents); cf. Tex. Property Code 209.009 (disallows foreclosure solely for fines or associated attorney fees); Fla. Stat. Ann. 720.305 (disallows liens for fines). The model statute permits liens only for assessments or after court judgment. See Section 109 (¶ 6), The Right to Reasonable Associations and Directors.

Given the extraordinary force of foreclosures, the model statute requires a minimum amount past due.<sup>52</sup> This is akin to statutes that set limits before a government can pursue foreclosure. As the Restatement comments, the law should preclude “[s]evere measures against minor, insubstantial infractions.”<sup>53</sup> The vast majority of creditors in America thrive without foreclosure power, so associations should be limited to foreclosure only for truly significant nonpayment.

The model statute also includes procedural safeguards. Requiring a two-thirds vote by directors provides some assurance that the community consensus supports this action. State law typically specifies that notice be given during the foreclosure process, and the model statute relies on the ombudsperson to keep such notices up to date.<sup>54</sup>

To account for homeowners who honestly want to meet their obligations but face real hardship, the model statute favors use of installment payment plans.<sup>55</sup> CAI “supports reasonable procedures to accommodate unit owners experiencing difficulties in meeting their assessment obligations.”<sup>56</sup> “In times of difficulties, illness, loss of employment or other economic problems, CAI advocates flexibility and compassion in the application of collection policies and procedures.”<sup>57</sup> This model statute calls for these rights to be stated clearly, and to be available equally to all homeowners. In addition, associations must credit payments first to minimize the risk of foreclosure.<sup>58</sup>

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<sup>52</sup> The model statute follows the \$2,500 threshold proposed in California’s SB 1682/AB 2598 (2004), which passed by large margins (34–0 in the state senate). In vetoing that bill, the governor “recognize[d] that additional clarification in the foreclosure statutes is necessary ... so that all homeowners are treated equitably and foreclosure only occurs after every reasonable alternative is exhausted.” Quoting [www.governor.ca.gov/govsite/pdf/vetoes/AB\\_2598\\_veto.pdf](http://www.governor.ca.gov/govsite/pdf/vetoes/AB_2598_veto.pdf), last visited 11/6/04. The next year the legislature passed, and the governor signed, a bill providing less protection for homeowners. SB 137 (2005) amended Cal. Civ. Code 1365.1 & 1367.4 to stop, for at least one year, foreclosures involving less than \$1,800 past due (“exclusive of any accelerated assessments, late charges, fees, attorney’s fees, interest, and costs of collection”).

<sup>53</sup> Restatement § 6.13 comment b, at 238.

<sup>54</sup> In the context of tax foreclosures, the Supreme Court recently affirmed the importance of giving homeowners actual notice before tax foreclosure sale. *Jones v. Flowers*, 126 S.Ct. 1708 (2006).

<sup>55</sup> See, e.g., Cal. Civ. Code 1365.1 & 1367.1.

<sup>56</sup> Community Associations Institute, “Public Policies”, reprinted at [www.caisecure.net/public\\_policies.pdf](http://www.caisecure.net/public_policies.pdf), last visited 1/24/05 (“CAI Public Policies”), at 29 (this policy effective 10/9/93).

<sup>57</sup> *Id.*

<sup>58</sup> See, e.g., Nev. Rev. Stat. 116.31145; Ariz. Rev. Stat. 33-1803(A & B) & 33-1807K; Cal. Civ. Code 1367.1(b). Nevada requires notice to the ombudsperson as well as to the homeowner, posted if not actually delivered. Nev. Rev. Stat. 116.311635. California also requires notice, and related procedures including a formal vote by the board to foreclose. Cal. Civ. Code 1365.1 & 1367.1.



*II. Homeowners and associations will have available alternative dispute resolution (ADR), although both parties preserve the right to litigate.*

## **Section 102: The Right to Resolve Disputes without Litigation**

1. *Required Notice of Violation.* Before an association may seek foreclosure, file suit, charge any fee (including attorney fees), limit common area use, or take other action against a homeowner for violation of governing documents, except for an emergency action as provided in ¶ 9, the association must, in addition to compliance with other law and governing documents, do the following:
  - a. Provide notice to the homeowner twice, at least 21 days apart, that
    - i. describes the basis for the claim, including how the homeowner allegedly violated quoted terms of the governing documents;
    - ii. states any amount the association claims is due, describes how the homeowner can remedy the violation, confirms the right to comply without waiving the right to dispute the violation, and (where applicable) gives notice of the right to request an installment plan for assessments;
    - iii. describes the ombudsperson, including that the ombudsperson has a list of no- and low-cost mediators and other information; and
    - iv. states the homeowner has a reasonable period to cure--of at least 21 days after the second notice, unless the homeowner had an opportunity to cure a similar violation within the past six months, and that during the cure period the homeowner can obtain a hearing as provided in ¶ 2 or mediation as provided in ¶ 3, and can contact the ombudsperson as provided in ¶ 4, without incurring any attorney fees charged by the association; and
  - b. If the certified mail notice is not delivered, reasonably try to confirm the homeowner's current address and either resend the notice as in ¶ 1a or, if no other address can be found, reasonably try to hand-deliver the notice, the period to cure starting anew from this notice.
2. *Right to a Hearing.* After notice of ¶ 1a, homeowners have the right at no cost to a hearing to verify facts and seek resolution with the directors or a committee designated by the directors. If the directors use a committee, any agreement must be enforceable, to be ratified by the directors unless it conflicts with law or the governing documents, and the homeowner must be allowed to appeal to the directors. In addition:
  - a. the association shall hold the hearing within 30 days after the association receives the homeowner's request and shall provide notice of the date, time, and place at least 10 days before the hearing; the homeowner may request postponement, which shall be granted if for not longer than ten days; additional postponements may be granted by written agreement of the parties; the homeowner may record

the meeting; and the committee (and, on any appeal, the directors) shall issue a written decision including the notice required by ¶ 5; and

- b. the association shall extend the period to cure under ¶ 1a(iv) until 15 days after notice of the written decision by the committee or directors, whichever is later.
3. *Right to Confidential Mediation.* After notice of ¶ 1a, except with respect to disputes involving only an assessment or small monetary charge (less than \$\_\_\_), homeowners shall have the right to one-half day of neutral mediation, with the proceedings to be kept confidential and not admissible in court except as provided by state law.<sup>59</sup> The requesting homeowner(s) shall pay 50 percent of the mediator’s charge and the association shall pay the balance. If after 30 days, the parties cannot agree on a mediator, the homeowner shall have the right to contact the ombudsperson as provided in ¶ 4. If the parties agree on a mediator, the association shall extend the period to cure under ¶ 1a(iv) until 15 days after the mediation.
4. *Right to Petition the Ombudsperson.* After notice of ¶ 1a, except with respect to disputes involving only an assessment or small monetary charge (less than \$\_\_\_), homeowners shall have the right to petition the ombudsperson upon payment of a filing fee not to exceed \$\_\_\_.<sup>60</sup> The association shall cooperate in any investigation pursued by the ombudsperson. The association shall extend the period to cure for 30 days, and for a longer period if requested by the ombudsperson.
5. *Right to Options.* After receiving notice of a decision under ¶ 2, homeowners shall have the right, within 15 days, to invoke either the procedure of ¶ 3 or ¶ 4. The notice of decision under ¶ 2b shall specify this right.
6. *Right to Extend Time to Cure.* During the period to cure as provided in ¶ 1, as extended in ¶¶ 2 to 4, the association shall not incur attorney fees chargeable to the homeowner, and shall not take any enforcement action except for emergency action allowed by ¶ 9.
7. *No Lawsuit Without Directors Voting.* No association may sue a homeowner without an authorizing vote by a majority of all directors, in compliance with applicable law and governing documents that may set super-majority vote or other requirements.
8. *Notice before Litigation.* Except for emergency action allowed by ¶ 9, the association must provide distinct notice at least 15 days before filing suit against a homeowner, that
  - a. describes the basis for the suit, including how the homeowner allegedly violated specified terms of the governing documents; and
  - b. states any amount the association claims due, describes how the homeowner can cure the violation, and (where applicable) gives notice of the right to request an installment plan for assessments.

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<sup>59</sup> While differences in cost and availability of mediators may affect the amount of a “small monetary charge,” in no case should this threshold exceed the annual assessment. See also the discussion below.

<sup>60</sup> The filing fee also depends on labor and other costs that differ among the states.

9. *Exception for Emergencies.* Nothing precludes an association from seeking a temporary injunction, or taking temporary enforcement action (such as suspension of rights to use a common property), in a good faith response to an emergency. An emergency is a situation that could not have been reasonably foreseen, poses a significant and immediate threat to the common-interest community, and makes compliance with the preceding paragraphs impractical. Any temporary enforcement action entitles the homeowner to immediate notice and the related rights above, provided enforcement action may remain in place pending (a) the final determination of homeowner rights or (b) the end of the conditions resulting in the immediate and significant threat, whichever comes sooner.
10. *Additional Right to Petition the Ombudsperson.* In addition to the rights of ¶ 4 and other rights in this model statute to petition the ombudsperson, except with respect to disputes involving only small monetary charges (less than \$\_\_\_\_), and upon paying the ombudsperson a filing fee not to exceed \$\_\_\_\_, homeowners shall have the right to petition the ombudsperson to challenge violations of homeowner statutory rights. Before making a petition under this ¶ 10, homeowners first shall give the directors notice of the dispute, and allow two weeks for a response, to be extended by an additional two weeks if needed to complete any procedures for alternative dispute resolution required by the governing documents; provided this shall not require more than one-half day of confidential mediation or require the homeowner to pay a fee. The association shall cooperate in any investigation pursued by the ombudsperson.
11. *No Additional Charges, but Additional Options Allowed.* No association may charge homeowners for exercise of the foregoing rights, but associations may offer additional options for alternative dispute resolution (ADR); provided no association may require binding ADR, otherwise require a homeowner to waive the right to go to court, or bill homeowners for mandatory ADR. In any litigation, if a party moves to compel nonbinding ADR, the court may consider the extent to which the parties already have pursued ADR.
12. *Annual Notice of Rights to Alternative Dispute Resolution.* Once each year, each association shall alert homeowners of their rights to ADR, including statutory rights and any others available under ¶ 11.

#### *Discussion*

ADR before litigation, including but not limited to use of the ombudsperson (see Section 110), offers an important way to promote homeowner rights. It avoids the cost of attorney fees and encourages a reasonable face-to-face discussion in an informal and non-threatening setting. For associations, too, ADR offers potential advantages to avoid “the financial costs and emotional investments” of lawsuits that can endure and divide communities.<sup>61</sup>

The California Law Revision Commission studied the benefits of “providing more affordable and available means to ensure compliance with the law and resolve disputes among”

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<sup>61</sup> CAI, “Public Policies,” *supra* n. 59, at 11 (this policy eff. 5/3/02).

homeowners and associations.<sup>62</sup> That study recognized the need to take into account “structural factors that work against effective alternative dispute resolution ... includ[ing] the relative inequality of bargaining position between the association and an individual homeowner, and the cost of invoking a neutral dispute resolution process.”<sup>63</sup>

The model statute, in ¶¶ 1 and 2, starts by ensuring clear notice, time for homeowners to reflect and consider their options with a right to cure, and an opportunity to be heard by directors.<sup>64</sup> This can promote rapid, fair resolution of disputes that reflect misunderstandings, and ensure that directors know if managers (or others) take abusive actions in the association’s name. This is similar to the constitutional requirement of due process when there is a dispute between an individual and traditional government.<sup>65</sup>

This process must enable agreements that homeowners can enforce. The directors can use a committee (which can be a committee of one), so long as the directors will ratify any settlement, unless it includes terms forbidden by law or the governing documents.<sup>66</sup>

The model statute, in ¶¶ 3 and 4, offers two means of neutral review. Mediation offers speed and confidentiality,<sup>67</sup> while the ombudsperson provides both information and resources if homeowners need help to develop their position. Both options should cost homeowners some money, to ensure a point to the process, but neither should cost so much as to discourage their fair use. The options provide assurance that, if a dispute can be resolved amicably, it will be.

Both ¶¶ 3 and 4 exclude disputes relating to assessments or small monetary charges. For assessments, the model statute proposes that the homeowner must pay under protest and thereafter bring a challenge. (See Section 103, The Right to Fairness in Litigation.) For example, the homeowner could pay and then petition the ombudsperson to investigate the lawfulness of the assessment under ¶10. For disputes about small charges, the model statute offers no new process other than the hearing of ¶ 2 (but allows challenges in small claims court).

Where multiple homeowners face the same charge and agree jointly to mediate or seek review by the ombudsperson, their charges should be aggregated to determine if they exceed the “small charge” threshold. The small charge threshold to invoke the ombudsperson should be lower than for mediation because the ombudsperson can resolve the matter by reading the letters, and because the ombudsperson gains practical knowledge by staying abreast of issues as they arise.

The model statute ¶10 enables homeowners to petition the ombudsperson to challenge violations of the model statute or other statutory homeowner rights. See also Section 107, The Right to

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<sup>62</sup> *Alternative Dispute Resolution in Common Interest Developments*, 33 Cal. L. Rev. Comm’n Reports 689, 696 & n.7 (2003).

<sup>63</sup> *Id.* at 700.

<sup>64</sup> See Tex. Prop. Code 209.006 & 209.007; see also Fla. Stat. Ann. 718.1255; Cal. Civ. Code 1363(h). Similarly, in *Jones v. Flowers*, 126 S.Ct. 1708 (2006), the Supreme Court explained the importance of making reasonable additional efforts to serve notice in those cases where certified mail is returned undelivered.

<sup>65</sup> *Accord*, e.g., CAI “Public Policies,” *supra* n.59, at 61 (eff. 10/9/93) (homeowners deserve fair process).

<sup>66</sup> See *Alternative Dispute Resolution in Common Interest Developments*, *supra* n.65, at 704 & Cal. Civ. Code 1368.840.

<sup>67</sup> See Cal. Civ. Code 1369.540(b).

Oversight of Associations and Directors. Only one filing fee need be paid if multiple homeowners join the same petition. Homeowners need this access to the ombudsperson because, as discussed previously, typically litigation provides their only other option, and they lack time, money, skill, and experience, making litigation ineffective to keep associations accountable.

The model statute ¶ 11 allows associations to adopt ADR procedures, but absolutely protects the right to judicial review as provided in Section 103, The Right to Fairness in Litigation.<sup>68</sup> Homeowners should be told annually of whatever ADR rights exist.<sup>69</sup>

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<sup>68</sup> See also *Villa Milano HOA v. Il Davorge*, 84 Cal. App. 4<sup>th</sup> 819, 102 Ca. Rptr.2d 1 (2000) (mandatory arbitration clause can be unconscionable).

<sup>69</sup> See Cal. Civ. Code 1369.590.

*III. Where there is litigation between an association and a homeowner, and the homeowner prevails, the association shall pay attorney fees to a reasonable level.*

### **Section 103: The Right to Fairness in Litigation**

1. *Judicial Protection.* Individual homeowners may sue associations to enforce statutory rights (under this model statute or otherwise) as well as their rights under governing documents, without being required to sue other homeowners; further, the association shall pay for any notice to homeowners that the court finds to be appropriate. Governing documents shall not limit judicial review or court enforcement; provided they may require ADR to the extent permitted by Section 102, The Right to Resolve Disputes without Litigation,.
2. *Burden of Proof.* Unless otherwise provided by statute, a homeowner has the burden to prove each breach of duty by a preponderance of the evidence. Except for *ultra vires* actions, or actions otherwise exceeding an association's or director's authority, homeowners must prove a breach caused, or threatens to cause, injury either to the homeowner as an individual or to the interests of any part of the common-interest community.
3. *Compliance Under Protest.* Homeowner compliance with an association's demand for action, or demand to cease action, including (but not limited to) any demand to pay assessments or attorney fees, does not waive homeowner rights to challenge such demand.
4. *Protected Homeowner Rights to Attorney Fees.* In any case brought by an association or homeowner to enforce governing documents or applicable law (under this model statute or otherwise), the homeowner shall be awarded reasonable attorney fees and costs to the extent that the homeowner prevails. Attorney fees shall reflect counsel's reasonable hourly rate and time worked, and shall not be limited by the amount the homeowner actually paid, if any.
5. *Limited Association Rights to Attorney Fees.* In any case brought by an association or homeowner to enforce governing documents or applicable law (under this model statute or otherwise), if authorized by the declaration, the association shall be awarded reasonable attorney fees and costs to the extent that the association prevails; provided that the reasonable attorney fees may be reduced at the discretion of the court based on finding that the judicial review benefited the association or homeowners by clarifying governing documents or applicable law, or other equitable considerations. Attorney fees shall reflect counsel's reasonable hourly rate and time worked, limited by the amount the association actually paid.

*Discussion*

In addition to providing a neutral forum, judicial review can bring important issues to public attention and develop precedent, both of which serve to improve laws. Even without a court ruling, judicial review can clarify governing documents or how the law applies to situations in common-interest communities. The model statute therefore secures homeowner rights to litigate.<sup>70</sup>

Some states have imposed burdensome limits on homeowner ability to sue, requiring either that a minimum number of homeowners join to sue, or that challengers sue all homeowners in the association.<sup>71</sup> The model statute rejects such limits on bringing claims, so all homeowners can defend their individual rights.<sup>72</sup>

However, nothing in the model statute precludes a court from determining that all homeowners should be given notice of a pending action, particularly if the court may be concerned that homeowners may not all have uniform interests. In such a case, the association (not homeowners) should pay for the notice, the form and content of which the court may specify.

The model statute recognizes that, like the association itself, homeowners may sue to protect the interest of the community as a whole. As the Restatement § 6.13(2) recognizes, *ultra vires* action always causes harm to homeowners, and for other claims the model statute requires proof that the breach “caused, or threatens to cause, injury to the [homeowner] individually or to the interests of the common-interest community.”

The case of *Inwood North Homeowners’ Association, Inc. v. Harris* illustrates problems arising from the lack of counsel for homeowners.<sup>1</sup> *Inwood* presented the critical question of whether associations could foreclose against homeowners in Texas. The Texas Constitution provides strong limits on foreclosures.<sup>1</sup> In *Inwood*, after the association sued, the homeowners “never appeared” with a lawyer in court.<sup>1</sup> Even so, both the trial court and the court of appeals ruled to protect homeowners, holding that the Texas Constitution prevented foreclosure.<sup>1</sup>

However, the association appealed to the Texas Supreme Court. That court reversed, and allowed the association to foreclose. Even though *Inwood* certainly presented difficult legal issues, the supreme court did not appoint anyone to defend homeowner rights and, as dissenting justices noted, “[n]o one appeared before [that court] to assert the Constitutional protection.”<sup>1</sup> Thus, in an important case, no lawyer ever defended homeowner rights.

<sup>70</sup> See also, e.g., UCIOA § 1-114(b) (“[a]ny right or obligation declared by [UCIOA] is enforceable by judicial proceeding”); Cal. Civ. Code 1354(a).

<sup>71</sup> See, e.g., *Dahl v. Hartman*, 14 S.W.3d 434 (Tex.App.--Houston [14th Dist.] 2000, pet. denied) (in some circumstances statute requires all homeowners be joined as parties), limited by *Brooks v. Northglen Association*, 141 S.W.3d 158, 163 (Tex. 2004); see also Ariz. Rev. Stat. 10-3304 (previously required 10 percent of homeowners to challenge action by association, recently amended).

<sup>72</sup> See also, e.g., *Kesl, Inc. v. Racquet Club of Deer Creek II Condominium, Inc.*, 574 So.2d 251 (Fla. DCA 1991) (association can be sued as representative of unit owners).

The model statute also enables homeowners to comply with association demands while reserving the right to challenge the demand. This reduces the risks and allows homeowners to reflect and consult with counsel about whether to bring a challenge.<sup>73</sup>

Homeowners' lack of ability to pay attorney fees, and their risk of being forced to pay the association's fees, constitute a recurring problem addressed by the model statute. As litigation plays a prominent role, it remains essential to rebalance the rights to attorney fees.

Insofar as associations have automatic (or close to automatic) rights to obtain attorney fees from homeowners, homeowners face substantial financial risk by contesting any issue. In effect, given the possibility of foreclosure, homeowners who litigate must "bet the house." Again, this applies both to cases that a homeowner might bring and to cases brought by associations.

Associations face no comparable risks, because they pay legal bills by increasing assessments on homeowners--including the homeowners challenging the association, who thus fund their own opposition--or by paying the cost of counsel through the association's insurance. Thus, the associations not only start with the dominant resources and experience, but the imbalance regarding the right to recover attorney fees prevents homeowners from protecting themselves and holding the association accountable.

The imbalance can provide excessive incentives for associations to proceed too rapidly to court--particularly where association attorneys take cases on full contingency. Some states allow prevailing homeowners to obtain attorney fees.<sup>74</sup> However, such a provision does not fully rectify the imbalance of positions for homeowners and associations.

To ensure reasonable opportunities to defend against or otherwise challenge actions by associations, this model statute addresses the right to recover attorney fees separately for associations and homeowners. It protects homeowners without eliminating rights of associations to obtain fees when homeowners simply refuse to pay assessments or otherwise disregard clear governing documents.

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<sup>73</sup> See Cal. Civ. Code 1366.3 (homeowner may invoke ADR for an assessment dispute by paying under protest); see also Cal. Civ. Code 1367.1(c).

<sup>74</sup> E.g., Cal. Civ. Code 1354(c); Fla. Stat. Ann. 720.305(1) ("prevailing party in any such litigation is entitled to recover reasonable attorney fees and costs"); Nev. Rev. Stat. 116.3116 (7); see also UCIOA § 4-117 & comment 1 (permitting the court to award attorney fees to any prevailing party).



*IV. Homeowners shall be told--before buying--of the association's broad powers, and the association may not exercise any power not clearly disclosed to the homeowner if the power unreasonably interferes with homeownership.*

#### **Section 104: The Right to Be Told of All Rules and Charges**

1. *Governing Documents.* Associations may not enforce charges or other rules against homeowners, except those set forth in plain English in governing documents. All operating rules shall be compiled in a single document, available to homeowners on request, that at the beginning provides contact information for the ombudsperson and a description of the ombudsperson's role.
2. *Disclosure to Buyers.* Unless otherwise provided by statute, the following provisions apply:
  - a. At least \_\_ days before an offer to buy a home becomes binding, the homeowner shall furnish the potential buyer with<sup>75</sup>
    - i. the information statement prepared by the ombudsperson (including an acknowledgment for the buyer to execute) and all the association's governing documents, excluding plats and plans;
    - ii. a statement of each existing assessment, any unpaid assessment currently due from the selling homeowner, and any other alleged violation of the association's governing documents by external features of the home or landscape as of the date of the certificate, citing applicable rules;
    - iii. the association's current operating budget and financial statement, including any legally required summary of the association's reserves; and
    - iv. a statement of the number of foreclosure lawsuits filed within the past three years, any unsatisfied judgments and pending legal actions against the association or otherwise relating to the common-interest community of which the selling homeowner has actual knowledge.
  - b. Upon a homeowner's request, within ten days the association shall furnish a certificate with the information specified in ¶ 2a. A requesting homeowner is not liable for erroneous information in the certificate. A buyer is not liable for any past assessment, any future assessment greater than stated in the certificate (unless lawfully increased after the sale), or for violations of governing documents by external features of the home or landscape not stated in the certificate. For this certificate, the association may charge only actual costs, not to exceed \$\_\_.<sup>76</sup>
  - c. Upon request by a homeowner, potential buyer in receipt of a certificate pursuant to ¶ 2b, or homeowner's or buyer's authorized agent, within \_\_ days the

<sup>75</sup> This time frame depends on other state laws as well as practical considerations that may be unique to local markets within the state.

<sup>76</sup> This may depend on, for example, labor costs.

association shall make any legally required study of the association's reserves reasonably available to copy and audit.

3. *Limits on Default and Implied Powers.* Governing documents, and statutes governing homeowners, shall be construed to favor homeowners' free and unrestricted use of their home, and against any person seeking to enforce a limit on homeowner rights.
  - a. Absent specific authorization in the declaration or in ¶ 3(b) or ¶ 3(c), associations do not have power to adopt any rules that restrict the use or occupancy of, or behavior within, individually owned homes.
  - b. Except as limited by statute or the governing documents, associations have implied power to adopt reasonable operating rules to govern the use of (i) common property and (ii) individually owned property to protect the common property.
  - c. If the declaration grants a general power to adopt rules, an association also has power to adopt reasonable operating rules designed to (i) protect homeowners from unreasonable interference in the enjoyment of their individual homes and the common property caused by use of other individually owned homes; and (ii) restrict the leasing of homes to meet valid underwriting requirements of institutional lenders.
  - d. Except to the extent provided by statute or authorized by the declaration, a common-interest community may not impose restrictions on the structures or landscaping that may be placed on individually owned property, or on the design, materials, colors, or plants that may be used.
  - e. An association may borrow money subject to any limits stated in the governing documents but, unless the declaration or a court-approved order grants specific authority, the association may not assign future revenues or create a security interest in common property without approval by \_\_\_percent of all homeowners (or more if required by governing documents) in a vote after at least 30 days notice.

### *Discussion*

Homeowners deserve to know what rules the association applies, but frequently they do not. Clear disclosure provides the foundation for homeowners to agree to association rules and charges, facilitates compliance, and prevents arbitrary enforcement.

The model statute requires plain English because homeowners face serious sanctions for noncompliance.<sup>77</sup> As required by the Americans with Disabilities Act and federal Fair Housing Act, such rules shall be provided accessibly for persons with disabilities.<sup>78</sup>

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<sup>77</sup> See, e.g., Cal. Civ. Code 1363(g) (all potential penalties and fees must be listed and distributed to homeowners); Nev. Rev. Stat. 116.3108(5) (similar); 116.12065 (also requires notice of new rules); 116.3106(3) (requires bylaws in plain English) & 116.31065 (rules must be reasonable and clear); see also UCIOA § 4-103(a)(4) (developers must

Many well-run associations provide notice by stating all their rules and charges in a handbook for homeowners. Such handbooks also often include important practical information such as telephone numbers. Although the model statute supports use of such handbooks, any additional information should not obscure the rules and charges. The ombudsperson could prepare a self-description for use in such handbooks.

The model statute also benefits potential buyers, because problems frequently arise when buyers do not understand how associations can constrain their home life. As stated in UCIOA, “[t]he best ‘consumer protection’ that the law can provide to any purchaser is to insure that [s]he has an opportunity to acquire an understanding of the nature of the products which [s]he is purchasing.”<sup>79</sup> UCIOA requires some disclosures by developers, as well as disclosures on resale.<sup>80</sup>

The model statute focuses on required disclosures before a home’s resale, following the practices in some states.<sup>81</sup> States can impose lesser requirements on smaller associations, but all associations should ensure homeowners know what rules and charges they may face when they buy into a common-interest community.

The model statute specifically requires notice to a prospective buyer if the association alleges violations of the governing documents.<sup>82</sup> This protects buyers who may be attracted to a particular feature of a house, such as a deck, only to learn (after the purchase) that the association demands that the deck be removed.

The model statute ensures that potential buyers have time to review required disclosures. This can overlap the period during which a potential buyer obtains inspections before making a final commitment to purchase. Having all the rules in a single document helps potential buyers just as it helps homeowners. Scattered rules may not be apparent and, even if discovered in a title search, the information may come too late to be useful.

The information statement must be clear and concise to be effective, but also must include descriptions of any default or implied powers. To ensure this, and to take into account local variation, the model statute requires the ombudsperson to prepare the information statement as a stand-alone document. Nevada and Florida statutes illustrate available options for text in the

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provide plain language summary of governing documents); cf., e.g., U.S. Const. Amend XIV (due process clause requires fair notice of rules before punishment).

<sup>78</sup> See 42 U.S.C. 12115 and 42 U.S.C. 3604(f).

<sup>79</sup> UCIOA § 4-103 comment 1.

<sup>80</sup> *Id.* §§ 4-103(a)(4) comment 3 (offering statement must include “the declaration, bylaws, and any rules and regulations of the common interest community,” in addition to plain language summary); 4-103(a)(16) (developers must disclose fees and charges); 4-109(a) (requiring disclosures for certain resales); 4-109(b) (association must provide information for resellers).

<sup>81</sup> E.g., Nev. Rev. Stat. 116.4109; Tex. Prop. Code 5.008, 5.012 & 207; Cal. Civ. Code 1368; Ariz. Rev. Stat. 33-1806 (mandates disclosures to buyers unless under 50 units in association) & 33-1260 (similar for condos); Fla. Stat. Ann. 720.401 (specifying required disclosure, absent which a buyer can void a sale, up to closing) & 718.503(2) (for condos).

<sup>82</sup> See, e.g., Va. Code 55-512A(9).

notice.<sup>83</sup> The model statute contemplates that a part of the information statement can be signed by the buyer and recorded to confirm disclosure.

Where ambiguity exists, the model statute follows traditional common law to protect homeowners' independence--protection that exists even when state laws call for liberal construction of governing documents.<sup>84</sup>

In limiting the default and implied powers of associations, the model statute ¶ 3 follows the Restatement §§ 6.7, 6.9 and 6.3(3).<sup>85</sup> In these and other sections, the Restatement recognizes needed limits on association power.<sup>86</sup> In addition to these substantive limits, the model statute requires special procedures to amend corporate documents and operating rules in Section 105, The Right to Stability in Rules and Charges.

Default or implied powers can surprise homeowners, who typically do not study case law or undisclosed statutes. Even clear requirements to disclose governing documents would not disclose such default or implied powers. As an example of an implied power, some associations have asserted implied power to prohibit (or impose large charges on) lease of homes. Except where authorized by the declaration, the model statute expressly limits such powers, and protects homeowner rights to income from leasing except for limited situations where required by lenders. This follows the Restatement § 6.7.<sup>87</sup>

Like the American Law Institute's Restatement, the model statute places more conservative limits on association power than UCIOA. UCIOA would grant broad authority, including (among many other powers) for associations to "exercise all other powers that may be exercised ... by legal entities of the same type as the association" and "exercise any other powers necessary and proper for the governance and operation of the association."<sup>88</sup> UCIOA's approach has been followed in some states.<sup>89</sup> Indeed, some states give even broader powers to associations.<sup>90</sup> However, this amounts to granting directors broad amendment power, without

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<sup>83</sup> Nev. Rev. Stat. 116.41095; Fla. Stat. Ann. 720.401.

<sup>84</sup> See, e.g., Tex. Prop. Code 202.003(a), construed in, e.g., *City of Pasadena v. Gennedy*, 125 S.W.3d 687, 693 n.3 (Tex.App.--Houston [1<sup>st</sup> Dist.] 2003, pet. den.); *Dyegard Land Partnership v. Hoover*, 39 S.W.3d 300, 309 (Tex. App.--Ft. Worth 2001), following *Ashcreek Homeowners' Ass'n v. Smith*, 902 S.W.2d 586, 588-89 (Tex. App.--Houston [1st Dist.] 1995, no writ). See also Cal. Civ. Code 1370 and *Moore v. Stevens*, 90 Fla. 879, 885, 106 So.2d 901, 904 (1925), followed in *White Egret Condo, Inc. v. Franklin*, 379 So.2d 346, 352 (Fla. 1979); and *Heck v. Park View HOA*, 642 So.2d 1201 (Fla. 4th DCA 1994); *Westwood Homeowners Ass'n v. Tenhoff*, 745 P.2d 976, 983-84, 155 Ariz. 229, 236-37 (App. Div. 1987). Contrary decisions exist, see, e.g., *Gennedy*, 125 S.W.2d at 693 n. 2, but they undermine homeowner rights and open a door to restrictions that cannot be anticipated.

<sup>85</sup> See also Ariz. Rev. Stat. 33-1252(A) (requires 80 percent vote to encumber common elements); Nev. Rev. Stat. 116.3112(1) (requires majority vote).

<sup>86</sup> See also, e.g., Restatement §§ 6.8 (limits on enforcement) & 6.10 (limits on powers to amend declaration).

<sup>87</sup> *Accord*, e.g., Nev. SB 325 § 42 (2005). The Restatement explains why "interpretive rules limit the scope of the power to restrict use of individually owned property." *Id.* at 141. "The rationale for not giving an expansive interpretation to an association's power ... is based in the traditional expectations of property owners.... *Id.* at 142.

<sup>88</sup> UCIOA § 3-102(a) (16 & 17).

<sup>89</sup> E.g., Nev. Rev. Stat. 116.3102; Ariz. Rev. Stat. 33-1242A (similar rule just for condos). See also Nev. Rev. Stat. 116.2111(b) (default rule that owner cannot change unit's exterior without association permission); Ariz. Rev. Stat. 33-1221 (similar rule just for condos).

<sup>90</sup> E.g., Tex. Prop. Code 204.010(a) (20 & 21). Even without a homeowner vote, directors have 19 stated implied or default powers, in addition to unqualified authority to "exercise other powers that may be exercised in this state by a

any homeowner votes. See also Section 105, The Right to Stability in Rules and Charges (forbidding such broad delegation of amendment power).

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corporation of the same type as the property owners' association" and "exercise other powers necessary and proper for the governance and operation of the property owners' association.")

*V. Homeowners shall have rights to vote to create, amend, or terminate deed restrictions and other important documents. Where an association's directors have power to change operating rules, the homeowners shall have notice and an opportunity, by majority vote, to override new rules and charges.*

## **Section 105: The Right to Stability in Rules and Charges**

1. *Seniority of Documents.* In resolving any conflict among governing documents, the senior document controls. Unless the documents otherwise provide, seniority is (a) declaration over (b) articles of incorporation or association over (c) bylaws over (d) operating rules.
2. *Homeowner Powers to Amend Governing Documents.* For any governing document, the following apply:
  - a. Except as limited by the governing document, a senior document, or statute, homeowners have the power to amend subject to the following requirements:
    - i. Unless the governing document, a senior document, or statute specifies a different number, an amendment adopted by homeowners holding a majority of the voting power is effective to
      - a) extend the term of the governing document,
      - b) make administrative changes reasonably necessary for management of the common property or administration of the servitude regime, or
      - c) prohibit or materially restrict uses of individually owned homes that threaten to harm or unreasonably interfere with reasonable use and enjoyment of other property in the community, or to amend or repeal such prohibition or restriction adopted by amendment under this ¶ 2a(i)(c).
    - ii. Unless the governing document, a senior document, or statute specifies a different number, an amendment adopted by homeowners holding two-thirds of the voting power is effective for all other lawful purposes except as stated in ¶ 2b and ¶ 2c.
  - b. Amendments that do not apply uniformly to similar homes and amendments that would violate association duties to homeowners under the model statute are not effective without approval by homeowners whose interests would be adversely affected, unless the declaration clearly and specifically apprises purchasers that such amendments may be made. This ¶ 2b does not apply to non-uniform modifications made under circumstances that would justify judicial modification.
  - c. Except as otherwise expressly authorized by the declaration, and except as provided in ¶ 2a, unanimous homeowner approval is required to

- i. prohibit or materially restrict the use or occupancy of, or behavior within, individually owned lots or units, or
    - ii. change the basis for allocating voting rights or assessments among homeowners.
  - d. At least 60 days before voting on any proposed amendment to a governing document, the association shall provide notice to all homeowners, including the specific text proposed and a description of the amendment's purpose and anticipated effects. No amendment takes effect before the association provides notice of adoption to all homeowners, certified by an association officer, and to the extent required by law, the association records the amendment.
  - e. Directors have no power to amend a governing document except where expressly authorized by statute or, where not otherwise contrary to statute, expressly authorized by the governing document or a senior document; provided that, if governing documents authorize directors to impose any duty or charge on homeowners, this shall be done by operating rule (as provided in ¶ 3) unless the governing document requires otherwise; and provided further that homeowners only, not directors, shall have power to amend
    - i. any provision that affects number, qualifications, powers and duties, terms of office, or manner and time of election or removal of directors; or
    - ii. any provision with respect to amendment of any governing document.
3. *Limits on Operating Rule Changes by Directors.* Directors may adopt, amend, or repeal operating rules only if all of the following requirements are satisfied:
- a. All operating rules must be
    - i. in writing;
    - ii. within directors' authority conferred by law or corporate documents;
    - iii. not inconsistent with law and corporate documents;
    - iv. adopted, amended, or repealed in good faith and in substantial compliance with this model statute; and
    - v. reasonable.
  - b. Paragraphs 3d and 3e apply only to operating rules that relate to one or more of the following subjects:
    - i. Use of common property
    - ii. Use of a home, including any aesthetic or architectural standards that govern alteration of a home
    - iii. Homeowner discipline, including any withdrawal of privileges or charges for violating governing documents and any procedure for withdrawing privileges or imposing charges

- iv. Any standard for delinquent assessment installment or other payment plans
  - v. Any procedure to resolve disputes
  - vi. Any procedure for reviewing and approving or disapproving a proposed physical change to a home or to the common area
  - vii. Any procedure for elections
- c. For the following actions by directors, §§ 3d and 3e do not apply:
- i. A decision regarding maintenance of the common property
  - ii. A decision on a specific matter that is not intended to apply generally
  - iii. A decision setting the amount of a regular or special assessment
  - iv. A rule change required by law, if directors have no discretion as to the substantive effect of the rule change
  - v. Issuance of a document that merely repeats existing law or the governing documents
- d. Directors shall provide written notice of a proposed rule change to homeowners at least 30 days before making the rule change. The notice shall include the text, and a description of the purpose and effect of the proposed rule change, except as provided by § 3d(iii).
- i. A decision on a proposed rule change shall be made at a meeting of the directors, after consideration of any comments made by homeowners.
  - ii. Not more than 15 days after making the rule change, the directors shall deliver notice of the rule change to every homeowner. If the rule change is an emergency rule change made under § 3d(iii), the notice shall include the text of the rule change, a description of the purpose and effect of the rule change, and the date that the rule change expires.
  - iii. If directors determine that an immediate rule change is required to address an imminent threat to public health or safety, or an imminent risk of substantial economic loss to the association, directors may make an emergency rule change; and no prior notice is required. An emergency rule change is effective for 120 days, unless the rule change provides for a shorter effective period. A rule change made under this § 3d(iii) may not be readopted under this paragraph.
- e. Homeowners holding 5 percent of the voting power may call a special meeting of the homeowners to reverse any rule change.
- i. To call such special meeting homeowners must, no more than 30 days after being notified of a rule change, deliver a written request to the association's president, secretary, or registered agent, after which the directors shall give notice of the meeting to all homeowners. Homeowners are deemed notified of a rule change after receiving notice of the rule change or enforcement of the resulting rule, whichever happens first. Homeowner requests to copy or review association member lists with addresses, e-mail, and phone numbers for the purpose of seeking support to reverse a rule change shall be honored as soon as reasonably possible, in any



- event within three business days. Homeowners shall be allowed to use common property reasonably in seeking support to reverse a rule change.
- ii. At such special meeting with a quorum present, the rule change shall be reversed by majority vote of homeowners represented and voting, unless a corporate document or statute requires otherwise.
  - iii. Unless otherwise provided by the corporate documents, for this ¶ 3e, one vote may be cast for each home.
  - iv. Special meetings under this ¶ 3e shall follow laws generally applicable to special meetings.
  - v. A rule change reversed under this ¶ 3e may not be readopted for one year after the date of the meeting reversing the rule change. Nothing in this ¶ 3e precludes directors from adopting a different rule on the same subject as a rule change that has been reversed.
  - vi. As soon as possible and not more than 15 days after the close of voting at a special meeting, the directors shall provide every homeowner with notice of the results of a vote held pursuant to this ¶ 3e.
  - vii. This ¶ 3e does not apply to emergency rule changes under ¶ 3d(iii).

4. *Required Notice for Homeowner Votes on Assessments.* Unless governing documents require a longer period, homeowner votes to impose or increase regular or special assessments require at least 30 days advance notice.

### *Discussion*

Stability in governing documents protects homeowner expectations in buying a house. The model statute first specifies how to resolve conflicts among governing documents, following widely accepted rules of seniority, with the declaration (also known as deed restrictions or CC&Rs, see Section 100 (¶ 2e), Definitions) being the most important.

Following the Restatement §§ 6.7 and 6.10, the model statute limits amendments of governing documents, with super-majority voting requirements to secure rights that should not often change, and to ensure essential consensus for major changes. Where directors have authority over operating rules, the model statute ensures homeowner oversight following California law.<sup>91</sup>

The model statute would not permit management companies to impose operating rules, because managers may perceive an economic interest in generating violations and cannot be held directly accountable. Rule making by managers also raises the specter of retaliation against critics.

As recognized in the Restatement § 6.10, some rules, if not specifically authorized by the declaration and recorded before a home is purchased, ought not be adopted without unanimous consent. These particularly include rules that restrict the use or occupancy of, or behavior within, individually owned units.<sup>92</sup> Voting rights also are fundamental as discussed in Section 108, The Right to Vote and Run for Office.

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<sup>91</sup> See Cal. Civ. Code 1357.100 *et seq.*

<sup>92</sup> See also, e.g., *Buddin v. Golden Bay Manor, Inc.*, 585 So.2d 435 (Fla. DCA 1991); *Carey v. Brown*, 447 U.S. 455, 471 (1980) (“privacy of the home is certainly of the highest order in a free and civilized society”).

Homeowners obtain adequate notice of proposed amendments in order to prevent a small group from organizing a vote before others can reflect and organize. All amendments remain subject to Section 106 (§ 8), The Right to Individual Autonomy, requiring that terms in governing documents not be illegal, an undue burden on constitutional rights, or contrary to public policy.<sup>93</sup> The scope of this prohibition may be broader for amendments than for initially drafted documents.<sup>94</sup> That is, terms allowed in governing documents may not be allowed by amendment, because some amendments may surprise homeowners in violation of public policy.<sup>95</sup>

The model statute specifically reserves two kinds of rights only for homeowners. One, in § 2e(i), protects against efforts by a director to expand powers unreasonably, as well as against directors instituting self-preservation devices such as extended terms. The other, in § 2e(ii), protects the amendment process.

Some states set super-majority homeowner voting requirements for amendments.<sup>96</sup> Other states contemplate that majority vote suffices for amendments.<sup>97</sup> Even where they do impose some limits, the Restatement recognizes a too-common problem: “[s]tatutes and governing documents frequently confer broad rule-making powers on common-interest-community associations, but may fail to specify the extent of that power over individually owned property.”<sup>98</sup>

The model statute here recognizes that associations can benefit from flexibility with respect to operating rules. See also Section 104, The Right to Be Told of All Rules and Charges (some implied power to make operating rules). Even on these matters, homeowners need oversight authority, because “operating rules can have a significant effect on member interests.”<sup>99</sup> Experience cautions that specific requirements serve this better than generalities, and the model statute tracks California law.<sup>100</sup> Such procedures have added benefits of promoting homeowner understanding, acceptance, and compliance.

Fair notice cannot be accomplished by an announcement hidden in a newsletter that homeowners may not read carefully, if they read it at all. The notice must alert homeowners about significant proposed changes.

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<sup>93</sup> See, e.g., *Dyegard Land Partnership v. Hoover*, 39 S.W.3d 300, 313 (Tex. App.--Ft. Worth 2001), following *Hanchett v. East Sunnyside Civic League*, 696 S.W.2d 613, 615 (Tex. App.--Houston [14th Dist.], 1985, writ ref. n.r.e.); *Apple I Condo. Ass'n v. Worth Bank & Trust Co.*, 277 Ill. App. 3d 345, 659 N.E.2d 93 (1995).

<sup>94</sup> See, e.g., *Harbour Estates, Inc. v. Basso*, 393 So.2d 637, 639-40 (Fla. 4th DCA 1981).

<sup>95</sup> See *Davis v. Huey*, 620 S.W.2d 561, 567 (Tex. 1981) (absent proper notice when buying their home, homeowners cannot be said to have agreed to surprise amendments).

<sup>96</sup> E.g., Fla. Stat. Ann. 720.306(1)(b) (default requirement of 2/3rds homeowner vote for amendments other than of “rules”); see also Fla. Stat. Ann. 718.110 (2/3rds default to amend condominium documents, except 4/5ths vote needed for some purposes) & 718.111(7) & 113 (75 percent default requirement to convey condominium property or for substantial alteration); *Holiday Pines POA, Inc. v. Wetherington*, 596 So.2d 84 (Fla. DCA 1992); Ariz. Rev. Stat. 33-1227 (2/3rds vote for condo amendments, some exceptions); UCIOA § 2-117(a) (recognizes need for 2/3rds vote on some issues) & 2-117(f) (80 percent to prohibit or materially restrict the permitted uses or behavior in a unit, or restrict the number of people who may occupy a unit).

<sup>97</sup> E.g., Cal. Civ. Code 1355, 1355.5 & 1356; Cal. Code Regs. 2792.24.

<sup>98</sup> Restatement § 6.7 comment b, at 141; see also, e.g., UCIOA § 3-102(c) (can be read to allow some regulation of behavior inside or occupancy of a unit).

<sup>99</sup> *Common Interest Development Law: Procedural Fairness in Association Rulemaking and Decisionmaking*, 33 Cal. L. Revision Comm'n Reports 81, 88 (2002).

<sup>100</sup> Cal. Civ. Code 1357.100 to 150. See also *infra* Section 108(3) (discussing quorum requirements).

In addition to procedural requirements, all operating rules must be reasonable.<sup>101</sup> This reflects principles discussed in Section 109, The Right to Reasonable Associations and Directors.

Apart from amendments to governing documents and rule changes, homeowners deserve stability in assessments. At a minimum, this requires advance notice so homeowners can consider whether to support increased charges.

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<sup>101</sup> See Nev. Rev. Stat. 116.31065 (rules must be reasonable); Cal. Civ. Code 1357.110(e); see also Cal. Code Regs., tit. 10, §§2792.15 to .28 (requires “reasonable arrangements” for assessments, meetings, and voting rights).

*VI. Homeowners shall not surrender any essential rights of individual autonomy because they live in a common-interest community. Homeowners shall have the right to peaceful advocacy during elections and other votes as well as use of common areas.*

## **Section 106: The Right to Individual Autonomy**

1. *Signs and Flags.* Homeowners have the right to display noncommercial signs, flags, and “for sale” signs on their property, provided the declaration may set reasonable limits so long as, for three months before any election or other vote held by an association, government, or other entity with geographic territory overlapping any part of a common-interest community, the association shall not forbid display of reasonable-size signs relating to the election or vote.
2. *Neighbor Contacts.* Homeowners have the right peacefully to visit, telephone, petition, or otherwise contact their neighbors; provided the declaration may set reasonable restrictions if it permits some weekday afternoon and some weekend hours for such neighbor contacts.
3. *Peaceful Assembly.* Homeowners have the right to invite guests to assemble peacefully on their property, provided the declaration may set reasonable limits to protect nearby homes.
4. *Common Property.* Where an association makes any part of common property available for use by homeowners:
  - a. the governing documents shall state any charge for homeowners’ use, which shall not exceed the association’s marginal cost for use, as well as any other restrictions on such use, which shall be content-neutral and otherwise reasonable; and
  - b. the governing documents shall not unreasonably restrict homeowners’ rights to invite public officers or candidates for public office to appear or speak in common areas, or unreasonably restrict lawful uses relating to an election or other vote held by the association or any government or quasi-governmental entity with geographic territory overlapping any part of the common-interest community.
5. *Discrimination Prohibited.* Restrictions on signs and flags, neighbor contacts, peaceful assembly, common property, or other self-expression shall not differ based on the content of a view sought to be expressed by a homeowner. If an association allows homeowners to express views on a topic, in a newsletter or other forum, other homeowners equally shall be allowed to respond with differing views.
6. *No Forced Membership in Another Organization.* No association may force a homeowner to join a separate organization unless (a) expressly authorized by the declaration before the homeowner’s purchase or (b) associations merge in compliance with state law.

7. *No Mandatory Charitable or Political Funding.* Assessments or other mandatory dues from association members may not be used by the association for charitable or political purposes. Any solicitations for charitable or political purposes by an association will be conducted separately from the billing for customary assessments of fees, and clearly be designated as voluntary.
8. *Ultimate Limit on Governing Documents.* Governing documents must be created in compliance with law, and not include terms that are illegal or unconstitutional, or that violate public policy. Terms that are invalid because they violate public policy include, but are not limited to, terms
  - a. that are arbitrary, spiteful, or capricious;
  - b. that unreasonably burden a fundamental constitutional right;
  - c. that impose an unreasonable restraint on alienation;<sup>102</sup>
  - d. that impose an unreasonable restraint on trade or competition; or
  - e. that are unconscionable.

### <C>Discussion

The United States has a long tradition of protecting, indeed encouraging, rights to free speech, petition, assembly, and access to public property. Both to enable self-expression and to promote democracy itself, the federal Constitution secures these rights against government restrictions and discrimination. The Constitution maximizes protection for people's use of their own home, reflecting widely accepted values of privacy and independence.<sup>103</sup> Similar protections exist in state constitutions.

By extending such protection for important rights, the model statute recognizes similarities of associations and traditional governments. Like traditional governments, associations start from the central mandate that, by virtue of residence, homeowners pay mandatory assessments akin to taxes, in return for which they receive services. Indeed, many associations have replaced--sometimes have statutory mandates to replace--traditional governments in providing core services such as police protection, garbage collection, road repair, and recreation. In addition, associations typically regulate both structure and use of property in a manner akin to zoning, impose rules for use of common property, and elect the persons who serve as directors.

Over the past decade, legislative studies increasingly recognize the governmental nature of associations.<sup>104</sup> Thus, many reasons to secure individual rights against governments also apply to associations.

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<sup>102</sup> Alienation is a legal term, referring to the right to sell property. Restraints on alienation limit the ability to sell.

<sup>103</sup> *City of Ladue v. Gilleo*, *supra* n.3 & *infra* n.116; *Carey v. Brown*, *supra* n. 100.

<sup>104</sup> See e.g., Texas Senate Committee on Intergovernmental Relations, Interim Report, at 38–39 (78th Legislature, October 2002) (“previous study was correct in stating that [associations] are ‘de facto political subdivisions,’ which is increasingly evident as developers are encouraged by cities and counties to provide services that were the responsibility of local governments in the past”), citing Texas Senate Interim Committee on State Affairs, Report, at 16 (11/2/1998); New Jersey Assembly Task Force to Study Homeowners Associations, Final Report at 2–3 (1/8/1998) (also recognizing “the increasingly governmental nature of the duties and powers ascribed to the homeowners’ association board,” calling them “quasi-governmental”); see also *Committee for a Better Twin Rivers*, *supra* n.7, 890 A.2d at 952-56 (finding associations “constitutional actors”, citing the Task Force); G. Staropoli, *The*

The need for this protection also reflects the nongovernmental roots that associations have in contracts; that is, deriving their power only by consent of homeowners. As discussed in Section 104, The Right to Be Told of All Rules and Charges, the governing documents should be interpreted to give maximum liberty to homeowners.

To the extent that associations become “governments,” a broad range of federal constitutional requirements would apply by virtue of the Fourteenth Amendment.<sup>105</sup> A few cases recognize the possibility to secure similar rights under state constitutions.<sup>106</sup>

Even if associations are not traditional governments, the model statute recognizes the need to secure certain vital rights of individual autonomy. These include rights that promote discussion of important issues that no association should compel homeowners to waive.<sup>107</sup>

The United States Supreme Court explains why the Constitution denies local governments the authority to forbid homeowners’ use of noncommercial signs:

a venerable means of communication that is both unique and important ... [for] political, religious, or personal messages. Signs that react to a local happening or express a view on a controversial issue both reflect and animate change in the life of a community. Often placed on lawns or in windows, residential signs play an important part in political campaigns.... Displaying a sign from one’s own residence often carries a message quite distinct from placing the same sign someplace else, or conveying the same text or picture by other means. Precisely because of their location such signs provide information about the identity of the “speaker.”<sup>108</sup>

In common-interest communities, as in governments, any legitimate interest in restricting signs can be fulfilled by reasonable time, place, and manner regulations.

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*Case Against State Protection of Homeowner Associations* (Infinity Publishing.com, 2003) (arguing associations are state actors so federal constitutional protections apply).

<sup>105</sup> *Marsh v. Alabama*, 326 U.S. 501 (1946); *Hudgens v. NLRB*, 424 U.S. 507 (1976).

<sup>106</sup> E.g., *Committee for a Better Twin Rivers*, *supra* n.7, 890 A.2d at 954-64; *Guttenberg Taxpayers and Rentpayers Ass’n v. The Galaxy Towers Condominium Ass’n*, 297 N.J.Super. 404, 409-11, 688 A.2d 156 (Ch. Div.) (association cannot be “political isolation booth”), *aff’d o.b.*, 297 N.J.Super. 309, 688 A.2d 108 (App. Div. 1996), *certif. den.* 149 N.J. 141, 693 A.2d 110 (1997); *Laguna Publishing Co. v. Golden Rain Foundation of Laguna Hills*, 182 Cal. Rptr. 813, 828 (1982); *Park Redlands Covenant Control Comm. v. Simon*, 226 Cal. Rptr. 199 (1986); *Jones v. Memorial Hosp.*, 746 S.W.2d 891, 893-94 (Tex. App.--Houston [1st Dist.] 1988, no writ) (“it appears that a private entity, even if not strictly engaged in ‘state action,’ may be subject to the enforcement of first amendment rights, if its functions are essentially public in nature”), citing RESTATEMENT (SECOND) OF TORTS § 874A (1979).

<sup>107</sup> *Committee for a Better Twin Rivers*, *supra* n.7, 890 A.2d at 960-64. See also Sullivan, *Unconstitutional Conditions*, 102 Harv. L. Rev. 1415 (1989) (limits to requiring a property buyer to give up constitutional rights); 765 Ill. Comp. Stat. Ann. 605/18.4(h) (“no rule or regulation may impair any rights guaranteed by the First Amendment”); Restatement § 3.1 (constitutional principles inform limits on association authority).

<sup>108</sup> *City of Ladue v. Gilleo*, 512 U.S. 43, 54-57 (1994).

The model statute’s protection for noncommercial signs and flags tracks California law, with signs and flags intended also to encompass posters and banners stated in that statute.<sup>109</sup> The California statute adds detail regarding reasonable time, place, and manner restrictions that may be helpful to minimize disputes, but the model statute takes no position on specifics used there.

The specific protection of elections and voting reflects our democratic values. For similar reasons, associations should not totally ban homeowners’ signs critical of their associations.

The model statute also protects the right to “for sale” signs because of the economic need to get the best price for a home. As the Supreme Court has recognized, “for sale” signs provide a particularly important way for homeowners to advertise, and no sufficient reason supports total prohibition of such signs.<sup>110</sup>

In addition to signs, the model statute protects the right to petition, because homeowner rights can depend on their ability to obtain support from their neighbors. This applies to association business, such as operating rules (see Section 105, The Right to Stability in Rules and Charges) and recall of directors (see Section 107, The Right to Oversight of Associations and Directors), as well as to matters of governments and similar entities on which homeowners vote. Under long-standing constitutional law, homeowners are presumed to have these rights.<sup>111</sup> Legitimate interests of associations can be fulfilled by reasonable restrictions.

The protection for peaceful assembly at home (in ¶ 3) reflects fundamental consideration for privacy, and supports many other basic rights.

The limit on charges (in ¶ 4a) both guards against arbitrary suppression of speech and reflects that homeowners (through their assessments) already have paid the fixed costs of common property. This is part of the more general rule of the Restatement § 6.5, that fees must be “reasonably related to the costs of [an association’s] providing the service, or providing and maintaining the common property, or the value of the use of the service.”<sup>112</sup> This also reflects the status of associations as nonprofits.<sup>113</sup> The specific protection for political activities (in ¶ 4b) tracks Florida law, and encompasses both lobbying and petitions against incumbent directors or managers, as well as presentation of information or candidates reflecting views disfavored by directors or management.<sup>114</sup>

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<sup>109</sup> Cal. Civ. Code 1353.5 & 1353.6; see also, e.g., Fla. Stat. Ann. 720.304(2) (protecting the right to fly flags) & 720.3075 (3); Ky. Rev. Stat. Ann. 2.042 (same); Ariz. Rev. Stat. 33-1261 & 33-1808 (same, and protecting signs); Nev. Rev. Stat. 116.31067 (same) & Nev. SB 325 § 46 (2005) (political signs); Tex. Prop. Code 202.009 (same).

<sup>110</sup> *Linmark Assoc. v. Township of Willingboro*, 431 U.S. 85 (1977).

<sup>111</sup> E.g., *Lovell v. Griffin*, 303 U.S. 444, 451-52 (1938) (pamphlets); *Jamison v. Texas*, 318 U.S. 413, 416 (1943); *Martin v. Struthers*, 319 U.S. 141, 145-49 (1943) (door-to-door distribution of literature); *Schneider v. State*, 308 U.S. 147, 164-65 (1939) (same).

<sup>112</sup> See also *Green Party of NJ v. Hartz Mountain Indus.*, 164 N.J. 127,157-58 (2000); *Chin v. Coventry Sq. Condo Assoc.*, 270 N.J. Super. 323, 330 (App. Div. 1994) (costs to be related to services).

<sup>113</sup> *Thanasoulis v. Windsor Towers 200 Assoc.*, 110 N.J. 650, 660-61 (1998) (association not entitled to make profit on common area).

<sup>114</sup> Fla. Stat. Ann. 720.304(1) & 718.123 (condos).

The prohibition against content-based discrimination (in ¶ 5) reflects long-standing principles also embodied in the First Amendment. The principle of equal access protects against use of community newsletters, as well as meeting halls, closed-circuit TV, web sites, bulletin boards and other common property solely or disproportionately to benefit incumbent directors or their favorites.<sup>115</sup> In addition to affirmative rights of self-expression, autonomy involves freedom not be forced to join organizations distinct from the association (see ¶6) and freedom to choose what charitable and political purposes to support (see ¶7).

Finally, the model statute (in ¶ 8) specifies overarching limits on terms of governing documents, following the Restatement § 3.1 that distills generations of court decisions and modern legislation.<sup>116</sup> Some statutes protect homeowners nationwide.<sup>117</sup> Other statutes may have been adopted by only one or a few states.<sup>118</sup> These limitations may evolve as society gains greater experience with common-interest community life.

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<sup>115</sup> *Guttenberg Taxpayers and Rentpayers Ass'n*, 297 N.J.Super. at 411 (opposition voices have a right to be heard “in essentially the same manner” as association directors and management). Equal access requires clear published standards to set forth when access may be denied. *Committee for a Better Twin Rivers*, *supra* n.7, 890 A.2d at 951-52 & 970. See also Section 108 (¶ 4), on specific protections for equal access during elections.

<sup>116</sup> Restatement at 347-410.

<sup>117</sup> E.g., 42 U.S.C. 3601 *et seq.* (Fair Housing); 15 U.S.C. 802 *et seq.* (Fair Debt Collection Practices Act).

<sup>118</sup> E.g., Restatement at 409-10 (multiple states invalidate covenants that impose restraints on solar energy); *id.* at 408-09 (a few states regulate roofing materials); Ariz. Rev. Stat. 33-1809 (protects right to park cars needed for work).



*VII. Homeowners shall have reasonable access to records and meetings, as well as specified abilities to call special meetings, to obtain oversight of elections and other votes, and to recall directors.*

## **Section 107: The Right to Oversight of Associations and Directors**

1. *Open Records.* All association meeting minutes, financial and budget materials, contracts, court filings, and other records must be maintained for at least four years at the association's main business office or other suitable location near homes in the association.<sup>119</sup>
  - a. Except as provided in ¶ 1b, the association must make all records available for homeowners, their authorized agents, or the ombudsperson to inspect and copy
    - i. during regular working hours, within ten days of a written request without requiring a statement of purpose or reason; and
    - ii. during an inspection, allowing copying of up to 25 pages at no cost, if the association or its agent has a photocopy machine at the site of the records; and in any event
    - iii. with a charge to the homeowner only for actual copying costs, not to exceed \_\_\_ cents per page plus staff time charges not to exceed \$ \_\_\_ per hour.<sup>120</sup>
  - b. Documents protected by the attorney-client privilege or as work product are exempt from disclosure to the same extent as they would be in litigation, as are contracts being negotiated. The following records also are exempt from disclosure to homeowners or their agents, except upon court order for good cause shown, provided that the ombudsperson may obtain the following records, and provided further that such records shall be kept confidential except upon court order for good cause shown:
    - i. staff personnel records, except the association shall make available under ¶ 1a records of time worked and salary and benefits paid; and
    - ii. records of homeowners other than the requester, except the association shall make available under ¶ 1a the list of homeowners with their mailing addresses and a compilation of violations of the governing documents, other than for nonpayment of an assessment, and this compilation must
      - a) describe the violation alleged and the sanction sought or imposed; and
      - b) not identify the person against whom the sanction was sought unless the matter was considered in an open meeting or court.

<sup>119</sup> This does not override obligations under other laws, to keep documents on site or in storage.

<sup>120</sup> Such charges should take into account market rates for staff, and the principle that neither associations nor managers should profit by such requests. Charges by state or local government may set a good model.

- c. If an association refuses to allow a homeowner, homeowner's agent, or the ombudsperson to review records as provided herein, the requester is entitled to an immediate injunction, a penalty of \$500, or in the court's discretion, more, and attorney fees, even if the association makes records available after filing of a case.
  - d. Any director may inspect any association records, except attorney-client privileged or work product records concerning potential, ongoing, or past litigation against the director. In addition to their rights under ¶ 1a, directors may make copies of minutes of any meeting during their term of office, and of any other document for purposes reasonably related to their duties as directors.
  - e. Pending litigation does not reduce the rights provided in this paragraph.
2. *Quarterly Review.* Every 90 days (or more frequently if required by governing documents), the directors shall review at one of the association meetings
- a. the latest statements from financial institutions that hold association accounts;
  - b. current reconciliations of the association's operating and reserve accounts;
  - c. year-to-date income and expense statement for association operating accounts, compared with the budget;
  - d. year-to-date revenues and expenses for the reserve account, compared with the budget; and
  - e. the status of any lawsuit, arbitration, or mediation involving the association.
3. *Open Meetings.* Except for executive sessions, homeowners may attend, record, and (subject to reasonable limits) speak at any meeting of the association or its directors.
- a. Directors may meet in executive session only to
    - i. approve, modify, terminate or take other action regarding a contract between the association and an attorney;
    - ii. consult with counsel on litigation or otherwise to obtain legal advice, if the discussion would be protected by attorney-client privilege;
    - iii. discuss the character, alleged misconduct, professional competence, or physical or mental health of an association manager or employee;
    - iv. discuss a homeowner's failure to pay an assessment or other alleged violation of governing documents, except as provided in ¶ 3b; or
    - v. discuss ongoing contract negotiations.
  - b. Directors shall use executive session to discuss alleged violations of governing documents unless the person who may be sanctioned requests an open meeting in writing. The person who may be sanctioned may attend and

testify at any hearing concerning the alleged violation, but has no right to attend director deliberations.

- c. Meeting minutes shall note generally any matter discussed in executive session.
4. *Open Voting.* All votes by directors shall be recorded in the minutes available to all homeowners, except to the extent permitted by ¶ 3. Directors may not vote by proxy or by secret ballot, except a secret ballot to elect officers. This rule also applies to any committee or agent of the association that makes final decisions to spend association funds, or approve or disapprove architectural decisions.
5. *Special Meetings.* In addition to any provisions for special meetings in the governing documents, the following provisions apply:
  - a. The directors shall provide 30 days notice and convene a special meeting of the association to be held no less than 30 days and no more than 60 days after the chair, the secretary, or the association's registered agent receives a petition stating one or more purposes for such meeting and signed by homeowners holding 10 percent of the voting power, unless other law or the corporate documents state a different percentage. The petition may specify a person to chair the special meeting. Each purpose and, if specified in the petition, the chair of such special meeting shall be stated in its notice.
  - b. If the directors fail to provide notice and convene the meeting as provided in ¶ 5a, then upon written petition to the ombudsperson (with copy to the association), the ombudsperson shall notice and convene the requested meeting subject to the other provisions of ¶ 5a. The association shall pay costs reasonably incurred by the ombudsperson. Such action shall not disqualify the ombudsperson from exercising any other power.
6. *Election and Ballot Oversight.* If at least 100 homeowners or homeowners holding 15 percent of the voting power in an election or other ballot provide a written request to the ombudsperson (with copy to the association) at least 15 days in advance, the ombudsperson shall supervise the election or ballot, and if so, shall retain copies of the election or ballot records (including all proxies submitted, whether or not counted). The ombudsperson also has discretion to supervise the election or ballot if one or more homeowners provide a written request at least 15 days in advance. The association shall pay costs reasonably incurred by the ombudsperson. Such action shall not disqualify the ombudsperson from exercising any other power.
7. *Recalls.* Except for directors appointed by the developer and directors elected by cumulative voting,<sup>121</sup> directors shall be subject to recall (without use of proxy votes) as follows:

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<sup>121</sup> Cumulative voting systems ensure significant groups of homeowners elect a director, even if the groups do not come close to majority power. "In cumulative voting, voters cast as many votes as there are seats. But unlike

- a. Any director may be recalled without cause by persons holding a majority of the total voting power, provided a homeowner's voting power for purposes of recall equals that to elect directors, and when only specific homeowners have power to elect a director, only those homeowners have voting power for recall.
- b. One or more directors may be recalled by written agreement or ballots without an annual or special meeting.
  - i. The written agreement or ballots, or a copy thereof, shall be served on the association by certified mail or by personal service under process permitted by state law.
  - ii. Within five business days after receipt of the agreement or ballots, the directors shall meet--without excluding directors proposed for recall --and, as the only business, as to each director proposed for recall shall either (A) certify the recall, in which case recall takes effect immediately and the recalled director shall within five business days turn over to the association all association records and property possessed by the director, or (B) proceed as described in ¶ 7d.
  - iii. If a court or the ombudsperson finds a recall effort defective, written recall agreements or ballots used in that recall effort and not found defective may be reused in only the next recall effort, if any. However, no written recall agreement or ballot shall be valid more than 120 days after being signed by a homeowner.
  - iv. A homeowner may revoke a vote by recall agreement or ballot, but only in writing delivered to the association before service of the recall agreement or ballot.
- c. If corporate documents specifically provide, homeowners may recall a director or directors by a vote taken at an annual or special meeting of homeowners.
  - i. A special meeting of homeowners to recall a director or directors may be called by homeowners with 15 percent of voting power (as defined in ¶ 7a) by giving notice as required for a special meeting, except that electronic transmission may not be used, and the notice shall state the purpose of the meeting.
  - ii. Within five business days after the special meeting, the directors shall meet--without excluding all directors proposed for recall--and, as their only business, as to each director proposed for recall shall either (A) certify the vote to recall, in which case recall takes effect immediately

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winner-take-all systems, voters are not limited to giving only one vote to a candidate. Instead, they can put multiple votes on one or more candidates. For instance, in an election for a five-seat body, voters could choose to give one vote each to five candidates, two votes to one candidate and three to another, or all five votes to a single candidate. If members of minority group work together and get behind a single candidate, "plumping" all of their votes on him or her, they can hope to get someone elected, even if they only make up a small share of the population." See [www.fairvote.org/?page=563](http://www.fairvote.org/?page=563).

and the recalled director shall within five business days turn over to the association all association records and property possessed by the director, or (B) proceed as described in ¶ 7d.

- d. Separately with respect to each director proposed for recall, if the directors do not certify the recall, the directors shall, within five business days after their meeting, petition the ombudsperson for arbitration, following procedures adopted by the ombudsperson. For purposes of this arbitration, homeowners who voted for recall shall be considered one party under the petition. If the ombudsperson certifies the recall of a director, the recall will be effective upon mailing the final order of arbitration to the association, and each director so recalled shall deliver to the association all records of the association possessed by the director within five business days after notice of the recall. Such decision shall be subject to review in court with jurisdiction in the county where the association maintains its principal office, but such pending action shall not delay implementation of the ombudsperson's decision.
- e. Vacancies created by recall shall be filled by homeowner vote held within 30 days after the recall is certified by the directors or by the ombudsperson, except that a director whose term expires within 30 days need not be replaced, provided
  - i. for recall pursuant to ¶ 7b, no separate vote shall be held if the written agreement or ballot specifies one replacement director for each director recalled, and homeowners holding a majority of the voting power vote for the named replacements; and
  - ii. for recall pursuant to ¶ 7c, the homeowner vote for replacement may take place at the same meeting held for the recall.
- f. If the directors fail to meet within five business days after service of a written recall agreement or ballot pursuant to ¶ 7b, or within five business days after adjournment of a recall meeting pursuant to ¶ 7c, the recall shall be deemed effective and the directors so recalled shall immediately turn over to the association all records and property of the association. Any homeowner may petition the ombudsperson for certification that directors have been recalled pursuant to this ¶ 7f.
- g. If a director who is removed fails to relinquish office or turn over records and property as required under this ¶ 7, a court in the county where the association maintains its principal office may, upon the petition by the ombudsperson, the association, or homeowners, summarily order the director to relinquish office and turn over all association records and documents to the association.
- h. Minutes of the meeting where directors decide whether to certify the recall are an association record. The minutes must record the date and time, each decision, and the vote count separately taken as to each director proposed for recall. In addition, when the directors decide not to certify a recall, as to each rejected

recall, the minutes must identify any rejected vote and the specific reason for each such rejection.

i. When recall of more than one director is sought, the written agreement, ballot, or vote at a meeting shall provide for a separate vote for each director sought to be recalled.

j. Nothing in this ¶ 7 prevents a recalled director from retaining documents lawfully obtained under ¶ 1.

### *Discussion*

Wide consensus supports homeowner rights to open records.<sup>122</sup> CAI recognizes “a quality community association should ... [keep the] association’s legal documents, resolutions, books and records ... in a location that is open to inspection by owners on reasonable notice during regular business hours.”<sup>123</sup> State laws typically favor disclosure, with some variations.<sup>124</sup> The model statute in ¶ 1 likewise favors disclosure absent strong reason for confidentiality.

Existing laws notwithstanding, homeowners frequently experience difficulty in obtaining records when disputes arise with their association. For example, associations sometimes impose prohibitively expensive hourly charges. The model statute limits what associations can charge, and provides for penalties and attorney fees if associations improperly withhold records.<sup>125</sup> The limitation to actual costs in ¶ 1a(iii) means that associations cannot impose charges for copies made by digital cameras, portable scanners, or other equipment homeowners themselves provide.

In addition to independent review by homeowners, state law typically authorizes directors to review documents.<sup>126</sup> Homeowners may contact directors to exercise this right, and directors retain their rights as homeowners.

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<sup>122</sup> E.g., Restatement § 6.13(1)(d) (homeowners deserve “reasonable access to information about the association, the common property, and the financial affairs of the association”); UCIOA § 3-118 (“[a]ll financial and other records must be made reasonably available for examination by any unit owner and his authorized agents”); see also, e.g., Fla. Stat. Ann. 720.303(4) (records to be retained for up to seven years).

<sup>123</sup> Foundation for Community Association Research, Governance, Resident Involvement and Conflict Resolution (Best Practices Report #2), [www.cairf.org/research/BPgovernance.pdf](http://www.cairf.org/research/BPgovernance.pdf), last visited 11/6/05 (“CAI Best Governance Practices”) at 3; see also CAI “Public Policies,” *supra* n.59 at 3 & 13 (eff. 4/25/98) (“CAI also supports full and open disclosure to owners”).

<sup>124</sup> E.g., Cal. Civ. Code 1365.2 & 1363(f); Nev. Rev. Stat. 116.31175, .31177 & .3118; Tex. Prop. Code 82.114 (b & c); Tex. Non-Profit Corporation Act, Art.1396-2.23; Fla. Stat. Ann. 720.303(4 & 5); Ariz. Rev. Stat. 33-1258 & 33-1805. See also *Grillo v. Montebello Condo. Unit Ass’n*, 243 Va. 475, 416 S.E.2d 444 (1992) (right to inspect includes right to see employee compensation); *Winter v. Playa del Sol, Inc.*, 353 So.2d 598 (Fla. DCA 1977) (owner may copy condo records although statute only provides for inspection); *White Egret Condominium v. Franklin*, 379 So.2d 346 (Fla. 1979) (need for records of other homeowners to show selective enforcement).

<sup>125</sup> See also Cal. Civ. Code 1365.2(e) & 1363(f); Nev. Rev. Stat. 116.31175, .31177 & .3118 (no charge greater than 25 cents per copy and \$10 per hour to review); Tex. Prop. Code 82.114 (b & c); Tex. Non-Profit Corporation Act, Art.1396-2.23; Fla. Stat. Ann. 720.303(4-5) (\$50 per day penalty, 50 cents per page, or actual cost).

<sup>126</sup> E.g., Cal. Corp. Code 8334; cf. Tex. Bus. Corp Act 2.44B; *Committee for a Better Twin Rivers*, *supra* n.7, 890 A.2d at 951-52 & 970 (rejecting vague, arbitrarily applied resolution governing director-disclosure of information).

Fiscal disputes often arise within common-interest communities, and states often require specific financial records.<sup>127</sup> The model statute in ¶ 2 aims to reduce incidence of such disputes, and misconduct, by requiring disclosures, following Nevada’s example.<sup>128</sup> This provision is not intended to address the full range of required financial reports, the extent of which depends on association activities, both operating and capital programs.

Wide consensus also supports homeowner rights to open meetings, including rights to address the directors.<sup>129</sup> State laws favor access, with variations.<sup>130</sup> The model statute in ¶ 3 favors open meetings absent strong reasons for confidentiality.

Accountability requires that directors and other decision-makers vote on the record. The model statute in ¶ 4 follows Florida law with respect to limits on proxy votes and secret ballots, and on the extension of such rules to committees and agents.<sup>131</sup>

The model statute in ¶ 5 ensures homeowner rights to convene special meetings. A separate specific provision permits 5 percent of homeowners to call special meetings on operating rules. See Section 105, The Right to Stability in Rules and Charges (¶ 3e). For other purposes, special meetings should be available when a reasonable percentage of homeowners recognize the need for immediate action.<sup>132</sup> The open records provision in ¶ 1 specifically includes the right to obtain homeowner lists, which may help locate homeowners who support a special meeting.<sup>133</sup>

The model statute in ¶ 6 provides for election oversight by the ombudsperson, because of the importance of fair elections to select directors.<sup>134</sup>

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<sup>127</sup> E.g., Fla. Stat. Ann. 720.303 (6 & 7) (including budgets and financial records) & 720.3086 (financial report); Ariz. Rev. Stat. 33-1243D & J & 33-1810 (budget and annual audit); Cal. Civ. Code 1365, 1365.5 & 1368 (annual budgets/year end reports/financial statements).

<sup>128</sup> Nev. Rev. Stat. 116.31083(6); see also *id.*, 116.31151 & UCIOA § 3-103(c) (budgets approved by homeowners).

<sup>129</sup> E.g., Restatement § 6.18; “CAI Best Governance Practices,” *supra* n.131, at 3 (homeowner rights to “attend board meetings, except when the board meets in executive session”).

<sup>130</sup> Nev. Rev. Stat. 116.31083(3 & 10) & 116.31083 (4 & 11) (right to attend and speak outside executive session, and right to tape-record meetings) & 116.31085 (executive session limited to privileged matters in litigation, certain nonsalary matters relating to employees and agents, violations of governing documents--unless the owner requests a public hearing); Cal. Civ. Code 1363.05 (b, d, g & i) (executive session limited to “consider litigation, matters relating to the formation of contracts with third parties, member discipline, [or] personnel matters,” and to protect homeowner privacy re certain violations, with homeowners’ rights to speak); Fla. Stat. Ann. 720.303(2) (a & b) (open meetings, with homeowner rights to speak, except for attorney-client privilege and personnel matters), 720.306(10) (right to tape meetings) & 718.112; Ariz. Rev. Stat. 33-1248A & 33-1804A (right to speak; executive session limited to legal advice/litigation and personal, health, and financial information about homeowner or employee, including job evaluations/pay); Va. Code Act 55-510.1 (open meetings with broad right to record). Compare Tex. Gov. Code 551.0015 & 552.036 (government open meetings and open record rules apply only to three categories of large associations).

<sup>131</sup> Fla. Stat. Ann. 720.303(2)(c)(3).

<sup>132</sup> Compare Cal. Corp. Code 7510(e) (5 percent can call special meeting); Nev. Rev. Stat. 116.3108(2) (10 percent can call special meeting, fewer if provided in bylaws); Fla. Stat. Ann. 720.306(3) (10 percent) *with* Ariz. Rev. Stat. 3-1248B & 33-1804B (25 percent) *and* UCIOA § 3-108 (20 percent, fewer, if provided in the declaration, can call special meetings). Cf. Fla. Stat. Ann. 720.303(2)(d) (20 percent can force consideration at a board meeting).

<sup>133</sup> Cf., *IBS Financial Corp. v. Seidman & Assoc., L.L.C.*, 954 F.Supp. 980 (D.N.J. 1997), *aff’d in part and rev’d in part*, 136 F.3d 940 (3rd Cir. 1998) (proper purpose to seek shareholder lists by group entitled to make nominations).

<sup>134</sup> See Fla. Stat. Ann. 718.5012(9).

The model statute in ¶ 7 provides for recall of directors, based on Florida law, but does not follow that statute's mandatory binding arbitration of election disputes.<sup>135</sup> The ombudsperson can take a position on recall, so the model statute relies on the courts for impartial review.

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<sup>135</sup> Fla. Stat. Ann. 720.303(10); *compare* Nev. Rev. Stat. 116.31036 (requires a majority vote that includes at least 35 percent of all homeowners); UCIOA § 3-103(g) (two-thirds of quorum); Ariz. Rev. Stat. 33-1813A & 33-1243H (majority vote at special meeting); Cal. Corp. Code 7222 (depends on size of corporation).



*VIII. Homeowners shall have well-defined voting rights, including secret ballots, and no director shall have a conflict of interest.*

### **Section 108: The Right to Vote and Run for Office**

1. *Voting Rights.* No association may deny a homeowner's right to vote on any issue that affects an assessment or other provision of governing documents that apply to the membership class of the homeowner.
  - a. For a home with multiple owners, unless expressly provided by the declaration: if only one owner seeks to vote, that owner votes for the home; but if more than one owner seeks to vote, votes must be allocated by agreement of a majority of the home's owners or, absent agreement, co-owners shall split votes in proportion to their ownership interest. Agreement exists if any homeowner votes without another homeowner protesting either before the vote in writing or, at the vote, promptly to the person presiding over the vote.
  - b. No vote may be cast except by the homeowner or, where permitted by law and the governing documents, by a person holding a proxy, provided the following applies
    - i. The proxy must be dated and designate a meeting for which it applies.
    - ii. The proxy may not be revocable without notice, and may be revoked only by actual notice to the person presiding over the meeting.
    - iii. The proxy must designate each specific agenda item to which it applies, except a homeowner may execute a proxy without designating any item if used solely to determine whether a quorum exists. For each specific agenda item designated, the proxy must specify a vote for or against the proposition or, in an election or recall, state a specific position regarding who to vote for or whether to vote for or against recall. If a proxy does not state proper instructions to vote on an item, the proxy must be treated as if the homeowner were present but not voting on that item.
    - iv. When a holder casts proxy votes, the holder must disclose the number of proxies held, and the proxies must be kept as part of the public record of the meeting for the period provided by law.
    - v. Association governing documents may provide for homeowner proxy voting by absentee ballot, with the ballot as specific as any other proxy, and with the association's secretary to announce the number of such ballots received for each vote at the meeting, and the ballots kept as part of the public record of the meeting.

- c. Votes allocated to homes owned by the association may not be cast, by proxy or otherwise, for any purpose.
2. *Candidacy.* No homeowner may be denied the right to run for office.
    - a. Unless a person is appointed by the developer: the person may not serve as director (or officer) if the person or any relative (defined under state law) serves as manager for the association or, if a master association, manager of any association that is subject to the governing documents of the master association.
    - b. Each candidate named on a ballot for director must make a good faith effort to disclose in writing, by actual notice to all homeowners or as otherwise provided in the corporate documents, any financial, business, professional or personal relationship or interest that would appear to a reasonable person to result in a potential conflict of interest if the candidate were elected director.
  3. *Voting Procedure.* Unless state law sets different requirements, and if not otherwise specified by corporate documents, a quorum exists if homeowners with 25 percent of voting power attend, or where permitted, are present by proxy at a meeting; provided, where only a specified class may vote on a particular issue, a quorum to vote on that matter requires 25 percent of voting power of that class. At any meeting, election of directors, recalls, and homeowner votes on assessments, amendment to governing documents, operating rules, or other matters shall be conducted by secret ballot (except as provided with respect to proxies in ¶ 1b), with all ballots kept as part of the records of the election for the period provided by law.
  4. *Access to Forums.* If any candidate for an election, or homeowner advocating a point of view for purposes reasonably related to a homeowner vote, is permitted to use a forum that is paid for by the community (such as a newsletter, bulletin board, or meeting area) to promote his or her candidacy for a board election, then other candidates and homeowners shall also be permitted equal access to the same forum under the same conditions.

### *Discussion*

As recognized by the Supreme Court, “the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights, [so] any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized.”<sup>136</sup> Absent truly exceptional circumstances, single-family subdivisions should follow the principle of one-home, one-vote.

This model statute supports secure rights to vote for all homeowners, whose actions may reflect legitimate and unresolved disagreements with their associations, personal hardship, or trivial violations.<sup>137</sup> Local governments do not deny the right to vote based on tax delinquency or noncompliance with zoning and, like local governments, associations have other effective ways

<sup>136</sup> *Reynolds v. Sims*, 377 U.S. 533, 562 (1964).

<sup>137</sup> See also *Duffy v. Sunburst Farms East Mut. Water & Ag. Co., Inc.*, 124 Ariz. 413, 604 P.2d 1124 (1979); *Adams v. Meyers*, 250 Ill.App.3d 477, 620 N.E.2d 1298 (1993).

to ensure compliance with their rules. Moreover, the power to deny votes carries too great a potential for abuse.

The model statute does permit denial of a right to vote on issues that have no effect on assessments or other provisions of governing documents that apply to the membership class of a homeowner. This enables associations to set classes of membership with different voting rights. For example, an association can provide a class of membership that belongs to a recreational club and a class of membership that does not belong to the club, and the levels of assessments could differ. The association could specify that only homeowners belonging to the club would have the right to vote on assessments or other provisions of governing documents that apply only to that class of members.

The rules for allocating votes (§ 1a),<sup>138</sup> proxies (§ 1b),<sup>139</sup> prohibition on voting by associations (§ 1c)<sup>140</sup>, and conflicts (§ 2)<sup>141</sup> derive from Nevada law. All rules regarding voting, and the period for voting, should be specified in writing before the election.<sup>142</sup>

Likewise associations should specify nomination procedures for candidates in writing before the election.<sup>143</sup> Protection of the right to run for office (§ 2) follows California and Florida law.<sup>144</sup>

The model statute contains a provision for proxies (including absentee ballots). The specificity guards against misuse of the process, at the same time ensuring that all homeowners (including any who may be ill or homebound) are provided an equal opportunity to participate in the election process or for any other vote.<sup>145</sup>

Quorum laws differ from state to state, and might differ based on the nature of the association or its size. The model statute contemplates a default rule.<sup>146</sup> Nevada provides for secret ballots to elect and recall directors, and the model statute applies this to each important vote.<sup>147</sup>

The model statute (§ 4) follows California's approach to ensure equal access to community forums, such as newsletters, an important part of "leveling the playing field" in board elections and other homeowner votes.<sup>148</sup> This is in addition to the requirements of fair access to community resources as stated in Section 106, The Right to Individual Autonomy (§§ 4-5).

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<sup>138</sup> Nev. Rev. Stat. 116.311(1); see also Cal. Corp. Code 7612 & 7517(b) (either of joint owners can vote); UCIOA § 3-110(a) (same).

<sup>139</sup> Nev. Rev. Stat. 116.311 (2 & 3); see also Ariz. Rev. Stat. 33-1250 (for condos); Cal. Corp. Code 7612 & 7613; Tex. Prop. Code 82.110; Fla. Stat. Ann. 720.306(8); cf. UCIOA § 3-110.

<sup>140</sup> Nev. Rev. Stat. 116.311(9).

<sup>141</sup> Nev. Rev. Stat. 116.31034(5 & 6); see also Ariz. Rev. Stat. 33-1250A.

<sup>142</sup> See Cal. Civ. Code 1363.03(a)(4).

<sup>143</sup> See Cal. Civ. Code 1363.03(a)(3).

<sup>144</sup> *Id.*; Fla. Stat. Ann. 720.306(9).

<sup>145</sup> Compare Ariz. Rev. Stat. 33-1812A & 33-1250(C) (allows absentee ballots but not proxies).

<sup>146</sup> See, e.g., UCIOA § 3-109 (20 percent for member meetings); Cal. Corp. Code 5512(a) (one-third of voting power).

<sup>147</sup> Nev. Rev. Stat. 116.31034(8) & 116.31036(2); see also Cal. Civ. Code 1363.03(b & d) (requiring secret ballot).

<sup>148</sup> See Cal. Civ. Code 1363.03(a)(1). If the association provides any candidate with financial support to run for an association office, all candidates must at the same time receive equal support.

*IX. Associations, their directors, and other agents shall act reasonably in exercising their power over homeowners.*

### **Section 109: The Right to Reasonable Associations and Directors**

1. *Duties of Associations.* In addition to compliance with law and governing documents, an association (whether acting through directors, officers, managers, or other agents, by homeowner vote, or otherwise) has the following duties to its homeowners:
  - a. To use ordinary care and prudence in managing property and financial affairs;
  - b. To treat homeowners fairly; and
  - c. To act reasonably in the exercise of discretionary powers, including rule-making, enforcement, and design-control powers.
  
2. *Duties of Directors, Officers, Managers, and Other Agents.* In addition to compliance with law and governing documents, association directors, officers, managers, and other agents must act in good faith, deal fairly with the association and its homeowners, and use ordinary care and prudence in performing their functions.
  - a. A director, officer, attorney, manager or other agent of an association shall not solicit or accept any form of compensation, gratuity or other remuneration that
    - i. would improperly influence or would appear to a reasonable person to improperly influence the decisions made by such agent; or
    - ii. would result or would appear to a reasonable person to result in a conflict of interest for such agent.
  
  - b. Unless appointed by the developer, a director or an officer of an association shall not
    - i. enter into or renew a contract with the association to provide goods or services to the association; or
    - ii. otherwise accept any commission, personal profit, or compensation of any kind from the association for providing goods or services to the association.
  
3. *Protection Regarding Attorneys.* In contracting for a lawyer to seek foreclosure or take other enforcement action, no association may make legal fees in whole or part contingent on the amount paid (for fees or otherwise) by a homeowner. Any homeowner payment to the lawyer shall be held for the association. No contract may authorize anyone to prevent a homeowner from seeking to resolve any dispute directly with directors or other agents of an association.
  
4. *Protection Regarding Managers.* All association managers must be licensed and bonded where required by law. In contracting with managers, associations may pay a flat fee, hourly rates, or a combination of flat fees and hourly rates. Managers may not be paid any fee, bonus, incentive, or other amount based on the number or value of violations they allege or address. Managers may not impose charges on homeowners, except where

reasonable and expressly authorized by governing documents. All homeowner payments to the manager shall be held for the association.

5. *Determination of Architectural Requests.* A homeowner's request that the association or related architectural body approve the homeowner's planned construction, landscaping, maintenance, or repairs shall be deemed approved unless, within 30 days or such other period as the declaration may specify, the association or architectural body provides written notice specifically detailing a lawful basis for disapproval in whole or part. Such notice shall specify that homeowners have the right to reconsideration by the directors, unless the directors collectively made the original decision. Each year the association in writing shall remind homeowners that rules govern approval of construction, landscaping, maintenance, or repairs.

6. *Fines and Other Charges*

- a. Where otherwise authorized by statute, associations may seek a court order to impose fines for a homeowner's willful noncompliance with duties under corporate documents, but may not otherwise impose fines.
- b. Where authorized by corporate documents, associations may recover reasonable compensation for damages or costs (such as late fees) when a homeowner's rulebreaking actually harms the association; provided that the association cannot place a lien for such charges without a court judgment.
- c. Nothing here prevents an association from withdrawing homeowner privileges to use recreational and social facilities where otherwise authorized, including withdrawal for nonpayment of fines or other charges authorized in this ¶ 6.

7. *Retaliation Specifically Forbidden.* No association, director, officer, manager, or other agent of an association may take, or direct, or encourage another person to attempt retaliatory action against a homeowner because the homeowner has

- a. complained about alleged violations of law or governing documents;
- b. requested to review books, records, or other papers of the association; or
- c. taken any other lawful action asserting homeowner rights or otherwise seeking to improve association operations.

The retaliatory forbidden action includes, without limitation, ill-motivated litigation (e.g., Strategic Lawsuits Against Public Participation, or SLAPP suits) as well as deprivation of other rights protected by law or governing documents.

8. *Remedies.* In addition to other remedies authorized by this model statute or other law, homeowners are entitled to recover compensatory and, for intentional violations, punitive damages from associations, and their directors, officers, managers, or other agents who act unlawfully. In addition, upon proof of intentional violations by directors, officers, managers, or other agents of the association, homeowners are entitled to appropriate relief in equity including (without limitation) removal of offenders from positions with the association, a bar against their return to office for a specified time, and an order requiring the offender to repay the association for expenses including legal fees. The attorney general (and if otherwise authorized, local government officials) may obtain the

same relief as any homeowner, as well as other appropriate equitable relief including a bar against the offender's serving in any capacity for an association.

### *Discussion*

For situations not covered by more specific statutes, the model statute follows the Restatement §§ 6.13 and 6.14, requiring ordinary care and prudence, fair dealing, good faith, and reasonability. Such protections (in ¶¶ 1 and 2) apply to associations and to directors, officers, managers, and other agents, reinforcing the foundation for homeowners.<sup>149</sup>

“Where the association exceeds its scope of authority, any rule or decision resulting from such an *ultra vires* act is invalid whether or not it is a ‘reasonable’ response to a particular circumstance.”<sup>150</sup> Moreover, when they act within the scope of their authority, associations and directors still must comply with laws including the federal Fair Housing Act,<sup>151</sup> and duties under the Fair Debt Collection Practices Act, the latter applicable to lawyers and others who collect debts for the association.<sup>152</sup> Nothing in the model statute reduces these or other existing protections for homeowners.

Like the Restatement, the model statute rejects use of the “business judgment rule,” which has been cited by some courts to deny review of actions by associations or individuals.<sup>153</sup> By contrast, the older UCIOA favored the business judgment rule.<sup>154</sup> However, as UCIOA also recognized, the business judgment rule was developed for traditional corporate situations. In those situations, owners can sell stock or easily resign their membership, whereas homeowners can avoid associations only by selling and moving, and so deserve greater protection.

Homeowners face significant practical limits on their ability to sell and move.<sup>155</sup> As the Restatement recognizes, the home typically constitutes a large--often the largest-- investment by a homeowner, and “has personal and social significance far beyond the monetary value.”<sup>156</sup>

In this context, the business judgment rule prevents effective judicial oversight by deferring too much to associations and their agents.<sup>157</sup> “[T]he fit between community associations and other types of corporations is not very close, and [the business judgment rule] provides too little protection against careless or risky management.”<sup>158</sup>

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<sup>149</sup> See also Restatement § 6.13 comment a, at 235 (homeowners “need and are entitled to protection against actions taken in breach of duty by either the [directors] or the membership acting collectively that cause them injury”).

<sup>150</sup> *Major v. Miraverde Homeowners Ass’n, Inc.*, 7 Cal. App. 4th 618, 628, 9 Cal. Rptr. 2d 237, 243 (1992).

<sup>151</sup> 42 U.S.C. 3601 *et seq.* Violations of this statute, some egregious, inexplicably persist. See, e.g., R. Jerome, et al., “Loathe Thy Neighbor,” *supra* n.13, at 125–36 (association’s unlawful policy banned wheelchair-using child from the front door); Consent Decree in *Trujillo v. Board of Triumvera Tower*, C.A. No. 04-1933 (N.D. Ill. 9/9/04).

<sup>152</sup> 15 U.S.C. 802 *et seq.* See, e.g., *Fuller v. Becker & Poliakoff*, 192 F.Supp.2d 1361 (M.D.Fla. 2002) (assessments are consumer debt, attorneys are debt collectors); *Caron v. Maxwell*, 48 F. Supp 2d 932 (D. Az. 1999).

<sup>153</sup> Restatement at 236-37.

<sup>154</sup> *Id.*; see § 3-103(a) & comment 6.

<sup>155</sup> Restatement at 237–38.

<sup>156</sup> *Id.* at 237.

<sup>157</sup> *Id.*

<sup>158</sup> *Id.* at 236–37.

The specific conflict of interest provisions (§ 2 a and b) follow Nevada’s example.<sup>159</sup> Some directors, having been properly elected, may face a vote with respect to which they have a conflict of interest or the appearance of a potential conflict of interest. In some such cases, a director might be required to recuse from the decision, while in others it might be sufficient to disclose relevant personal information. The model statute does not attempt to anticipate all scenarios, but disagrees with statutes that always allow voting after disclosure of actual conflicts.<sup>160</sup>

The model statute (in § 3) specifically prohibits associations from hiring lawyers to sue homeowners on a contingent fee basis. Experience confirms that such contingent fee retainers lead to premature and excessive litigation because the lawyers typically face no risk and homeowners face unwarranted pressures to give in and pay fees, however, unwarranted the claim, as discussed in Section 103, The Right to Fairness in Litigation.

The model statute (in § 4) also prohibits the equivalent of contingent fee billing by managers. To compensate managers for charging homeowners imperils efforts to cooperate in resolving disputes. Services can be billed to homeowners, such as for copying, or for supervision during document review, if such charges are reasonable. See Section 107, The Right to Oversight of Associations and Directors (§ 1).

The model statute (in § 4) requires managers to be licensed (and sometimes bonded) because of their significant responsibilities over homeowners and their money. Agencies in other contexts commonly test licensees that have far less responsibility. Moreover, individual associations have little ability to evaluate potential managers. The prospect of losing a mandatory license should serve as a disincentive to misconduct by managers. CAI likewise favors licensing.<sup>161</sup>

Requests to add to or renovate a home invariably reflects strong desires of homeowners, whether concerning “additions or renovations, landscaping, choice of exterior paint colors, coverings, or roofing materials, changes to windows and balconies, and other such changes to the structure or appearance of the property.”<sup>162</sup> As provided in Section 104, The Right to Be Told of All Rules and Charges, (§ 3b), the model statute allows architectural regulation in the declaration.

The model statute (in § 5) focuses on securing prompt decisions for homeowners, with specification of the basis for any rejection or limitation on use of their home.<sup>163</sup> Moreover, homeowners denied a requested change obtain the right to seek review by the directors, without waiving other rights.<sup>164</sup> “These requirements would improve the fairness of the process, without imposing significant costs on the association.”<sup>165</sup> This does not change any standards if lawfully adopted by the association.

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<sup>159</sup> Nev. Rev. Stat. 116.31185 & 31187.

<sup>160</sup> E.g., Ariz. Rev. Stat. 33-1811.

<sup>161</sup> CAI “Public Policies,” *supra* n.59 at 3 & 16–20 (eff. 10/19/01). See also Nev. SB 325 §§ 23-29 (on licensing managers and reserve study specialists).

<sup>162</sup> *Common Interest Development Law: Architectural Review and Decisionmaking*, 34 Cal. L. Revision Comm’n Reports 107, 114 (2/6/04).

<sup>163</sup> See *id.* at 113; Cal. Civ. Code 1378 (a) (1 & 4).

<sup>164</sup> *Id.* at 114; Cal. Civ. Code 1378(a)(5).

<sup>165</sup> *Id.* at 111-12.

The association must provide notice of these rights at least annually, such as when sending bills for assessments.<sup>166</sup> This assumes no alternative, always-accessible posting of such rights. If an association provides this information in an always-accessible place, such as a posting in a common room or on a web site, then a reminder every two years may be sufficient. Reminding homeowners of architectural review rules avoids hardship that can result if homeowners inadvertently proceed without first seeking approval.

Where otherwise authorized by law, the model statute (§ 6a) permits associations to seek fines as a judicial sanction for willful noncompliance with homeowner duties under corporate documents or applicable statute.<sup>167</sup> In addition, the model statute (§ 6b) permits associations to recover reasonable compensation for damages or costs (such as late fees) when a homeowner's rule-breaking actually harms the association, provided that the association cannot place a lien for such charges without a court judgment.<sup>168</sup>

Following the Restatement § 6.8, the model statute allows enforcement by reasonable withdrawal of privileges, but only for "common recreational and social facilities."<sup>169</sup> Section 108, The Right to Vote and Run for Office, specifically forbids denial of voting rights based on alleged violations.

The model statute adds a specific prohibition of retaliation following Nevada's example,<sup>170</sup> and to confirm this mandate specifies strong remedies. Retaliatory litigation poses particularly grievous problems, reflecting both the direct attack on a family home and the ability to pursue that attack by misusing association funds and information (sometimes including confidential information) available to the association.<sup>171</sup> Homeowners deserve protection against retaliatory suits, as in Florida.<sup>172</sup>

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<sup>166</sup> See Cal. Civ. Code 1378(c).

<sup>167</sup> The requirement to go to court reflects the need for separation of powers to ensure fairness in imposing fines. Cf. *Tumey v. Ohio*, 273 U.S. 510 (1927) (unconstitutional for the person who decides whether to impose fines also to keep the fines). Some cases hold that only governments, not associations, have constitutional power to impose fines. E.g., *Foley v. Osborne Court Condominium*, 1999 R.I.Super. LEXIS 50; see also *Walker v. Briarwood Condominium Assn.*, 274 N.J. Super. 422, 428 (App. Div. 1994) (suggesting fines and penalties are uniquely governmental); *Unit Owners Ass'n of BuildAmerica-1 v. Gillman*, 223 Va. 752, 292 S.E.2d 378 (1982) (distinguishing late fees); but cf. Va. Code 55-79.80:2 (enacted before *Gillman* recognized the constitutional ban).

<sup>168</sup> See also *Committee for a Better Twin Rivers*, *supra* n.7, 890 A.2d at 970 (no liquidated damages unless reasonably related to harm alleged).

<sup>169</sup> See also Fla. Stat. Ann. 720.305(2) (suspend common area privileges only, not including parking).

<sup>170</sup> Nev. Rev. Stat. 116.31183.

<sup>171</sup> See also *Brooks v. Northglen Association*, 141 S.W.3d 158 (Tex. 2004) (describing an association that sued to stop homeowners from protesting and sought damages in libel/slander, these claims all eventually dropped before the homeowners won declaratory judgments underscoring the righteousness of their protest) (author was counsel).

<sup>172</sup> Fla. Stat. Ann. 720.304(4).



X. Homeowners shall have fair interpretation of their rights through the state Office of Ombudsperson for Homeowners. This ombudsperson enables state oversight where needed, and increases available information for all.

### **Section 110: The Right to an Ombudsperson for Homeowners**

1. *Creation of the Ombudsperson for Homeowners.* The state Office of Ombudsperson for Homeowners shall have powers and duties provided in this model statute.
  - a. Each association annually shall register with the ombudsperson, providing its name and contact information; the same information for each management company; the location of each recorded governing document; the number of the association's homeowners; and other information required by the ombudsperson.
  - b. With the annual registration, each association shall pay to the ombudsperson \$         for each home in the common-interest community.<sup>173</sup>
2. *Investigation and Oversight.* The ombudsperson shall investigate alleged denials of homeowner rights under this model statute, the Non-Profit Corporation Act, or other statute by associations, their current or former directors, officers, employees, managers, or other agents and, where authorized by law, shall oversee elections and other ballots.
  - a. The ombudsperson has subpoena power for investigations, and shall provide petitioning homeowners and responding associations a statement of facts and legal conclusions, to be completed within 90 days, unless the ombudsperson expressly finds a need for up to twice that time.
  - b. The ombudsperson shall expedite investigations concerning supervised elections or other ballots and arbitration of recalls, to be completed within 15 days, unless the ombudsperson expressly finds a need for up to twice that time.
3. *Enforcement.* If the ombudsperson advises the attorney general to pursue litigation concerning an association, the ombudsperson shall so advise all petitioning homeowners and all directors of the association. However, the attorney general, local governments (if otherwise authorized), and homeowners may seek judicial relief with or without such recommendation.
  - a. In addition to enforcement of subpoenas for the ombudsperson, the attorney general shall seek judicial enforcement of the ombudsperson's decisions regarding supervised elections or other ballots, arbitration of recalls, and findings that specified intentional violations of this model statute or other law justify removal of a director, officer, manager, or other agent. With or without a referral

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<sup>173</sup> As discussed below, the charge should not be large, with many factors determining the amount.

from the ombudsperson, upon finding actual or threatened violations of homeowner rights, the attorney general may seek temporary, preliminary, or final injunctions, independent audits, removal of directors, statutory penalties, and other lawful relief. If the homeowner agrees, the attorney general also can present individual claims for relief with government claims.

- b. If a local government agency has power to enforce governing documents, it also has power to enforce the model statute and other rights for homeowners.
4. *Optional Mediation and Supervised Voting.* The ombudsperson may offer to participate in any mediation, or to supervise any election or other ballot, even where not required by law. No such offer, whether or not accepted, disqualifies the ombudsperson from exercising any power or duty under this model statute; provided, by agreement in writing, the ombudsperson and parties can specify confidentiality or other condition on agreed action by the ombudsperson.
5. *Licensing Managers.* The ombudsperson shall license qualified association managers, with tests to confirm knowledge of the law and, for managers who seek to handle association funds, to confirm knowledge of accounting. The ombudsperson may set requirements for managers to be bonded.
6. *Forms Updated, Mediators Listed and Homeowner Education.* The ombudsperson shall keep current the information statement and other disclosure forms that sellers must give to buyers as provided in Section 104, The Right to Be Told of All Rules and Charges, the Notice of Foreclosure Rights, the Notice of Foreclosure Filing, the Notice of Right of Redemption, and other forms that may assist homeowners. The ombudsperson also shall be required to maintain lists of available no- or low-cost mediation programs, publish and promote educational materials to secure homeowner rights, and accredit programs to license association management. All such documents prepared by the ombudsperson shall be translated into any language used at one or more polling places during elections, and also made accessible to persons with disabilities.
7. *Rulemaking.* The ombudsperson shall adopt rules governing investigations, oversight, licensing of managers, and its other functions as appropriate to implement this model statute.
8. *Annual Reports.* The ombudsperson annually shall publish information on
  - a. the number, kind, and size of associations in this state;
  - b. how state law affects operation and management of associations;
  - c. known violations of this model statute;
  - d. homeowners' use of options for mediation and arbitration, costs incurred, and the decisions and awards made by mediation and arbitration procedures;
  - e. the number of foreclosure cases filed, the number completed, and the reasons for such cases; and
  - f. other issues the ombudsperson considers of concern to homeowners.

## *Discussion*

Between homeowners and associations, disputes happen. The frequency and wide range of focal points for conflict underscore the need for fair, rapid, and cost-effective ways to resolve such disputes. The ultimate goal remains to strengthen rather than divide communities.

Homeowners typically have neither support, time, money, skills, or experience to enforce, or even to fully understand, their rights. As stated in a recent California study, “[a] homeowner who believes that a community association is violating the law or has otherwise breached its duties has no effective remedy other than civil litigation.... Many homeowners cannot afford to bring a lawsuit, especially in cases where money damages are not at issue.”<sup>174</sup>

Having an independent ombudsperson offers a neutral, prompt, low-cost forum for homeowners to learn and protect their rights. Directors, being homeowners, can seek advice from the ombudsperson. This provides well-meaning directors with an alternative to consultation with association attorneys. The ombudsperson also enables better managers and disclosures for homeowners.

The model statute provides for the attorney general to enforce the ombudsperson’s determinations of who are the directors, because courts and others need to know who speaks for the association. Otherwise, the attorney general (and local governments, where authorized) have enforcement discretion.<sup>175</sup>

The choice of where, within state agencies, to locate the ombudsperson also will influence the ombudsperson’s effectiveness. On this, the model statute makes no recommendation because the best location will vary from state to state.

County attorneys and district attorneys also might investigate or prosecute violations, and in some cases already have authority to enforce governing documents against homeowners.<sup>176</sup> The model statute does not promote use of local governments as a primary means for enforcement, but recognizes that if local government power exists to prosecute homeowners, then that same government also should have authority to enforce the law regulating associations.

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<sup>174</sup> California Law Revision Commission, *Common Interest Development Ombudsperson* at 1–2 (Preprint Recommendation, March 2005) (“Cal. Ombudsperson Proposal”). Thus, homeowners can be “effectively denied the benefit of laws designed for [their] protection, and “[t]he absence of an affordable remedy limits accountability for wrongdoing, creating an atmosphere in which some may choose to cut corners or abuse their power.” *Id.* at 2. In her *Study*, *supra* n.40, at 5, Professor French likewise identified the lack of a “regulatory agency charged with overseeing” associations as a central reason for the critical problem that she states “Securing Compliance with the Law Is Difficult.” See also NJ Assembly Task Force, *supra* n. 112 (recommending oversight, as noted in *Committee for a Better Twin Rivers*, *supra* n.7, 890 A.2d at 956).

<sup>175</sup> Under current practice, even attorneys general with such powers almost never use them. See *Alternative Dispute Resolution in Common Interest Developments*, 33 Cal. L. Rev. Comm’n Reports 689, 698-99 (2003) (Cal. Corp. Code 8216 provides limited power, but the attorney general’s role usually ends after sending an inquiry letter); accord “Cal. Ombudsperson Proposal,” *supra* n.182, at 1 n.5; see also *State Assistance to Common Interest Developments* (staff draft), Memorandum 2004-39 (Calif. L. Rev. Comm’n 8/9/04), Exh. at 1–2 (as a matter of policy, California’s “Attorney General does not pursue legal action”).

<sup>176</sup> E.g., Tex. Prop. Code 203.003(a).

Whether or not an agency chooses to proceed based on the ombudsperson's findings, homeowners can do so themselves. Hopefully, in most cases, clear findings by the ombudsperson should persuade associations to terminate unlawful practices or, regarding permitted practices, persuade homeowners to terminate challenges, avoiding litigation.

In addition to providing investigative and enforcement power, the ombudsperson licenses managers, can mediate, and maintains a list of mediators and arbitrators as well as gathering and disseminating other information.<sup>177</sup>

Public education would include publication of answers to frequently asked questions, such as Florida has done, as well as other training materials.<sup>178</sup> The ombudsperson also would have an 800 number to assist homeowners. Rather than employ outside trainers, ombudsperson employees should conduct training sessions for homeowners and directors who seek unbiased information. Outside training programs to license managers would need to be accredited by the ombudsperson.

An oversight agency such as the Ombudsperson for Homeowners may benefit from "authority to adopt regulations to define its own operations."<sup>179</sup> The model statute does not provide more general rule-making power, because the relative newness of the issues suggests a need for more legislative involvement. The model statute focuses on having the ombudsperson as problem solver. This encompasses promoting homeowner rights with clear and concise forms to be given to potential buyers of homes in associations, and promoting education about associations.

Several state legislatures recently have recognized the advantages of an ombudsperson or other government overseer, and others have the issues under close consideration.<sup>180</sup> Statutes provide for one or more of the following activities: information and advice, state-assisted mediation or arbitration, informal intervention, and law enforcement.

Providing all of these, Nevada first created an Ombudsman for Owners in Common Interest Communities,<sup>181</sup> and later created the Commission for Common Interest Communities.<sup>182</sup> The Nevada ombudsman can investigate alleged statutory violations, attempt resolution, and, if that fails, prepare a report stating relevant facts.<sup>183</sup> Nevada then uses a complex administrative system to resolve disputes,<sup>184</sup> including subpoena power.<sup>185</sup> The administrative rights supplement other

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<sup>177</sup> See, e.g., Nev. Rev. Stat. 38.300-38.360, 116.745 to 750 (similar powers); see also Va. Code Ann. 55-530 (does not intervene in disputes but provides nonbinding interpretation of laws and referrals for ADR, as well as other information and educational opportunities); *Common Interest Development Law: CID Information Center*, Memorandum 2003-40 (Calif. L. Rev. Comm'n 11/7/03), at 1 (California Department of Consumer Affairs maintains a list of ADR programs).

<sup>178</sup> See [www.state.fl.us/dbpr/lsc/condominiums/information/faq.shtml](http://www.state.fl.us/dbpr/lsc/condominiums/information/faq.shtml), last visited 11/6/05; [www.state.fl.us/dbpr/lsc/condominiums/index.shtml](http://www.state.fl.us/dbpr/lsc/condominiums/index.shtml), last visited 11/6/05.

<sup>179</sup> *State Oversight of Common Interest Developments (Discussion of Issues)*, Memorandum 2004-20 (Calif. L. Revision Comm'n 3/30/04), at 20; see also Nev. Rev. Stat. 116.625.

<sup>180</sup> See generally "Cal. Ombudsperson Proposal," *supra* n. 182 (discussing several state programs and seeking comments).

<sup>181</sup> Nev. Rev. Stat. 116.625.

<sup>182</sup> Nev. Rev. Stat. 116.600.

<sup>183</sup> Nev. Rev. Stat. 116.745, 750 & 765.

<sup>184</sup> Nev. Rev. Stat. 116.745 to 795.

rights that exist at law or in equity.<sup>186</sup> This model statute does not recommend such an active administrator, but Nevada’s approach merits further consideration as experience increases.

Florida so far has rejected most state oversight for single-family homeowner associations.<sup>187</sup> However, recently proposed legislation would have changed that, and Florida uses an ombudsperson for condominiums, in addition to providing oversight including enforcement of statutes by the Division of Florida Land Sales, Condominiums and Mobile Homes.<sup>188</sup> Florida also mandates nonbinding arbitration for disputes involving condominiums, but not for associations--except making ADR mandatory for election disputes.<sup>189</sup>

Hawaii’s Real Estate Commission lists centers under contract to mediate condominium disputes, with some mediation subsidized by the state, and provides information and advice.<sup>190</sup> The Commission also can investigate and administratively enforce some statutes, mostly relating to development and sale but also including homeowner rights of access to records.<sup>191</sup>

Montgomery County, Maryland, provides for non-judicial dispute resolution based on a 1991 study finding “inequality of bargaining power and the need to provide for due process in fundamental association activities.”<sup>192</sup> The complex administrative remedy includes optional mediation, is subject to judicial review, and can provide attorney fees to homeowners.<sup>193</sup>

Small charges for each home should provide sufficient funds for an ombudsperson, including the charge for filing a petition to investigate. See Section 102 (§ 4), The Right to Resolve Disputes without Litigation.<sup>194</sup> Advantages of this approach, noted by the California Law Revision Commission, include (1) sharing costs among all homeowners, allowing low-cost investigation to those who need help; (2) avoiding dipping into the state’s general fund; and (3) piggy-backing on existing collection mechanisms, sparing the ombudsperson the costs and hassles of collection.<sup>195</sup> All homeowners should pay this nominal charge as a form of insurance and because they all benefit by promoting this office, even if they do not directly ask the ombudsperson for help.

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<sup>185</sup> Nev. Rev. Stat. 116.660.

<sup>186</sup> Nev. Rev. Stat. 116.755(1).

<sup>187</sup> Fla. Stat. Ann. 720.302(2).

<sup>188</sup> For condominiums, see Fla. Stat. Ann. 718.5011 & 720.5012 (reports and recommendations, liaison to associations, educational material, monitoring of disputes concerning meetings and elections, neutral resource for dispute resolution). For associations, see Fla. SB 2498 (Garcia, 2004) (proposing an ombudsperson to investigate homeowner complaints, did not pass).

<sup>189</sup> See Fla. Stat. Ann. 718.1255 (condominiums); Fla. Stat. Ann. 720.311(1) (association elections).

<sup>190</sup> “Cal. Ombudsperson Proposal,” *supra* n.182, at 9.

<sup>191</sup> *Id.*; see Haw. Rev. Stat. 514A-46 to 49 & -83.5.

<sup>192</sup> “Cal. Ombudsperson Proposal,” *supra* n.182, at 8-9, citing Montgomery County Code, Chapter 10B.

<sup>193</sup> *Id.*

<sup>194</sup> “Cal. Ombudsperson Proposal,” *supra* n. 182, at 5–10 (Nevada program funded by charge of \$3 per home, expected to increase to \$4, Montgomery County, Maryland, program funded by \$2.25 per home plus a \$50 fee to file a petition); Hawaii charges \$4 per home; Virginia charges each association \$25 for less comprehensive services); Fla. Stat. Ann. 718.501(2)(a) (\$4 per home); see also *id.* at 4 (\$5 per home charge proposed in pilot project, plus up to \$25 filing fee for formal mediation).

<sup>195</sup> “State Oversight of Common Interest Developments”, *supra* n.187, at 21; see also *id.* at 22 (recognizing benefits “to have a homeowner pay for some or all of the services provided by the agency”).