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# A BALANCING ACT: THE FORECLOSURE POWER OF HOMEOWNERS' ASSOCIATIONS

*Gemma Giantomasi\**

## INTRODUCTION

In 2001, the home of Wenonah Blevins, an eighty-two-year-old widow, was foreclosed upon by her property owners' association ("POA") because she could not pay \$814.50 in maintenance fees.<sup>1</sup> At first glance, this foreclosure appears reasonable. Blevins defaulted on an agreement with her POA and the association took the appropriate, legal foreclosure action.<sup>2</sup> However, when examined carefully, the foreclosure seems unfair to Blevins. Her home was worth \$150,000 but was sold at auction for \$5,000, a sum much greater than the \$814.50 she owed to her POA.<sup>3</sup> Blevins filed suit against the POA and eventually recovered her home, receiving a \$300,000 settlement from the association.<sup>4</sup>

Experiences like Blevins's demonstrate the growing power exerted by neighborhood governments and have drawn the attention of state legislatures.<sup>5</sup> Blevins's legal battle with her POA in Houston prompted Texas legislators to propose laws to limit the power of POAs to foreclose on homes.<sup>6</sup> These legislators want to stop POAs from using their foreclosure power to make life difficult for the vulnerable and elderly.<sup>7</sup>

Contrast Blevins's situation with that of Jerre E. Epps.<sup>8</sup> On May 2, 1995, Epps's POA filed a complaint seeking judgment against him for

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1. S.K. Bardwell & Eric Berger, *Sale of Widow's Home Outrages Officials; Homeowners' Group Tried to Buy Property*, Hous. Chron., May 3, 2001, at 1A.

2. See *infra* notes 118-43 and accompanying text.

3. Bardwell & Berger, *supra* note 1.

4. Armando Villafranca, *78th Legislature; Housing; Homeowners Association Bills Inspired by Houston Woman's Case*, Hous. Chron., Apr. 26, 2003, at 34A.

5. See *infra* notes 178-235 and accompanying text.

6. Bardwell & Berger, *supra* note 1.

7. Eric Berger, *Help for Widow Moving Quickly in Legislature*, Hous. Chron., May 4, 2001, at 1A (detailing legislative efforts to assist the elderly in the Houston area by placing curbs on homeowners' associations).

8. *Park Ctr. Condo. Council v. Epps*, No. 95C-05-033-WTQ, 1997 WL 817875 (Del. Super. Ct., May 16, 1997).

unpaid assessments.<sup>9</sup> Epps had not paid his assessments since April 1, 1994, and he owed a total of \$5,600.<sup>10</sup> Unlike Blevins, Epps was financially able to pay his fees; however, he stopped making payments because he felt that his POA had breached its duty to make repairs.<sup>11</sup> Epps's case demonstrates another side to the story of POA foreclosures. It is this side that state legislators may forget to acknowledge when trying to garner support for proposed legislation.

POAs do not have foreclosure powers solely to prey on victims like Wenonah Blevins. Foreclosure procedures also serve to maintain the integrity of POAs. Without such a tool, it is possible that people would stop paying their maintenance fees; consequently, the POA could go bankrupt and fail to provide its agreed upon services. Thus, state legislators should not restrict the foreclosure powers of such associations, but instead, should support the power of POAs to foreclose on delinquent members.

This Note examines whether proposed foreclosure restriction measures for homeowners' associations ("HOAs"), one type of POA, are valid and necessary. Part I.A. discusses the history and background of HOAs, and Part I.B. addresses the responsibilities and powers of HOAs, including the power to levy dues. Part I.C. describes HOA assessments; Part I.D. follows by detailing assessment collection methods. Further, Part I.E. examines the foreclosure powers of HOAs. Parts II.A., B., and C. address the fight for foreclosure and the legislative response to the foreclosure power of HOAs in Arizona, California, and Texas. Part II.D. analyzes the three legislative approaches. Finally, Part III argues that foreclosure is a necessary remedy for HOAs and concludes by setting forth various ways to improve state legislation in order to meet the needs of both homeowners and their associations.

## I. BACKGROUND AND HISTORY OF THE HOMEOWNERS' ASSOCIATION

### A. History

The origin of the POA lies in the common law of servitudes, as modified by statutes and legislation.<sup>12</sup> The classification of a POA includes organizations "created by covenants or servitudes running with the land and whose membership consists of owners of units in

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9. *Id.* at \*1; see *infra* notes 62-82 and accompanying text, discussing assessments.

10. *Epps*, 1997 WL 817875, at \*1.

11. *Id.*

12. Warren Freedman & Jonathan B. Alter, *The Law of Condominia and Property Owners' Associations* 3 (1992).

that subdivision.”<sup>13</sup> This part traces the development of the POA from the eighteenth century.

The first POA was instituted in England in 1743 when a group of homeowners contributed to the maintenance of a park and created the exclusive right to use it.<sup>14</sup> The oldest known POA in America was established in 1844.<sup>15</sup> It consisted of twenty-eight homes around Louisburg Square in Boston.<sup>16</sup> The residents “drafted, signed and recorded a set of covenants for maintenance of the park in the center of the square” and deemed the area the “Committee of the Proprietors of Louisburg Square.”<sup>17</sup> Throughout the next century, POAs became more common, especially in New England and the tri-state area around New York City.<sup>18</sup> By the 1960s and 1970s, POAs were commonplace in the lives of most American homeowners.<sup>19</sup>

There are many different types of POAs, including condominiums and HOAs. For example, condominium developments are a type of POA that provide “individual ownership in fee simple of a one-family unit in . . . multifamily structures” along with fee simple ownership of the entire interest in the land and joint ownership in all other parts of the structure with all other owners of the one-family units in the structure.<sup>20</sup> Another type of POA is the HOA. The term HOA is used in reference to “all noncondominium developments [where] there is some form of common interest in and use or ownership of [the] property.”<sup>21</sup> HOAs are meant to protect property values through the maintenance of the “property itself and through preservation of the [property’s] character and appearance.”<sup>22</sup>

13. *Id.* Such “subdivision[s] may be a town house project, a single-family home development, or . . . any kind of residential or nonresidential subdivision. Cooperatives and other rental properties are not subdivisions because the developer or landlord does not divide a single estate into new co-equal estates.” *Id.* at n.12.

14. *Id.* at 3.

15. Robert G. Natelson, *Law of Property Owners Associations* 17 (1989).

16. *Id.*

17. *Id.*

18. *Id.* Such communities included: Ocean Grove, NJ, 1870; Squirrel Island, ME, 1871; Roland Park, MD, 1891. *Id.*

19. *Id.* at 17-18.

20. Freedman & Alter, *supra* note 12, at 21 & n.3 (quoting Ramsey, *Condominium: The New Look in Co-ops* 3 (1961)). A planned unit development is another type of POA that is defined as “[e]ither a development plan complying with municipal ordinances permitting waiver of normal zoning requirements or a hybrid subdivision or other covenanted subdivision, sometimes specifically a subdivision other than a condominium.” *Id.* at 13.

21. *Id.* at 23.

22. Evan McKenzie, *Privatopia: Homeowner Associations and the Rise of Residential Private Government* 128-29 (1994). David Sterrett best describes why homeowners both despise and revere their HOAs:

They’re annoying, oppressive and unconstitutional. They’re helpful, democratic and necessary. . . . They protect property values; they violate property rights. Residents can’t stand living with the rules; residents can’t

Beginning in the 1960s, owners of “detached and attached single-family homes who shared community facilities usually did so by the use of a homeowners’ association.”<sup>23</sup> Today many people are choosing to live in such communities: One out of every six people in the United States, about fifty million Americans, lives in a community governed by an HOA.<sup>24</sup> Of the 106 million homes in the nation, twenty million are governed by HOAs.<sup>25</sup> This number is a remarkable increase from the 10,000 HOAs in the United States in 1970.<sup>26</sup> Additionally, according to the Community Association Institute, there has been a twenty-one percent increase in the number of HOAs since 1998.<sup>27</sup>

## B. Responsibilities and Powers of HOAs

### 1. General Responsibilities and Powers

HOAs are founded and governed by certain documents that are similar to state constitutions or codes.<sup>28</sup> These governing documents include a declaration, articles or certificates of incorporation, bylaws and covenants.<sup>29</sup> The declaration is the basic governing instrument of the HOA.<sup>30</sup> In *Providence Square Ass’n v. Biancardi*, the Supreme Court of Florida defined the declaration as “the legal ground rules for a controlled process of subdivision, development, sale, and use of the individual parcels of real property pursuant to a general plan.”<sup>31</sup> HOA declarations describe the land, each unit, and the common areas of the community.<sup>32</sup> The declaration should “provide for the establishment of an association of owners, a method of sharing

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stand living without the safeguards. They provide pools and parks; they collect dues and fees. They maintain the appearance of neighborhoods. They can foreclose on homes . . . .

David Sterrett, *Homeowners Associations: Love Them or Leave Them*, N. County Times, July 5, 2003, at <http://www.nctimes.com/articles/2003/07/06/export260.txt>.

23. Freedman & Alter, *supra* note 12, at 24.

24. Motoko Rich, *Homeowner Boards Blur Line of Just Who Rules the Roost*, N.Y. Times, July 27, 2003, at A1.

25. *Id.*

26. Curtis Howell, *Clout Growing with Homeowners Groups*, Dallas Morning News, Nov. 11, 2002, at [http://classifieds.dallasnews.com/real\\_estate/story/111002\\_cc\\_realestate\\_associations.41ade554.html](http://classifieds.dallasnews.com/real_estate/story/111002_cc_realestate_associations.41ade554.html).

27. Rich, *supra* note 24.

28. McKenzie, *supra* note 22, at 127.

29. See, e.g., Freedman & Alter, *supra* note 12, at 23, 61-72; McKenzie, *supra* note 22, at 127-28; Wayne S. Hyatt, *Condominium and Homeowner Association Practice: Community Association Law 18-19* (1981).

30. Freedman & Alter, *supra* note 12, at 61.

31. *Providence Square Ass’n v. Biancardi*, 507 So. 2d 1366, 1370 (Fla. 1987).

32. Freedman & Alter, *supra* note 12, at 61.

common expenses . . . and procedures governing the management of the building.”<sup>33</sup> Additionally, the declaration sets forth the purpose of the HOA, which is normally to “maintain, manage and regulate the common property and, in some cases, all or a portion of the individual [units].”<sup>34</sup>

HOAs are generally set up as non-stock corporations so that the interest of each unit owner has the protection of the corporate form.<sup>35</sup> Each state has a different requirement for what should be included in the articles or certificates of incorporation.<sup>36</sup> Generally, the documents include: the name of the corporation; the period of its duration; the purpose of the corporation; the address of the initial registered office of the corporation; the address of the corporation’s principal place of business; the names of the corporation’s directors; the powers of the board; and the names of the incorporators.<sup>37</sup>

The guiding force behind an HOA is the bylaws of the association. The bylaws “are the set of rules adopted by the [HOA] for its internal management and government.”<sup>38</sup> The bylaws contain the rules and regulations that govern members of the HOA.<sup>39</sup> Limits on the

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33. *Id.*

34. *Id.* at 23. For more information on the declaration, see *id.* at 61-63.

35. *Id.* at 23, 63. One benefit of the corporate form is that the HOA board has the protection of the business judgment rule. For a detailed description of the business judgment rule, see *infra* notes 89-99 and accompanying text.

36. Freedman & Alter, *supra* note 12, at 63. For example, in California the articles of incorporation of an HOA are required to include the purpose of the association, the business or corporate office of the association, and the name and address of the managing agent. See Cal. Civ. Code § 1363.5(a)(1)-(3) (West Supp. 2004). Moreover, in Illinois, the articles of incorporation must set forth: a corporate name, the purpose of the corporation, the address of the corporation’s initial registered office and the name of the corporation, the name and address of the incorporators, the number of directors constituting the first board of directors, including their names and addresses; a statement that it will comply with the state and local laws and ordinances relating to alcoholic liquors; whether the corporation is a condominium association, a cooperative housing corporation or a homeowner association which administers a common-interest community. 805 Ill. Comp. Stat. 105/102.10-(a)(1)-(7) (2003). Additionally, New Jersey requires the articles of incorporation of an HOA to provide:

(1) that the association has the power to negotiate for, acquire, and operate the private residential leasehold community on behalf of the homeowners; and (2) that the association has the power to convert the private residential leasehold community, once acquired by the homeowners, to a condominium, a cooperative, or other type of ownership.

N.J. Stat. Ann. § 46:8C-17(a)(1)-(2) (West 2003).

37. Freedman & Alter, *supra* note 12, at 63.

38. *Id.* at 64.

39. See *id.* (citing Louise Hickok, Symposium, *Promulgation and Enforcement of House Rules*, 48 St. John’s L. Rev. 1132 (1974)). Sometimes the rules and regulations are contained in a separate document. *Id.* HOA bylaws vary from community to community; however, the bylaws of some communities prohibit “clotheslines, recreational vehicles, flagpoles, signs, basketball courts or garden sheds.” Sterrett, *supra* note 22. Additionally, “[a]pproval can be needed for satellite dishes, patio

contents of bylaws do exist: A Florida court in *Hidden Harbour Estates, Inc. v. Norman* noted that an HOA is not at liberty to adopt arbitrary or capricious rules that have no bearing on the health, happiness, and enjoyment of its unit owners.<sup>40</sup> Thus, HOA bylaws are enforced as long as they are reasonable.<sup>41</sup>

In addition to the bylaws, HOA members are bound by the covenants of the association, which include "conditions, and restrictions that run with the land and that are legally binding on present and future owners of the property."<sup>42</sup> The covenants are usually written by the developer and are only subject to change by a supermajority vote of all members.<sup>43</sup> Further, modifications to the covenants are difficult to implement.<sup>44</sup> Taken together, the developer's conception of the many aspects of how people should live is "cast in concrete."<sup>45</sup>

Other governing documents include: public offering statements, legal descriptions, resale certificates, management agreements, warranty deeds, and architectural control documents.<sup>46</sup> All governing documents of an HOA are "enforceable as the laws, charters, and constitutions of public governments."<sup>47</sup> They constitute the "rules of the regime under which . . . the residents will be living."<sup>48</sup>

These governing documents often "provide for the election of a board of directors of the association from among the membership."<sup>49</sup> One responsibility of a board of directors is to ensure the fulfillment

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furniture, lawn or ground covering, the species, shape and height of plants, and the color and style of window coverings." *Id.* Furthermore, "[l]imits are placed on the number and types of pets, when and how long residents can open their garage doors and how long residents have to landscape new houses." *Id.*

40. *Hidden Harbor Estates, Inc. v. Norman*, 309 So. 2d 180 (Fla. Dist. Ct. App. 1975) (upholding a rule forbidding alcoholic beverages in the clubhouse and adjacent common areas on the grounds that this regulation was reasonable and therefore properly adopted by the association).

41. *Forest Park Coop. v. Hellman*, 152 N.Y.S.2d 685 (Sup. Ct. 1956) (upholding a rule forbidding separate washing machines in individual apartments and requiring the use of common machines in the basement as reasonable where the use of separate washing machines caused a back-up of water into other apartments, clogged waste lines, annoyed other tenants with resulting noise and vibrations, and caused damage to ceilings); see also W. E. Shipley, Annotation, *Validity and Construction of Condominium Association's Regulations Governing Members' Use of Common Facilities*, 72 A.L.R.3d 308 (1976).

42. McKenzie, *supra* note 22, at 127.

43. *Id.*

44. *Id.* (noting that the 1964 *Homes Association Handbook* proposed that changes to the covenants require a two-thirds majority vote and a three year waiting period before becoming effective).

45. *Id.*

46. Freedman & Alter, *supra* note 12, at 61, 66-71.

47. McKenzie, *supra* note 22, at 127.

48. *Id.* at 128.

49. *Id.*

of the dictates of the governing documents.<sup>50</sup> These dictates include: maintenance of common areas, management of all association assets and operations, and covenant enforcement over all owners and occupants.<sup>51</sup> To fulfill these dictates, assessments, also called maintenance fees or association dues, are imposed by the association and collected by the board from homeowners.<sup>52</sup>

## 2. Power to Levy Dues

The HOA has title to the common property in the community,<sup>53</sup> while individuals only have title to their individual units—their own “parcel of real estate.”<sup>54</sup> Property owners automatically become members of an HOA when they take title to the property.<sup>55</sup> Upon taking such title, every owner “is subject to the obligations of membership as set forth in the governing documents.”<sup>56</sup> Membership is based on property ownership, not citizenship.<sup>57</sup> Individual owners can be compelled to satisfy their financial obligations to the association as set forth in the HOA’s rules and regulations.<sup>58</sup>

The overall operation and activities of an HOA are funded by dues or assessments paid by each homeowner. The power to levy such dues is an affirmative covenant created in the HOA’s declaration and is enforceable by state courts.<sup>59</sup> This covenant runs with the land and binds all successors in title.<sup>60</sup> The power to levy dues includes the

obligation of the association or its board of directors to develop a fiscal plan, to assign a share of that plan to individual owners as a charge against the real property of each individual unit owner, and to collect the assessment through lien rights and state court action in the event that the assessment is not paid as scheduled.<sup>61</sup>

### C. Assessments

Assessments are not equivalent to membership dues or

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50. *Id.*

51. *See, e.g., id.*; Donald B. Kuperman, *Assessment Collection, in* Condominium and Homeowner Association Litigation: Community Association Law 259 (Wayne S. Hyatt & Philip S. Downer eds., 1987).

52. Kuperman, *supra* note 51.

53. Freedman & Alter, *supra* note 12, at 23.

54. *Id.*

55. Hyatt, *supra* note 29, at 35.

56. *Id.*

57. Freedman & Alter, *supra* note 12, at 23. Residents who are renting homes in the community are not voting members of the HOA. *Id.*

58. Hyatt, *supra* note 29, at 35.

59. *Id.*

60. *Streams Sports Club, Ltd. v. Richmond*, 457 N.E.2d 1226, 1230 (Ill. 1983); *see also* Kuperman, *supra* note 51, at 260.

61. Hyatt, *supra* note 29, at 35-36.



discretionary charges.<sup>62</sup> Rather, an assessment is “a proportionate share of the expenses incurred to fund the association’s business and governmental services.”<sup>63</sup> As long as assessments are put towards a legitimate use, the individual member must bear his share of the expenses.<sup>64</sup> In *Ass’n of Unit Owners v. Gruenfeld*, the court determined that assessments for services and items “reasonably identified as necessary” can be collected by an HOA.<sup>65</sup> In *Gruenfeld*, the defendant argued that the plaintiff’s board of directors lacked the authority to assess for “electric power, heat, television signal, firewood, garbage removal, security police, fire protection, insurance, contingency reserves, and television set and furniture rentals.”<sup>66</sup> The court determined that these assessments were reasonable and the HOA was entitled to payment.<sup>67</sup> Notwithstanding the reasonableness of the purpose or use of the assessment, the collection procedure must be lawfully imposed pursuant to the HOA’s covenants and the applicable state statute in order to be legally collected.<sup>68</sup> The association may collect assessments in any way as provided by state law.<sup>69</sup>

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62. *Id.*

63. *Id.*

64. *Id.* at 35; *see also* Kuperman, *supra* note 51, at 262.

65. *Ass’n of Unit Owners v. Gruenfeld*, 560 P.2d 641, 644 (Or. 1977); *see also* Gulf Shores Council of Co-Owners, Inc. v. Raul Cantu No. 3 Family Ltd. P’ship, 985 S.W.2d 667, 670-71 (Tex. App. 1999) (applying a reasonableness standard where an association determines the necessary expenses for the operation of the community and assesses “the owners’ *pro rata* share of the common expenses”); *San Antonio Villa Del Sol Homeowners Ass’n v. Miller*, 761 S.W.2d 460, 464 (Tex. App. 1988) (stating that an association “is vested with considerable discretion to determine the necessary expenses” for its operation and to “assess the owners’ *pro rata* share of such common expenses” so long as the association acts reasonably); *Raymond v. Aquarius Condo. Owners Ass’n*, 662 S.W.2d 82, 89-90 (Tex. App. 1983) (recognizing that expenses “reasonably identified as necessary to accomplish the purpose of creating a uniform plan for the development and operation of the condominium project” may be assessed).

66. *Gruenfeld*, 560 P.2d at 642.

67. *Id.* at 644.

68. Kuperman, *supra* note 51, at 262.

69. *Freedman & Alter*, *supra* note 12, at 86. Such collection methods include “garnishment of bank accounts, wages, or other monies of the unit owner.” *Id.* Collecting assessments is usually the HOA’s single source of income, thus it is “critical” for every HOA to establish a “cohesive collection policy” in order to preserve its financial resources. *Id.* at 88 n.55. In light of the importance of assessments, some HOAs resort to “strong-arm” techniques to collect from residents. *Id.* at 88. Jurisdictions are split as to the legitimacy of such techniques. *Compare* *Western v. Chardonnay Vill. Condo. Ass’n*, 519 So. 2d 243, 244-45 (La. Ct. App. 1988) (refusing to uphold an HOA’s decision to shut off water in units where assessments were past due and determining that HOAs only have power to enforce assessments through lien imposition and the judicial process), *with* *Miller*, 761 S.W.2d at 465 (upholding an association’s action in partially disconnecting the unit owner’s gas and water in order to collect an assessment).

Payment of assessments is not voluntary, nor is payment at the discretion of the homeowner. Courts are unsympathetic to most arguments opposing the requirement to pay assessments, reasoning that those who enjoy the land must pay maintenance for it.<sup>70</sup> In most suits brought by HOAs against delinquent members for the collection of assessments, the defendant commonly asserts the position that he or she is not satisfied with some action or inaction of the HOA and therefore should be excused from paying assessments.<sup>71</sup> Despite these claims, courts have held that payment of assessments is an independent obligation that is not tied to an association's commissions or omissions.<sup>72</sup> For example, in *Nisqually Pines Community Club v.*

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70. See *Sea Gate Ass'n v. Fleischer*, 211 N.Y.S.2d 767, 781 (Sup. Ct. 1960) (holding that when one purchases property in an HOA, they "impliedly agree[] to pay a proportionate share of the cost therefore," as they are entitled to enjoy the facilities available to them). According to the court in *Fleischer*, "[s]uch terms included the obligation to pay a proportionate share of the cost of maintaining the facilities and services and not merely the reasonable value of such facilities and services to the defendants as measured by the use made by them of such facilities and services." *Id.*; see also *Harbor Hills Landowners v. Manelski* 318 N.Y.S.2d 793, 796-97 (Sup. Ct. 1970) (noting that the purchase of the property in an HOA constitutes acceptance of the terms of the community); *Tomkins Lakes Estates Ass'n v. Speisman*, 273 N.Y.S.2d 457, 460 (Sup. Ct. 1966) (stating that by purchasing property in an HOA community, homeowners impliedly agree to pay a proportionate share of the cost of the community's services); *Freedman & Alter*, *supra* note 12, at 82-83; *Hyatt*, *supra* note 29, at 35-36; *Kuperman*, *supra* note 51, at 262.

71. See, e.g., *Park Ctr. Condo. Council v. Epps*, No. 95C-05-033-WTQ, 1997 WL 817875, at \*2 (Del. Super. Ct. May 16, 1997). In *Epps*, the defendant denied liability for the payment of assessments because the Council breached its duty to repair and maintain the premises. *Id.*; see also *Rivers Edge Condo. Ass'n v. Rere Inc.*, 568 A.2d 261, 263 (Pa. Super. Ct. 1990). In *Rere*, the defendant argued that the withholding of assessments was justified because the association failed to maintain and repair common elements. *Id.* The failure to fulfill such obligations caused the defendant to suffer property damage. *Id.*; see also *Abbey Park Homeowners Ass'n v. Bowen*, 508 So. 2d 554, 555 (Fla. Dist. Ct. App. 1987) (asserting as a defense for nonpayment of assessments that the HOA failed to maintain the common elements); *Hyatt*, *supra* note 29, at 212-13.

72. *Pooser v. Lovett Square Townhomes Owners' Ass'n*, 702 S.W.2d 226, 230 (Tex. Ct. App. 1985) (noting that the duty to pay assessments is not contingent upon the obligation of the HOA to maintain common areas); see also *Epps*, 1997 WL 817875, at \*2 (granting summary judgment in favor of the Council and finding that the "obligation to pay assessments is unconditional and that Epps had no authority to suspend payment of the assessments because of any alleged breaches of a duty to repair or maintain"); *Abbey Park Homeowners Ass'n*, 508 So. 2d at 555 (stating that "the affirmative defense of failure to maintain the common elements is inadequate as a matter of law"); *Newport W. Condo. Ass'n v. Veniar*, 350 N.W.2d 818, 822 (Mich. Ct. App. 1984) (determining that owners are not entitled to withhold part of their assessments merely because they believed association was improperly managed); *Agassiz W. Condo. Ass'n v. Solum*, 527 N.W.2d 244, 247 (N.D. 1995) (finding that a unit owner is not authorized to withhold assessments for common charges for any reason); *Rivers Edge Condo. Ass'n*, 568 A.2d at 263 (holding that unit owners cannot withhold assessments where they believe that their association is not performing its obligations properly); *Kuperman*, *supra* note 51, at 259, 261.

*Cupps*, the Nisqually Pines Community Club, a nonprofit HOA, sued *Cupps* to foreclose its lien for unpaid assessments.<sup>73</sup> *Cupps* countersued claiming that the HOA had violated its bylaws by: allowing a nonmember to serve on the board of directors; engaging in extortion, embezzlement, fraud by deceit, and harassment; and allowing nonmembers to trespass.<sup>74</sup> The appellate court upheld the trial court's finding that "[i]t is not a defense to a lien foreclosure action brought by a homeowners' association that the association, either through its general membership or board of directors, has taken action in unrelated matters that the defendant disagrees with."<sup>75</sup> Such complaints can only be resolved by an independent claim against the association.<sup>76</sup>

Assessments are the sole source of income covering association expenses; therefore, nonpayment of assessments can adversely affect the purpose of an HOA.<sup>77</sup> The budget of an HOA is based on the assumption that each homeowner will pay his or her share of the association's common expenses through assessments.<sup>78</sup> If homeowners do not pay their assessments, HOAs would have problems planning, budgeting and meeting expenses.<sup>79</sup> Additionally, HOAs would lose the funds necessary to perform their agreed upon services.<sup>80</sup> Such negligence will also defer the cost onto the other residents, causing an immediate increase in assessments for other owners. Furthermore, if one homeowner escapes his assessment obligations, then other owners would not have the incentive necessary to pay their own assessments.<sup>81</sup> It is possible that nonpayment could cause the HOA's cash flow to become unstable and unpredictable, which would "defeat the very reasons for the creation of a community having mutual covenants, restrictions, and obligations."<sup>82</sup>

#### D. Assessment Collection Methods

To ensure the stability of payment, HOAs implement various collection methods. Collecting assessments is vital to maintaining a

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73. *Nisqually Pines Cmty Club v. Cupps*, No. 24114-5-II, 2000 Wash. App. LEXIS 1788, at \*1 (Ct. App. Sept. 15, 2000).

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

75. *Id.* at \*6 (quoting the trial court's opinion).

76. See *Rivers Edge Condo. Ass'n*, 568 A.2d at 263 (noting that if a unit owner believes that an HOA has been negligent or breached a contractual obligation, the unit owner must institute a separate legal action against the association); see also Kuperman, *supra* note 51, at 261.

77. Kuperman, *supra* note 51, at 259.

78. *Id.* at 262.

79. *Id.* at 259.

80. *Id.* at 262.

81. *Id.*

82. *Id.*

smoothly run HOA. Assessments are not collectable until they become due and payable.<sup>83</sup> The governing documents establish a payment schedule that sets forth when assessments become due.<sup>84</sup> These due dates are “an essential link in the chain of evidence necessary to prove the assessment obligation.”<sup>85</sup>

HOA rules must be enforced “uniformly, promptly and firmly” by the association.<sup>86</sup> If rules are not so enforced, “[o]ther homeowners may violate [them] and eventually you have a general disregard of the rules.”<sup>87</sup> Although it is an independent business decision as to how aggressive the collection of past due assessments should be pursued, an HOA *must* undertake to collect assessments from unit owners.<sup>88</sup> Courts have generally applied the business judgment rule in upholding the good faith exercise of the authority of HOAs.<sup>89</sup> The use of the business judgment rule in the context of HOAs derives from corporate law. In the corporate context, if the board of directors of a corporation can show that it acted in good faith, absent a clear case of fraud, oppression, arbitrary action, or breach of trust, the board’s decision will be upheld by a court and shielded by the business judgment rule.<sup>90</sup> The same application of the business judgment rule applies in reviewing decisions made by HOA boards.

In applying the business judgment rule, a court will not interfere with the internal practices of an HOA, nor will the court substitute its judgment for that of the HOA so long as their decisions are made

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83. *Id.* at 265. According to some scholars, “[t]he date an assessment is due and payable should not be confused with the date an assessment is defined as being delinquent or the date when a late charge is imposed.” *Id.*

84. *Id.* Dues are typically due the first day of the first month of each payment period. *Id.*

85. *Id.*

86. McKenzie, *supra* note 22, at 131 (quoting Interview with F. Scott Jackson, in *The Buck Stops with the Board*, Common Ground, Nov.-Dec. 1992, at 34).

87. *Id.*

88. Freedman & Alter, *supra* note 12, at 86.

89. See *Schoninger v. Yardam Beach Homeowners Ass’n*, 523 N.Y.S.2d 523, 529 (App. Div. 1987). The court in *Schoninger* held:

[W]here a challenge is made by an individual owner to an action of a condominium board of managers, whether incorporated or not, absent claims of fraud, self-dealing, unconscionability or other misconduct, the court should apply the business-judgment rule and should limit its inquiry to whether the action was authorized and whether it was taken in good faith and in furtherance of the legitimate interests of the condominium.

*Id.*; see also *Quinones v. Bd. of Managers*, 673 N.Y.S.2d 450, 452 (App. Div. 1998) (stating that the business judgment rule limits judicial review of decisions made by boards of managers to whether the board’s “action was authorized and whether it was taken in good faith and in furtherance of the legitimate interests of the condominium” (quoting *Schoninger*, 523 N.Y.S.2d at 529)); Freedman & Alter, *supra* note 12 at 88.

90. See *Kamin v. Am. Express Co.*, 383 N.Y.S.2d 807, 810 (App. Div. 1976).

upon a reasonable basis.<sup>91</sup> Any provision in question will be upheld so long as the board has acted in good faith and to further the interests of the HOA.<sup>92</sup> Conversely, a board's action will not be upheld upon a showing of bad faith, wrongful or negligent conduct by the board, or if the board furthers its own interests at the expense of the HOA.<sup>93</sup>

*Schoninger v. Yordam Beach Homeowners Ass'n* illustrates how courts apply the business judgment rule in upholding an HOA board's good faith exercise of authority. In *Schoninger*, a unit owner brought an action against her association and members of her board of managers seeking an affirmative injunction compelling the association to make necessary repairs.<sup>94</sup> The plaintiff alleged that her association "wholly neglected its duties with regard to the maintenance and preservation of the common properties," that there were "several outstanding violations issued by the local building inspector charging that the condominium's stairways were in an unsafe condition," and that they had been left in said condition for over one year.<sup>95</sup> In response, the association filed a counterclaim for past due amounts and for legal fees incurred in connection with recovery of those amounts.<sup>96</sup> Upon arriving at a decision, the court found that the record demonstrated that the association had a repair plan developed by a qualified engineering company that had been approved by another qualified engineer and had the work under the plan performed by a qualified contractor.<sup>97</sup> Further, the court determined that the association acted in good faith and with honest judgment.<sup>98</sup> Applying the business judgment rule, the court noted the absence of fraud, self-dealing, unconscionability or other misconduct, and awarded summary judgment to the association and dismissed the plaintiff's claims.<sup>99</sup>

As a result of the protection of the business judgment rule, HOAs may choose from a number of different acceptable methods to collect unpaid dues. As a first step to compel a homeowner to pay assessments, the HOA may opt to write a letter to each delinquent homeowner to notify him or her of the past due assessment.<sup>100</sup> If the homeowner does not respond to the letter, the HOA may suspend the

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91. Hyatt, *supra* note 29, at 61.

92. Michael R. Fierro, Note, *Condominium Association Remedies Against a Recalcitrant Unit Owner*, 73 St. John's L. Rev. 247, 256 (1999) (citations omitted).

93. *Id.*

94. *Schoninger*, 523 N.Y.S.2d at 525.

95. *Id.*

96. *Id.* at 526.

97. *Id.* at 529.

98. *See id.*

99. *Id.*

100. Natelson, *supra* note 15, at 246.

right of the homeowner to vote at association meetings.<sup>101</sup> When the suspension of voting rights proves to be ineffective, the HOA may then suspend the homeowner's privileges or services so long as such a remedy is provided for in the governing documents or by statute.<sup>102</sup>

Association covenants often provide for late charges for delinquent assessments. These charges "arise only in connection with and are conditioned upon the failure to timely pay assessments."<sup>103</sup> The most common late fees are: a one time charge for failure to pay an assessment, and interest, which accrues on delinquent assessments at a specified rate.<sup>104</sup> Some jurisdictions have found such charges to be impermissible penalties, but overall the validity of a late charge is determined on a case by case basis.<sup>105</sup> Courts may look to two factors to determine whether the charge is a penalty. First, courts should look to the "anticipated or actual loss caused by the breach."<sup>106</sup> The second factor is the "difficulty of proof of loss."<sup>107</sup> Any late charge that the court finds to be a penalty will be unenforceable, as it goes against public policy.<sup>108</sup>

Other covenants include acceleration clauses, which provide that upon default the board may immediately declare all remaining portions of the annual assessment due and payable.<sup>109</sup> However, only HOAs with long-term assessments payable in installments can make use of this remedy because HOAs that have assessments that accrue

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101. Fierro, *supra* note 92, at 261-62. This remedy may be less effective than others because homeowners who are not concerned with paying their assessments may be indifferent about their voting rights. *Id.* at 262.

102. *Id.* at 262-63. Individuals often join HOAs for the benefits provided to all unit owners at a more cost effective group rate in comparison to having those same benefits individually. *Id.* Thus, this remedy is more effective than the suspension of voting rights not only because the unit owner may care more about these services than voting rights, but also because it is arguably likely to be upheld in court. *Id.* John Fierro notes that "[i]f a unit owner is unwilling to abide by the rules of the community, it makes sense that a prohibition be imposed restricting participation in the services offered to the community until compliance with the rules is achieved. *Id.* at 263.

103. Kuperman, *supra* note 51, at 266.

104. *Id.*

105. Unit Owners Ass'n of Buildamerica-1 v. Gillman, 292 S.E.2d 378, 383 (Va. 1982) (finding no authorization of an association to "impose penalties . . . for violation of bylaws and regulations by unit owners"). In response to *Buildamerica-1*, the Virginia legislature enacted a statute authorizing fines. Fierro, *supra* note 92, at 264 n.83; see also Walker v. Briarwood Condo. Ass'n, 644 A.2d 634, 637 (N.J. Super. Ct. App. Div. 1994) (determining that failure to abide by rules and regulations does not give an association power to administer fines or impose liens through its rules and regulations without resorting to judicial process).

106. Restatement (Second) of Contracts, § 356 cmt. b (1981).

107. *Id.*

108. Fierro, *supra* note 92, at 264.

109. Kuperman, *supra* note 51, at 267; see also Lakewood Patio Homes Ass'n v. Spitzfaden, 410 So. 2d 281, 281 (La. Ct. App. 1982) (finding an HOA resolution accelerating a recalcitrant owner's balance of a year's monthly assessments effective).

monthly have nothing to accelerate.<sup>110</sup>

Additionally, assessments are the personal obligation of the owner. HOAs may collect assessments following any manner provided under state law for collection of any other personal obligation.<sup>111</sup> These personal obligation remedies generally include a lawsuit, judgment, and post-judgment collection.<sup>112</sup>

Most association covenants allow an HOA to institute a lien against the home of a delinquent payor.<sup>113</sup> State statutes and HOA covenants determine the steps necessary to implement such a lien.<sup>114</sup> For example, in California, a lien will be instituted for the amount of the assessment, any costs of collection, late charges, and interest accrued when the association records: (1) a notice of delinquent assessment, stating the amount of the assessment monies owed; (2) a legal description of the owner's interest in the HOA against which the assessment and other sums are levied; (3) the name of the owner's interest in the HOA against which the lien is imposed; and, (4) in order for the lien to be enforced by nonjudicial foreclosure, the name and address of the trustee authorized by the HOA to enforce the lien by sale.<sup>115</sup> These statutes and covenants also determine the priority of the HOA's lien claim as compared to the claims of other creditors of the homeowner.<sup>116</sup> An HOA's assessment rights may be strengthened

110. Natelson, *supra* note 15, at 252-53.

111. Kuperman, *supra* note 51, at 267. State laws for collection generally require, "a lawsuit, judgment, and postjudgment collection remedies such as levying and executing on the judgment, including garnishment of bank accounts, wages, or rent payments from a tenant to an investor (nonresident) owner, or levying and executing on other real or personal property of the owner." *Id.*

112. Kuperman, *supra* note 51, at 267

113. *Id.* at 268.

114. *Id.* at 268-69.

115. Cal. Civ. Code § 1367(b) (West 2003); *see also* N.C. Gen. Stat. § 47F-3-116 (a) (2003), stating in pertinent part, "[a]ny assessment levied against a lot remaining unpaid for a period of 30 days or longer shall constitute a lien on that lot" when a claim of said lien is filed with the clerk of the superior court of the county where the lot is located; N.Y. Real Prop. Law § 339-z (McKinney's 1989) (setting forth that "[t]he board of managers, on behalf of the unit owners, shall have a lien on each unit for the unpaid common charges thereof, together with interest") In New York, such a lien is effective:

[F]rom and after the filing in the office of the recording officer in which the declaration is filed a verified notice of lien stating the name (if any) and address of the property, the liber and page of record of the declaration, the name of the record owner of the unit, the unit designation, the amount and purpose for which due, and the date when due; and shall continue in effect until all sums secured thereby, with the interest thereon, shall have been fully paid or until expiration six years from the date of filing, whichever occurs sooner.

*Id.* § 339-aa.

116. Kuperman, *supra* note 51, at 268-69. In California, a lien for assessments is prior to all "other liens recorded subsequent to the notice of assessment, except that the declaration may provide for the subordination thereof to any other liens and

by “providing that a successor owner may be personally obligated . . . [to] the original owner for unpaid assessments.”<sup>117</sup>

### E. Foreclosure

State statutes also permit foreclosure as an extreme remedy against a delinquent payor for the nonpayment of dues.<sup>118</sup> In order to foreclose, an HOA must comply with all of the requirements and procedures set forth in both individual state statutes and HOA covenants.<sup>119</sup> For example, in California, a foreclosure proceeding may occur only “after the expiration of 30 days following the recording of a lien.”<sup>120</sup> In New York, a lien for assessments may be foreclosed upon “by suit authorized by and brought in the name of the board of managers, acting on behalf of the unit owners, in like manner as a mortgage of real property.”<sup>121</sup>

encumbrances.” Cal. Civ. Code § 1367(d).

Moreover, in Colorado, liens for assessments are prior to all other liens and encumbrances on a unit except:

(I) Liens and encumbrances recorded before the recordation of the declaration and, in a cooperative, liens and encumbrances which the association creates, assumes, or takes subject to; (II) A security interest on the unit which has priority over all other security interests on the unit and which was recorded before the date on which the assessment sought to be enforced became delinquent, or, in a cooperative, a security interest encumbering only the unit owner’s interest which has priority over all other security interests on the unit and which was perfected before the date on which the assessment sought to be enforced became delinquent; and (III) Liens for real estate taxes and other governmental assessments or charges against the unit or cooperative.

Colo. Rev. Stat. § 38-33.3-316 (2)(a)(I)-(III) (2003).

Additionally, a lien for assessments in North Carolina “is prior to all liens and encumbrances on a lot except (i) liens and encumbrances (specifically including, but not limited to, a mortgage or deed of trust on the lot) recorded before the docketing of the claim of lien in the office of the clerk of superior court, and (ii) liens for real estate taxes and other governmental assessments and charges against the lot.” N.C. Gen. Stat. § 47F-3-116 (b) (2003).

In New York, liens for assessments are:

[P]rior to all other liens except only (i) liens for taxes on the unit in favor of any assessing unit, school district, special district, county or other taxing unit, (ii) all sums unpaid on a first mortgage of record, and (iii) all sums unpaid on a subordinate mortgage of record held by the New York job development authority, the New York state urban development corporation, the New York City housing development corporation, or in a city having a population of one million or more, the department of housing, preservation and development.

N.Y. Real Prop. Law § 339-z (McKinney’s 1989).

117. Kuperman, *supra* note 51, at 268–69 (citing D.C. Code Ann. § 45–1853(h); Ga. Code Ann. § 44-3-80(e)).

118. *Id.* at 270.

119. *Id.*

120. Cal. Civ. Code § 1367.1(g).

121. N.Y. Real Prop. Law § 339-aa.



Additionally, in North Carolina, an association may foreclose the claim of a lien for assessments in the same manner as a mortgage on real estate.<sup>122</sup> The association seeking to exercise such power “shall file with the clerk of court a notice of hearing in accordance with the terms of this section. After the notice of hearing is filed, the notice of hearing shall be served upon each party entitled to notice under this section.”<sup>123</sup> Such notice must be served no less than ten days prior to the date of the foreclosure proceeding.<sup>124</sup> The hearing is held before “the clerk of court in the county where the land, or any portion thereof, is situated.”<sup>125</sup> If the foreclosure proceeding is legally challenged, the association’s procedures will be subject to scrutiny.<sup>126</sup>

Before resorting to foreclosure proceedings, alternate dispute resolution (“ADR”) methods may be used to solve delinquent assessment problems. States have taken a multitude of approaches in implementing ADR provisions in their HOA statutes. For example, the Florida Condominium Act requires “nonbinding arbitration in such disputes before either party can file suit.”<sup>127</sup> In Montgomery County, Maryland, where an estimated one-third of the population lives in HOA communities, there is an ADR system within the county’s Common Interest Ownership Commission.<sup>128</sup> Moreover, in Hawaii, an ADR program was established involving a nonprofit Neighborhood Justice Center.<sup>129</sup>

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122. N.C. Gen. Stat. § 47F-3-116(a).

123. *Id.* § 45-21.16(a).

124. *Id.*

125. *Id.* § 45-21.16(d).

126. Kuperman, *supra* note 51, at 270.

127. *See* McKenzie, *supra* note 22, at 132; *see also* Fla. Stat. Ann. § 718.1255(4) (West 2004). The Florida legislature finds that HOA community members are “frequently at a disadvantage when litigating against an association” because associations are “often more able to bear the costs and expenses of litigation than the unit owner who must rely on his or her own financial resources to satisfy the costs of litigation against the association.” *Id.* § 718.1255 (3)(a). The legislature also finds that ADR methods help relieve the problem of congested court dockets and offer “a more efficient, cost-effective option to court litigation.” *Id.* § 718.1255(3)(b).

128. *See* McKenzie, *supra* note 22, at 132; *see also* Mo. Co. Code, Chapter 10B, at [http://www.amlegal.com/mcmd\\_nxt/gateway.dll?f=templates&fn=default.htm&vid=al p:montgomerycounty\\_md](http://www.amlegal.com/mcmd_nxt/gateway.dll?f=templates&fn=default.htm&vid=al p:montgomerycounty_md) (last visited Feb. 27, 2004). In January of 1991, the Commission on Common Ownership Communities was established in Montgomery County, Maryland. Montgomery County Maryland Commission on Common Ownership Communities, [http://www.montgomerycountymd.gov/mcgtmpl.asp?url=/content/dhca/consumer/ccoc/general\\_information.asp](http://www.montgomerycountymd.gov/mcgtmpl.asp?url=/content/dhca/consumer/ccoc/general_information.asp) (last visited Feb. 27, 2004). The Commission’s purpose is to protect HOA residents from the unequal bargaining power between HOA boards and residents. *Id.* § 10-B1. To serve this purpose, the Commission finds ways to “reduce the number and divisiveness of disputes, and encourage informal resolution of disputes.” *Id.* § 10B-1(c). The Commission also “operate[s] a dispute resolution process to furnish mediation and administrative hearings.” *Id.* § 10B-5(i).

129. *See* McKenzie, *supra* note 22, at 132; *see also* Haw. Rev. Stat. § 514A-121 (2003). This law makes the use of ADR methods mandatory for certain types of

Arbitration and mediation are two effective ADR methods. Arbitration is a form of adjudication in which a neutral third-party decision maker renders a binding decision.<sup>130</sup> An arbitrator's decision may be confirmed or vacated by a court;<sup>131</sup> however, the standards for vacating awards are extremely narrow.<sup>132</sup>

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HOA disputes in Hawaii. *New Law Requires Condo Owners and Boards to Mediate Certain Disputes*, Haw. Condo. Bull. (Condo. Educ. Fund, Haw.), Sept. 2001, at 1, at <http://www.hawaii.gov/hirec/publications/cb33.pdf>. The law was established upon a finding by the Hawaii legislature that "mediation is an effective method of resolving disputes, and is less costly than settling disputes through litigation." *Id.* at 6.

130. Black's Law Dictionary 100 (7th ed. 1999); see also Scott E. Mollen, *Alternate Dispute Resolution of Condominium and Cooperative Conflicts*, 73 St. John's L. Rev. 75, 91-92 (1999).

131. Mollen, *supra* note 130, at 91-92. For example, the Federal Arbitration Act sets forth, "[T]he United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration." Federal Arbitration Act, 9 U.S.C. § 10(a) (2000). Moreover, the Uniform Arbitration Act also allows arbitration awards to be vacated in limited circumstances upon application of the parties involved. Unif. Arbitration Act, § 23(a), 7 U.L.A. 43 (2003). Furthermore, the New York Civil Practice Law and Rules set forth that "[a]n application to vacate or modify an award may be made by a party within ninety days after is [sic] delivery to him." N.Y. C.P.L.R. 7511(a) (McKinney 2004).

132. Mollen, *supra* note 130, at 92. For example, in New York, an arbitration award will be vacated if the court finds that the rights of the applying party were prejudiced by *only*:

(i) corruption, fraud or misconduct in procuring the award; or (ii) partiality of an arbitrator appointed as a neutral, except where the award was by confession; or (iii) an arbitrator, or agency or person making the award exceeded his power or so imperfectly executed it that a final and definite award upon the subject matter submitted was not made; or (iv) failure to follow the procedure of this article, unless the party applying to vacate the award continued with the arbitration with notice of the defect and without objection.

N.Y. C.P.L.R. 7511(b)(1)(i)-(iv).

Additionally, the Federal Arbitration Act *only* allows for an award to be vacated:

1. Where the award was procured by corruption, fraud, or undue means. 2. Where there was evident partiality or corruption in the arbitrators, or either of them. 3. Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced. 4. Where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made. 5. Where an award is vacated and the time within which the agreement required the award to be made has not expired the court may, in its discretion, direct a rehearing by the arbitrators.

Federal Arbitration Act, 9 U.S.C. § 10(a)(1)-(5).

Similarly, the Uniform Arbitration Act allows an award to be vacated *only* when:

(1) the award was procured by corruption, fraud, or other undue means; (2) there was: (A) evident partiality by an arbitrator appointed as a neutral arbitrator; (B) corruption by an arbitrator; or (C) misconduct by an

In an effort to further promote judicial efficiency, courts have increasingly turned to court annexed arbitration programs such as mediation.<sup>133</sup> Mediation is a non-binding ADR method by which a neutral third-party mediator tries to help parties reach an agreeable solution.<sup>134</sup> It is worth the effort to try mediation as a first step to keep disputes between neighbors and allow them to arrive at their own solution.<sup>135</sup> Mediation is often successful because it allows both parties to "have their say."<sup>136</sup> Often both parties have complaints and once aired, a compromise between them is possible.<sup>137</sup> Mediators help parties "respond to accusations and clarify misunderstandings."<sup>138</sup> Mediators also help parties to "explore all possible options for resolving the dispute."<sup>139</sup> The nature of the process "minimizes hostility and animosity and is especially helpful to parties who want to continue their relationship with their adversary."<sup>140</sup>

In his treatise, Robert Natelson proposes a schedule of procedures to collect dues. The schedule assumes that the assessment is due on the first of the month and delinquent after the fifteenth:<sup>141</sup>

Day 1 Assessment due

Day 15 Assessment delinquent

Day 20 Manager sends friendly reminder to unit owner

Day 27 Delinquent account sent to legal counsel

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arbitrator prejudicing the rights of a party to the arbitration proceeding; (3) an arbitrator refused to postpone the hearing upon showing of sufficient cause for postponement, refused to consider evidence material to the controversy, or otherwise conducted the hearing contrary to Section 15, so as to prejudice substantially the rights of a party to the arbitration proceeding; (4) an arbitrator exceeded the arbitrator's powers; (5) there was no agreement to arbitrate, unless the person participated in the arbitration proceeding without raising the objection under Section 15(c) not later than the beginning of the arbitration hearing; or (6) the arbitration was conducted without proper notice of the initiation of an arbitration as required in Section 9 so as to prejudice substantially the rights of a party to the arbitration proceeding.

Unif. Arbitration Act, § 23(a)(1)-(6), 7 U.L.A. 43.

133. Mollen, *supra* note 130, at 92.

134. Black's Law Dictionary 996 (7th ed. 1999); *see also* Mollen, *supra* note 130, at 92.

135. Cora Jordan, *Neighbor Law: Fences, Trees, Boundaries & Noise* 1/12 (1991).

136. *Id.* at 1/12-1/13. For example, "the American Arbitration Association has reported a success rate of 75%-90% in the mediations which it conducts." Mollen, *supra* note 130, at 96.

137. Jordan, *supra* note 135, at 1/12-1/13

138. Mollen, *supra* note 130, at 95-96.

139. *Id.*

140. *Id.* at 96.

141. Natelson, *supra* note 15, at 246.

- Day 30 Demand letter from legal counsel, with threat to file notice of lien
- Day 40 Notice of lien recorded, and owner so informed
- Day 60 Foreclosure and personal suit commenced<sup>142</sup>

Assessments must be collected promptly in order to maintain the integrity of the HOA. The above timetable provides a schedule so that an HOA may take action without delay, yet allows room for homeowners to remedy their delinquencies. However, if homeowners take no action, an HOA may be forced to resort to foreclosure proceedings.<sup>143</sup> This Note now discusses the debate over the foreclosure powers of HOAs.

## II. THE FIGHT FOR FORECLOSURE

HOAs have been referred to as “private government[s] delivering public services.”<sup>144</sup> HOAs provide many of the same services that municipal governments provide, including utility services, road maintenance, street and common area lighting, garbage collection, and security services, in addition to other “municipal” services.<sup>145</sup> HOAs also provide services that municipal governments cannot.<sup>146</sup> For example, HOAs “give predictability to neighborhoods, and they are set up to preserve neighborhoods and prevent decline.”<sup>147</sup> In order to provide these services, HOAs must levy and collect assessments to cover their expenses.<sup>148</sup>

To maintain their effectiveness, associations around the country have begun to use their foreclosure powers to force the sales of homes if members do not pay their assessments.<sup>149</sup> The exercise of such power has created tensions between residents and HOAs.<sup>150</sup> HOAs feel that their foreclosure powers are necessary to serve their purposes;<sup>151</sup> homeowners, however, feel that HOAs are asserting powers that are far too broad and should be restricted by legislation.<sup>152</sup> Part II explains both sides of the fight for foreclosure.<sup>153</sup> Additionally, it details the legislative attempts to both protect and thwart the

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142. *Id.*

143. *See supra* notes 118-26 and accompanying text.

144. Hyatt, *supra* note 29, at 33 (internal quotation omitted).

145. *Id.* at 34.

146. Howell, *supra* note 26.

147. *Id.*

148. *See supra* notes 53-143 and accompanying text.

149. *See, e.g.,* Howell, *supra* note 26; Rich, *supra* note 24.

150. Rich, *supra* note 24.

151. *See, e.g.,* Howell, *supra* note 26; Rich, *supra* note 24.

152. *See, e.g.,* Howell, *supra* note 26; Rich, *supra* note 24.

153. *See infra* notes 155-74 and accompanying text.

foreclosure powers of HOAs in Arizona, California, and Texas.<sup>154</sup>

### A. Arguments in Favor of Foreclosure

Proponents of the foreclosure powers of HOAs assert that there is no need for limitation; instead, residents should be educated about their rights and responsibilities.<sup>155</sup> These advocates point out that in a 1999 Gallup poll commissioned by the Community Associations Institute, seventy-five percent of respondents said they were “‘very or extremely satisfied’ with their associations.”<sup>156</sup>

HOA officials argue that actual foreclosure is extremely rare.<sup>157</sup> Further, without this foreclosure tool it would be more likely that owners would not pay assessments, resulting in a devastating blow to the HOA. The chain of events has been described as follows:

[T]he association’s cash flow would dwindle to a trickle, the maintenance and operations of the property would cease or decline dramatically, and the protection and valuation of all property in the community would decline. This would defeat the very reasons for the creation of a community having mutual covenants, restrictions, and obligations, which is the protection and preservation of the community and the ultimate increased value of the individual homes in that community.<sup>158</sup>

If more than a few delinquencies occur, an “association will lose credibility, more homeowners will become delinquent in assessment payments, and the association’s cash flow will become at risk or impaired.”<sup>159</sup>

Additionally, it is likely that the use of the foreclosure remedy will be self-limiting because “up-front expense and lengthy delays in finally achieving the objective will likely deter the condominium association” from turning to foreclosure.<sup>160</sup> Such a remedy is reserved only for those extreme instances where the board of directors is “bereft of any other meaningful recourse and the general community sentiment will support the effort’s inevitable expense” from proceeding with foreclosure.<sup>161</sup>

154. See *infra* notes 175-235 and accompanying text.

155. Sterrett, *supra* note 22.

156. Rich, *supra* note 24.

157. *Id.* Burton Cohen, a lawyer from Scottsdale, Arizona, who has handled approximately 100 HOA foreclosure cases, explained that the vast majority of homeowners keep their homes despite the initiation of foreclosure proceedings. *Id.* He stated, “[t]he whole goal here is to get the homeowner to pay his or her share of costs, not to take away houses.” *Id.*

158. Kuperman, *supra* note 51, at 262.

159. *Id.* at 272.

160. Symposium, *Involuntary Sale: Banishing an Owner from the Condominium Community*, 31 J. Marshall L. Rev. 299, 442 (1998).

161. *Id.*

Proponents of the foreclosure powers of HOAs can also draw a comparison between defaulting on a mortgage and defaulting on assessments. Every state has some form of foreclosure procedure when a property goes into default on a mortgage.<sup>162</sup> If a mortgagor is unable to maintain payments, the mortgagee must take steps to foreclose on the property in order for the mortgagee to realize value from the mortgage.<sup>163</sup> It has been argued that the “availability of foreclosure is what makes the secured debt process work.”<sup>164</sup> Without foreclosure procedures, collection upon default for mortgagees would be “cumbersome, costly, and time consuming.”<sup>165</sup> There are also economic advantages to providing a system of foreclosure. For example, “foreclosure allows a mortgagee to swiftly, efficiently, and cheaply recover or sell the property.”<sup>166</sup>

These same principles should apply when a homeowner defaults on his HOA assessments. In both default situations, there is an existing agreement to pay for services.<sup>167</sup> Both delinquent homeowners and mortgagors have agreed to perform a duty, fully aware of the remedies for failure to pay. In both situations, the ownership interest is their collateral. Therefore, it should follow that foreclosure is also

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162. David Schmudde, *Mortgages and Liens 1* (2004) (noting that while they may differ in substance, “[e]very state has some form of foreclosure procedure.”). For example, in North Carolina, the customary method of foreclosure is non-judicial. *Id.* at app. 23. The party seeking to foreclose the claim of a mortgage on real estate “shall file with the clerk of court a notice of hearing” to be “served upon each party entitled to notice.” N.C. Gen. Stat. § 45-21.16 (a) (2003). Notice must be served no less than ten days prior to the date of the foreclosure proceeding. *Id.* Finally, the hearing will be held before “the clerk of court in the county where the land, or any portion thereof, is situated.” *Id.* In Connecticut, on the other hand, judicial foreclosure is most commonly used. Schmudde, *supra*, at app. 15. Foreclosure actions are “brought in Superior Court where the property is located.” *Id.* The court “fixes conditions on which redemption may be made by determining the amount of the debt and fixing the time” during which the debt must be paid. *Id.* Such judgment can be opened and modified “at the discretion of the court rendering the same, upon the written motion of any person having an interest therein, and for cause shown;” however, “no such judgment shall be opened after the title has become absolute.” Conn. Gen. Stat. Ann. § 49-15 (West 2003). If:

[T]he time . . . for redemption has passed, and the title to the mortgaged premises has become absolute in the mortgagee, or any person claiming under him, he shall, either in person or by his agent or attorney, forthwith make and sign a certificate describing the premises foreclosed, the deed of mortgage on which the foreclosure was had, the book and page where the same was recorded and the time when the mortgage title became absolute.

*Id.* § 49-16. The foreclosure certificate must then be recorded in the town records. *Id.* Upon motion by any party, foreclosure may be by sale instead of strict foreclosure at the discretion of the court. *Id.* § 49-24.

163. Schmudde, *supra* note 162, at 1.

164. *Id.*

165. *Id.*

166. *Id.*

167. See *supra* notes 59-82 and accompanying text.

an appropriate remedy when a homeowner defaults on his assessments.

### B. Arguments Against Foreclosure

Proponents of restricting the foreclosure power point to the same Gallup poll<sup>168</sup> and note that “only 40 percent of those surveyed said they would buy their next home in a community governed by an association.”<sup>169</sup> These proponents find that HOAs have “few checks and balances, and often act in secret.”<sup>170</sup> Critics argue that HOAs are abusing their powers by implementing foreclosure procedures for failure to pay dues.<sup>171</sup>

Although HOA officials claim that the actual foreclosure rarely occurs, those calling for restrictions point out that the *initiation* of foreclosure proceedings is not rare.<sup>172</sup> In 2001, in four counties near San Francisco, HOAs initiated fifteen percent of all foreclosures.<sup>173</sup> Even if the foreclosure ultimately does not go through, simply the threat of foreclosure requires owners to pay legal fees that are much greater than any delinquent assessments.<sup>174</sup> The mere availability of foreclosure proceedings to HOAs is detrimental to homeowners.

### C. Legislative Action

In response to this debate, legislators in Arizona,<sup>175</sup> California,<sup>176</sup> and Texas<sup>177</sup> proposed legislation restricting the powers of HOAs to foreclose upon their delinquent homeowners. Although uniform in their objective to limit the powers, every legislator took his or her own approach to addressing the problem.

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168. See Rich, *supra* note 24.

169. *Id.*

170. *Id.*

171. *Id.* Motoko Rich reports, “[t]he biggest complaint stems from the association boards’ ability to evict residents—in some cases for bad behavior, but more often for not paying dues.” *Id.*

172. *Id.* Court records from the Houston area show more than 15,000 filings between 1985 and 2001 that could have led to foreclosure. Houston Area HOA Foreclosure-Related Filings, at <http://pages.prodigy.net/hoadata/> (last visited Jan. 7, 2004). This data reflects court filings that could have led to foreclosure; it does not list actual foreclosure sales. *Id.*

173. Rich, *supra* note 24. The Sentinel Fair Housing Corporation, a nonprofit group in Oakland, California found this statistic in a 2001 study. *Id.*

174. *Id.* For example, Melissa Colburn, a homeowner in an HOA community, paid almost \$3,000 to her HOA’s lawyers though she only owed \$1,000 to the association. *Id.*

175. See *infra* notes 178-90 and accompanying text.

176. See *infra* notes 191-99 and accompanying text.

177. See *infra* notes 200-35 and accompanying text.

## 1. Arizona

In 1996, the Arizona state legislature passed a law that was amended in 1997 which permits planned communities to enforce their rules by levying fines.<sup>178</sup> The statute also set out guidelines meant “to protect residents and improve the odds that warring parties may be able to work out an amicable solution,”<sup>179</sup> by calling for notice, hearings, and reasonable fines.<sup>180</sup>

In 2003, Representative Eddie Farnsworth proposed House Bill 2307 (“H.B. 2307”), which would prevent people from being evicted from HOA communities. The bill would require associations to go to court to get a successful judgment before placing a lien on a house for unpaid association fees and fines.<sup>181</sup> Additionally, HOAs could only institute foreclosure proceedings for monies associated with assessments.<sup>182</sup> Farnsworth also amended the bill to read “[t]he association’s lien for assessments, . . . may be foreclosed in the same manner as a mortgage on real estate, except that it shall not be foreclosed any sooner than seven years after the recording of the lien.”<sup>183</sup> The Arizona House passed H.B. 2307 in February 2003;<sup>184</sup> however, in April 2003 the bill was defeated in the Arizona Senate by the Senate Government Committee with a vote of 7-2.<sup>185</sup>

In 2004, another crop of HOA reform bills were proposed.<sup>186</sup>

178. Ariz. Rev. Stat. § 33-1803(B) (2003) (“[T]he board of directors may impose reasonable monetary penalties on members for violations of the declaration, bylaws and rules of the association.”).

179. Russ Wiles, *Arizona Law Helps Homeowner Groups*, Ariz. Republic, Aug. 31, 1998, available at LEXIS, News Library, Arizrp File.

180. Ariz. Rev. Stat. § 33-1803(B) (“After notice and an opportunity to be heard, the board of directors may impose reasonable monetary penalties on members.” (emphasis added)).

181. H.B. 2307, 46th Leg., 1st Reg. Sess., § 33-1807(A) (Ariz. 2003) at <http://www.azleg.state.az.us/FormatDocument.asp?inDoc=/legtext/46leg/1r/adopted/h%2E2307%2Dse%2Dfmr%2Edoc%2Ehtm&DocType=A> (“The association has a lien for fees, charges, late charges, other than charges for late payment of assessments, monetary penalties or interest charged . . . after the entry of a judgment in a civil suit for those fees, charges, late charges, monetary penalties, or interest.”); see also, Elvia Diaz, *Home Seizures by Associations Targeted; Legislator is Hoping Measure Will Curb Groups’ Eviction Clout*, Ariz. Republic, Feb. 7, 2003 at 11B, available at LEXIS, News Library, Arizrp File.

182. H.B. 2307, § 33-1807(A) (“The association’s lien for monies other than for assessments, for charges for late payment of those assessments and for reasonable attorney’s fees incurred with respect to those assessments may not be foreclosed . . .”).

183. *Id.*

184. Kevin Pang & Chris Fiscus, *Homeowners Association Bill Defeated; Senate Hearing Attracts Hundreds of Opponents*, Ariz. Republic, Apr. 2, 2003, at 9B, available at LEXIS, News Library, Arizrp File.

185. *Id.*

186. Chris Fiscus, *Legislators Shift Tactic on HOA Reforms*, Ariz. Republic, Feb. 9, 2004, at 1A, available at LEXIS, News Library, Arizrp File.



Representative Chuck Gray, who alone proposed six bills, stated, “[t]he pressure is there. The people are tired of it. . . . It’s come to a head because of some HOAs trampling over homeowners.”<sup>187</sup> Arizona legislators decided to try a different approach with this batch of legislation. Instead of drafting a “massive reform bill that touched on countless aspects of associations,”<sup>188</sup> legislators are now proffering narrowly focused bills that address specific HOA concerns.<sup>189</sup> Homeowner’s rights’ lobbyists feel that 2004 is their year.<sup>190</sup>

## 2. California

In California, the 1985 Davis-Stirling Act governs and sets the guidelines for HOAs.<sup>191</sup> The debate between homeowners and HOAs caused the California Law Revision Commission to review this Act,<sup>192</sup> and in 2002, Assemblymember Christine Kehoe proposed Assembly Bill 2289 (“A.B. 2289”) to help resolve the debate.<sup>193</sup> A.B. 2289 requires an HOA to meet with homeowners upon request to discuss any delinquent assessments and to work out a payment plan before foreclosure.<sup>194</sup> The bill additionally requires adequate notice to the

187. *Id.*

188. *Id.*

189. *Id.*

190. *Id.* Proposed bills include: H.B. 2402, 46th Leg., 2d Reg. Sess., § 33-1256(A) (Ariz. 2004) (requiring HOAs to wait seven years from when a lien is recorded before foreclosing for unpaid fees and that houses be sold for fair market value at auction), at <http://www.azleg.state.az.us/legtext/46leg/2r/bills/hb2402p%2Epdf>; H.B. 2381, 46th Leg., 2d Reg. Sess., § 33-1243(C) (Ariz. 2004) (preventing HOA boards from entering into contracts that benefit them or their relatives), at <http://www.azleg.state.az.us/legtext/46leg/2r/bills/hb2381p%2Epdf>; H.B. 2378, 46th Leg., 2d Reg. Sess., § 33-1804 (Ariz. 2004) (applying state Open Meeting laws to HOAs), at <http://www.azleg.state.az.us/legtext/46leg/2r/bills/hb2378p%2Epdf>. See generally H.B. 2177, 46th Leg., 2d Reg. Sess. (Ariz. 2004) (making it easier to view association records and to speak during HOA meetings), at <http://www.azleg.state.az.us/legtext/46leg/2r/bills/hb2177p%2Epdf>. To track the progress of these HOA bills in the Arizona legislature, see [www.azleg.state.az.us](http://www.azleg.state.az.us).

191. Cal. Civ. Code §§ 1350-1367 (West 2003). The Davis-Stirling Act is “48 pages of civil code setting the guidelines for associations.” Sterrett, *supra* note 22. Under the Act, HOAs in California “have dues ranging from \$40 and \$200 a month, five to seven elected board members and monthly meetings.” *Id.*

192. Sterrett, *supra* note 22. UCLA law professor Susan French, who submitted a report to the Commission stated, “[t]he laws should be clearer and more accessible to homeowners. . . . It would also help if the state provided some dispute resolution between associations and individuals.” *Id.*

193. See, e.g., Merit Property Management, Legislative Update: New California Laws Affect Community Associations, at [http://www.meritpm.com/meritpm/news/display\\_news.cfm?key\\_news=23](http://www.meritpm.com/meritpm/news/display_news.cfm?key_news=23) (last visited Feb. 10, 2004); Miguel Bustillo & Nancy Vogel, *Renewable-Energy Bill Passed by Assembly*, L.A. Times, Aug. 28, 2002, at B7.

194. A.B. 2289, 2001-02 Leg., Reg. Sess., § 1367.1(c)(2) (Cal. 2002) (enacted); Cal. Civ. Code § 1367.1(c)(2). This bill states:

An owner . . . may submit a written request to meet with the board to discuss

homeowner when the HOA records a lien<sup>195</sup> and sets forth the procedures to be used to file said lien.<sup>196</sup> However, the bill only requires a thirty day waiting period after recording the lien before an HOA can foreclose on the unit and does not provide for notice or a hearing before said foreclosure.<sup>197</sup> The bill furthermore sets forth that reasonable attorney's fees are the debt of the homeowner.<sup>198</sup> A.B. 2289 was signed into law by former governor Gray Davis.<sup>199</sup>

### 3. Texas

In 1987, HOA foreclosure power was established by the Texas Supreme Court in the case of *Inwood North Homeowners Ass'n Inc. v. Harris*.<sup>200</sup> In 1998, the Texas Senate Interim Committee on State Affairs "completed a study of the legal powers, duties and structure of

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a payment plan for the debt noticed . . . The board shall meet with the owner in executive session within 45 days of the postmark of the request, if the request is mailed within 15 days of the date of the postmark of the notice, unless there is no regularly scheduled board meeting within that period, in which case the board may designate a committee of one or more members to meet with the owner.

*Id*; see, e.g., Merit Property Management, *supra* note 193; Bustillo & Vogel, *supra* note 193.

195. A.B. 2289, § 1367.1(a) ("At least 30 days prior to recording a lien upon the separate interest of the owner of record to collect a debt that is past due . . . the association shall notify the owner of record in writing by certified mail . . ."); see, e.g., Merit Property Management, *supra* note 193; Bustillo & Vogel, *supra* note 193.

196. A.B. 2289, § 1367.1(d). This bill states in pertinent part:

The amount of the assessment, plus any costs of collection, late charges, and interest assessed in accordance with Section 1366, shall be a lien on the owner's interest in the common interest development from and after the time the association causes to be recorded with the county recorder of the county in which the separate interest is located, a notice of delinquent assessment, which shall state the amount of the assessment and other sums imposed in accordance with Section 1366, a legal description of the owner's interest in the common interest development against which the assessment and other sums are levied, the name of the record owner of the owner's interest in the common interest development against which the lien is imposed.

*Id*; see also Merit Property Management, *supra* note 193; Bustillo & Vogel, *supra* note 193.

197. A.B. 2289, § 1367(e). The statute states in pertinent part: "After the expiration of 30 days following the recording of a lien . . . the lien may be enforced in any manner permitted by law, including sale by the court, sale by the trustee designated in the notice of delinquent assessment . . ." *Id*; see, e.g., Merit Property Management, *supra* note 193; Bustillo & Vogel, *supra* note 193.

198. A.B. 2289, § 1367.1(a) ("[R]easonable attorney's fees, if any. . . shall be a debt of the owner of the separate interest at the time the assessment or other sums are levied.").

199. See, e.g., Merit Property Management, *supra* note 193; Bustillo & Vogel, *supra* note 193.

200. 736 S.W.2d 632 (Tex. App. 1987) (holding that homeowners are subject to liens and not protected against foreclosure for failure to pay assessments).

the thousands” of HOAs in their state.<sup>201</sup> Following this study, Senators John Carona and Rodney Ellis proposed Senate Bill 699 (“S.B. 699”), the Texas Planned Community Act.<sup>202</sup> S.B. 699 is a forty-six page bill of rights and limitations of power for homeowners and HOAs.<sup>203</sup> The bill included provisions that give homeowners the right to request a hearing before the HOA board,<sup>204</sup> the right to redeem the property up to ninety-one days after notice of foreclosure is given,<sup>205</sup> and the right to request alternate dispute resolution methods to settle delinquent fee problems.<sup>206</sup> While the bill passed in the Texas Senate in April of 1999,<sup>207</sup> Carona and Ellis lost their first battle against HOAs when the proposed bill died in the Texas House. However, the war was not over.<sup>208</sup>

Inspired by Wenonah Blevins,<sup>209</sup> Senator John Lindsay (R-Houston) started another legislative battle on behalf of homeowners in 2001 when he proposed Senate Bill 1834 (S.B. 1834).<sup>210</sup> Lindsay’s proposed reforms went beyond the 1999 proposal.<sup>211</sup> S.B. 1834 additionally called for HOAs to reimburse any “property owner for the difference between the sale price and the value determined by the appraisal district” if the HOA authorized a sale of property for a price less than the most recent appraisal value.<sup>212</sup> While this bill passed in the Texas Senate, it was not approved by the Texas House.<sup>213</sup>

Carona and Ellis made another attempt to regulate HOAs with Senate Bill 507 (“S.B. 507”), the Texas Residential Property Owner

201. Mike Snyder, *Some Homeowners’ Groups are ‘Just a Racket’; Advocates and Lawmakers’ Report Urge Reform*, Hous. Chron., Dec. 20, 1998, at 37A.

202. Melissa Prentice, *Homeowner Groups Support Senate Bill*, San Antonio Express-News, Mar. 31, 1999, at 6H, available at LEXIS, News Library, Santex File.

203. *Id.*

204. S.B. 699, 1999 Leg., 76th Reg. Sess., § 207.125(c) (Tex. 1999) (“An owner may request a hearing before the property owners’ association may institute foreclosure proceedings.”), at <http://www.capitol.state.tx.us/tlo/76R/billtext/SB00699H..>

205. S.B. 699, § 207.127(a). The bill stated in pertinent part: “The owner of property in a residential subdivision may redeem the property from any purchaser at a sale foreclosing a property owners’ association’s assessment lien not later than the 90th day after the date the association mails written notice of the sale to the owner.” *Id.*

206. S.B. 699, § 207.125(d) (“An owner or association may use alternate dispute resolution services.”).

207. Julie Mason, *State Senate Moves to Regulate Texas Homeowners Associations*, Hous. Chron., Apr. 10, 1999, at 1A.

208. Julie Mason, *Lawmakers Unable to Restrain Homeowners Associations*, Hous. Chron., May 28, 1999, at 37A.

209. See *supra* notes 1-6 and accompanying text.

210. Berger, *supra* note 7.

211. *Id.*

212. S.B. 1834, 2001 Leg., 77th Reg. Sess., § 51.008(c) (Tex. 2001), at <http://www.capitol.state.tx.us/tlo/77R/billtext/SB01834I.>

213. See Howell, *supra* note 26.

Protections Act.<sup>214</sup> Like its predecessor, S.B. 507 was approved by the Senate.<sup>215</sup> S.B. 507 passed in the House as well.<sup>216</sup> The bill forbade foreclosure for debts accrued solely because of fines imposed by the HOA or for attorney's fees incurred by the HOA in association with such fines.<sup>217</sup> Additionally, the bill allowed a homeowner to redeem the foreclosed—upon property no later than the “180th day after the date the association mails written notice of the sale.”<sup>218</sup> The bill's notice and hearing provisions do not apply to foreclosure proceedings.<sup>219</sup> S.B. 507 placed moderate restrictions on HOAs, but did not limit their power to foreclose upon homes.<sup>220</sup>

In 2002, Senator Lindsay and Texas homeowners were still unhappy,<sup>221</sup> because S.B. 507 passed without certain provisions that were crucial for the protection of homeowners.<sup>222</sup> Lindsay planned to file a bill in the legislature that would make “fairly significant changes” to S.B. 507,<sup>223</sup> and he and Ellis “vowed to strip HOAs of

214. S.B. 507, 2001 Leg., 77th Reg. Sess., § 209.009 (Tex. 2001) (enacted); Tex. Prop. Code § 209.009 (Vernon, 1984 & Supp. 2004).

215. Editorial, *Bridle Civic Associations' Power to Abuse Homeowners*, Hous. Chron., May 5, 2001, at 36A [hereinafter *Power to Abuse*].

216. Mike Snyder, *Panel Hears Debate on Home Foreclosure*, Hous. Chron., Jan. 17, 2002, at 23A. Lindsay staged the filibuster because he “contended [the bill] was too weak to be meaningful.” *Id.*

217. S.B. 507, § 209.009. The bill proposed that “[a] property owners' association may not foreclose a property owners' association's assessment lien if the debt securing the lien consists solely of: (1) fines assessed by the association; or (2) attorney's fees incurred by the association solely associated with fines assessed by the association.” *Id.*

218. *Id.* § 209.011(b).

219. *Id.* § 209.007(d). The statute reads: “The notice and hearing provisions . . . do not apply if the association files a suit seeking a temporary restraining order or temporary injunctive relief or files a suit that includes *foreclosure* as a cause of action.” *Id.* (emphasis added).

220. *Power to Abuse*, *supra* note 215.

221. Chuck McCollough, *Mandatory HOAs Avoid Legal Bullet; Legislators Do Not Pass a Law Restricting Judicial Powers of Organizations*, San Antonio Express-News, June 11, 2003 at 1H, available at LEXIS, News Library, Santex File.

222. Lindsay still wanted to “eliminate nonjudicial foreclosures (by which HOAs can foreclose without going through a court) and make it more of a level playing field by letting homeowners sue to recover attorney fees when they win a case against an HOA.” Chuck McCollough, *Bill to Change HOA Laws Planned*, San Antonio Express-News, Jan. 8, 2003, at 1H, available at LEXIS, News Library, Santex File.

223. McCollough, *supra* note 222. These changes included:

Eliminat[ing] contingency fees for attorneys suing delinquent HOA members. Requir[ing] HOAs to handle late or delinquent payment billing instead of their attorneys. Giv[ing] a homeowner up to two years to get property back after a foreclosure sale. Mak[ing] HOAs wait at least two years before hiring an attorney to collect delinquent dues. Prohibit[ing] HOAs from barring a homeowner-member from voting in an HOA election unless the homeowner is more than 60 days in arrears on dues payment. Requiring HOAs to offer payment plans with interest to delinquent homeowners in certain cases. Chang[ing] legal wording to make S.B. 507's

their right to foreclose on members who don't pay association dues."<sup>224</sup> At a workshop sponsored by the Neighborhood Resource Center in Houston on new HOA legislation, Susan Rice, a Houston attorney who represents HOAs, said, "[t]he end game for HOA critics is to take away HOA foreclosure power completely."<sup>225</sup> Lindsay still hoped to enact regulations that would prevent associations from foreclosing on properties.<sup>226</sup>

Lindsay therefore proposed Senate Bill 949 ("S.B. 949"). S.B. 949 would make it more difficult and expensive for associations to foreclose on the homes of members of HOAs who fall behind in their assessments.<sup>227</sup> The bill limited the power of foreclosure to matters involving only assessments<sup>228</sup> and only after an HOA obtains a judgment in a court of law.<sup>229</sup> In addition, the board would have to take a vote to approve foreclosure action in an open meeting.<sup>230</sup> The bill would also create a right of redemption of the property for up to two years following foreclosure, as opposed to the 180 days in S.B. 507.<sup>231</sup> In response to the bill, Senator Carona said, "Senate Bill 949

language applicable to all mandatory HOAs in the state [because] [s]ome language in the current law pertains only to mandatory HOAs in Harris County.

*Id.*

224. *Id.*

225. Chuck McCollough, *S.A. Conference Emphasizes New State HOA Law; Foreclosure Ranks as Major Subject*, San Antonio Express-News, Apr. 17, 2002, at 6H, available at LEXIS, News Library, Santex File.

226. Paris Achen, *An Issue of Power; Homeowners Groups Leery of Legislation*, Hous. Chron., This Week, Zone 6, June 27, 2002, at 1.

227. See Thom Marshall, *Bill Aims to Tame Foreclosure Beast*, Hous. Chron., Mar. 7, 2003, at A33.

228. S.B. 949, 2003 Leg., 78th Reg. Sess., § 209.009 (Tex. 2003), at <http://www.capitol.state.tx.us/tlo/78R/billtext/SB00949I.HTM>. S.B. 949 proposed that:

A property owners' association may not foreclose a property owners' association's assessment lien unless: (1) the debt for which the lien secures payment includes a mandatory regular or special assessment that is at least two years overdue; and (2) the board approves the foreclosure by a majority vote taken in a meeting open to the public. (b) A debt described by Subsection (a)(1) may include: (1) any accrued interest on assessments; (2) collection costs, attorney's fees, expenses, and court costs associated with collection of the debt; and (3) any fees or fines allowed by the dedicatory instruments.

*Id.*

229. *Id.* § 209.0091 ("A property owners' association may not foreclose a property owners' association's assessment lien unless the association first obtains a court judgment foreclosing the lien and providing for issuance of an order of sale.").

230. *Id.* § 209.009(a)(2) (stating that a POA may not foreclose an assessment unless "the board approves the foreclosure by a majority vote taken in a meeting open to the public.").

231. *Id.* § 209.011(b) ("The owner of property in a residential subdivision may redeem the property from any purchaser at a sale foreclosing a property owners' association's assessment lien not later than the second anniversary of the date the association mails written notice of the sale . . ."); see *supra* note 218 and

goes much too far. It literally would devastate homeowners associations throughout the state. . . . Senate Bill 507 . . . provide[s] greater consumer protection without doing harm to the effective operation of homeowners associations."<sup>232</sup> S.B. 949 was slated for a Senate vote twice, but Lindsay pulled it when he did not have the requisite votes to pass it.<sup>233</sup>

It is expected that Lindsay and anti-HOA groups will again try to restrict the legal powers of HOAs in 2005 when the Legislative session begins.<sup>234</sup> Lindsay said he would continue to offer modified versions of the bill until something was done to amend the situation.<sup>235</sup>

#### D. Analysis: The Secrets to Legislative Success

While legislators in Arizona, California and Texas have attempted to craft legislation to regulate homeowners associations, only two of the many proposals passed in their respective legislatures.<sup>236</sup> This section looks at the differences between the statutes and examine what factors contributed to the success of the two bills.

In Arizona, H.B. 2307, while unsuccessful, proposed to amend Arizona's Civil Code to protect homeowners from an HOA foreclosure.<sup>237</sup> H.B. 2307 provided for notice to the homeowner, setting forth the amount owed in delinquent assessments.<sup>238</sup> The bill clarified that an HOA could only place an automatic lien on a home for the owner's failure to pay assessments.<sup>239</sup> Additionally, H.B. 2307 allowed for HOA foreclosure in the same manner as a mortgage foreclosure, but no sooner than seven years after a lien is filed.<sup>240</sup>

accompanying text.

232. Richard Abshire, *Homeowners Groups Scrutinize Legislation: 3 Bills Would Reduce Associations' Authority Too Much, Critics Say*, Dallas Morning News, Apr. 13, 2003, at 1R.

233. McCollough, *supra* note 221.

234. *Id.*

235. Rich, *supra* note 24. Lindsay said he would offer a modified version next session, not because he is "against having homeowners associations," but because, "they have expanded their powers a little too far." *Id.*

236. *See supra* notes 178-235 and accompanying text.

237. *See supra* notes 178-85 and accompanying text.

238. H.B. 2307, 46th Leg., 1st Reg. Sess., §§ 33-1807(I), 33-1803(B) (Ariz. 2003) ("On written request, the association shall furnish to a lienholder, unit owner or person designated by a unit owner a statement setting forth the amount of unpaid assessments against the unit."), *at* <http://www.azleg.state.az.us/FormatDocument.asp?inDoc=/legtext/46leg/1r/adopted/h%2E2307%2Dse%2Dfmp%2Edoc%2Ehtm&DocType=A>.

239. *Id.* §§ 33-1807(A) ("The association has a lien [for] fees, charges, late charges, other than charges for late payment of assessments, monetary penalties or interest charged pursuant to section . . . after the entry of a judgment in a civil suit . . .").

240. *Id.* § 33-1807(A) ("The association's lien for assessments, for charges for late payment of those assessments and for reasonable attorney fees incurred with respect to those assessments may be foreclosed in the same manner as a mortgage on real

Furthermore, the bill set forth that a lien for assessments had priority over all other liens except those previously recorded, first mortgage liens, or liens for real estate taxes and other governmental assessments.<sup>241</sup> H.B. 2307 did not provide a right of redemption for homeowners.<sup>242</sup>

In California, A.B. 2289 amended the California Civil Code with respect to the HOA's foreclosure power.<sup>243</sup> Kehoe's bill demanded that homeowners were to be notified about the filing of the lien.<sup>244</sup> However, while A.B. 2289 required HOAs to wait thirty days after filing a lien before foreclosing on the home, it did not require any additional notice before foreclosure.<sup>245</sup> Additionally, the bill entailed that at the request of a homeowner, HOA board members would have to meet with each delinquent homeowner to work out a personalized payment plan.<sup>246</sup> Under A.B. 2289, attorney's fees are the debt of the homeowner,<sup>247</sup> and A.B. 2289 also failed to provide a right of redemption for homeowners.<sup>248</sup> A.B. 2289 was adopted as California law.<sup>249</sup>

Texas has the most interesting legislative history regarding HOA foreclosure laws. While four bills have been proposed, only one, S.B. 507, was adopted as Texas law.<sup>250</sup> S.B. 699 provided that homeowners be given written notice before foreclosure proceedings can be instituted.<sup>251</sup> The bill also provided that foreclosure could be avoided

estate, except that it shall not be foreclosed any sooner than seven years after the recording of the lien.”).

241. *Id.* § 33-1807(B)(1)-(3).

242. *See generally id.* § 33-1807.

243. A.B. 2289, 2001-02 Leg., Reg. Sess., §§ 1367, 1367.1 (Cal. 2002) (enacted); Cal. Civ. Code §§ 1367, 1367.1 (West Supp. 2004).

244. A.B. 2289, § 1367(a). This bill states in relevant part:

Before an association may place a lien upon the separate interest of an owner to collect a debt which is past due . . . the association shall notify the owner in writing by certified mail of the fee and penalty procedures of the association, provide an itemized statement of the charges owed by the owner.

*Id.*

245. *Id.* § 1367(e). This bill requires that “[a]fter the expiration of 30 days following the recording of a lien . . . the lien may be enforced in any manner permitted by law, including sale.” *Id.*

246. *Id.* § 1367.1(c)(2). According to the statute, “[a]n owner . . . may submit a written request to meet with the board to discuss a payment plan for the debt . . . . The association shall provide the owners the standards for payment plans, if any exist.” *Id.*

247. *Id.* § 1367.1(a) (“[R]easonable attorney’s fees, if any . . . shall be a debt of the owner.”).

248. *See generally id.* §§ 1367, 1367.1.

249. *See, e.g.,* Sterrett, *supra* note 22; Merit Property Management, *supra* note 193; Bustillo & Vogel, *supra* note 193.

250. *See supra* notes 200-34 and accompanying text.

251. S.B. 699, 1999 Leg., 76th Reg. Sess., § 207.125(b) (Tex. 1999) (“Before a property owners’ association may institute foreclosure proceedings against an owner’s

if the homeowner paid all amounts due before the time of foreclosure<sup>252</sup> and that the property could be redeemed before the ninety-first day after written notice was sent.<sup>253</sup> The bill also allowed a homeowner to request a hearing,<sup>254</sup> or the use of alternate dispute resolution methods.<sup>255</sup> Additionally, the bill called for the association to refund a homeowner any proceeds from the sale price that exceeded the amount owed to the HOA.<sup>256</sup> S.B. 699 would have outlawed foreclosure in situations where only overdue fines or attorney's fees were owed to the HOA.<sup>257</sup> The bill continued to specify that owners have a right to file "an action to enjoin a wrongful foreclosure or an action for damages for wrongful foreclosure" by a property owners' association.<sup>258</sup> Furthermore, the bill provided homeowners with the right to redeem property upon foreclosure<sup>259</sup> and required associations to provide homeowners with notice of such right.<sup>260</sup> Finally, under S.B. 699, an owner would not have liability for attorney's fees the HOA incurred in a foreclosure proceeding if the attorney's fees were incurred before the conclusion of the hearing or if the owner did not request a hearing before the required date.<sup>261</sup> S.B. 699 was never signed into law.

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lot, the association or its agent must send the owner written notice, by certified mail. . . ."), at <http://www.capitol.state.tx.us/tlo/76R/billtext/SB00699H.HTM>.

252. *Id.* § 207.125(b)(1) (setting forth that the "owner may avoid the foreclosure by paying all amounts due" before the time of foreclosure).

253. *Id.* § 207.125(b)(2). The bill stated that the owner "may redeem the property before the 91st day after the date the association mails written notice of the sale to the owner." *Id.*

254. *Id.* § 207.125(c) ("[A]n owner may request a hearing before the property owners' association may institute foreclosure proceedings.").

255. *Id.* § 207.125(d). The bill called for "[a]n owner or an association [to] use alternative dispute resolution services").

256. *Id.* § 207.125(h). S.B. 699 proposed, "[i]f the foreclosure sales price exceeds the amount due to the property owners' association, the association shall refund the excess proceeds to the owner." *Id.*

257. *Id.* § 207.125(j) ("A property owners' association may not foreclose a lien for an assessment consisting solely of fines or attorney's fees associated solely with fines.").

258. *Id.* § 207.125(k).

259. *Id.* § 207.127(a). This bill recommended that "[t]he owner of property in a residential subdivision may redeem the property from any purchaser at a sale foreclosing a property owners' association's assessment lien not later than the 90th day after the date the association mails written notice of the sale to the owner." *Id.*

260. *Id.* § 207.126(a). S.B. 699 required that

[a] property owners' association that conducts a foreclosure sale of an owner's lot must send to the lot owner, by certified mail, return receipt requested, not later than the 30th day after the date of the foreclosure sale a written notice stating the date and time the sale occurred and informing the lot owner of the owner's right to redeem the property.

*Id.*

261. S.B. 699, § 207.125(c) ("An owner is not liable for attorney's fees incurred by the association . . .").



S.B. 1834 went even further than S.B. 699 as it called for HOAs to reimburse any “property owner for the difference between the sale price and the value determined by the appraisal district” if the HOA authorized a sale of property for a price less than the most recent appraisal value.<sup>262</sup> Not surprisingly, S.B. 1834 was not passed.

S.B. 507 is the only bill that was enacted into Texas law.<sup>263</sup> This bill is much more favorable to HOAs than either S.B. 699 or S.B. 1834. The bill does forbid foreclosure for debts accrued solely because of fines imposed by the HOA or attorney’s fees incurred by the HOA in association with such fines,<sup>264</sup> and allows for a homeowner to redeem the foreclosed-upon property 180 days after the sale.<sup>265</sup> However, the bill’s notice and hearing provisions do not apply to foreclosure proceedings.<sup>266</sup> Additionally, the bill does not provide any of the additional protections afforded to homeowners in S.B. 699 or S.B. 1834.<sup>267</sup>

After S.B. 507 was passed into Texas law, S.B. 949 was proposed to afford more protection to homeowners. S.B. 949 limited foreclosures to matters only involving assessments,<sup>268</sup> and only after an HOA obtained a court order.<sup>269</sup> The bill also called for a board vote to approve a foreclosure proceeding.<sup>270</sup> Finally, the bill provided for a redemption period of two years post-foreclosure.<sup>271</sup>

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262. S.B. 1834, 2001 Leg., 77th Reg. Sess., § 51.008(c) (Tex. 2001), at <http://www.capitol.state.tx.us/tlo/77R/billtext/SB01834I.HTM>.

263. See *supra* notes 214-34 and accompanying text.

264. S.B. 507, 2001 Leg., 77th Reg. Sess., § 209.009(1)(2) (Tex. 2001) (enacted); Tex. Prop. Code § 209.009(1)(2) (Vernon 1984 & Supp. 2004) (“A property owners’ association may not foreclose a property owners’ association’s assessment lien if the debt securing the lien consists solely of: (1) fines assessed by the association; or (2) attorney’s fees incurred by the association solely associated with fines assessed by the association.”).

265. S.B. 507, § 209.011(b).

266. *Id.* § 209.007(d). The statute provides in pertinent part: “The notice and hearing provisions . . . [of] this section do not apply if the association files a suit seeking a temporary restraining order or temporary injunctive relief or files a suit that includes foreclosure as a cause of action.” *Id.*

267. See *supra* notes 251-62 and accompanying text.

268. S.B. 949, 2003 Leg., 78th Reg. Sess., § 209.009(a)(1) (Tex. 2003), at <http://www.capitol.state.tx.us/tlo/78R/billtext/SB00949I.HTM>. S.B. 949 stated that “[a] property owners’ association may not foreclose a property owners’ association’s assessment lien unless: (1) the debt for which the lien secures payment includes a mandatory regular or special assessment that is at least two years overdue.” *Id.*

269. *Id.* § 209.0091 (“A property owners’ association may not foreclose a property owners’ association’s assessment lien unless the association first obtains a court judgment foreclosing the lien and providing for issuance of an order of sale.”).

270. *Id.* § 209.009(a)(2). The bill would have only allowed a property owners’ association to foreclose an assessment when “the board approves the foreclosure by a majority vote taken in a meeting open to the public.” *Id.*

271. *Id.* § 209.011 (b). According to S.B. 949 “[t]he owner of property in a residential subdivision may redeem the property from any purchaser at a sale foreclosing a property owners’ association’s assessment lien not later than the second

It appears that the two bills that passed—California A.B. 2289 and Texas S.B. 507—were more protective of the foreclosure powers of HOAs, while the unsuccessful bills were more inclined to restrict these powers to protect homeowners.<sup>272</sup> By forbidding foreclosure until seven years after a lien is filed, Arizona H.B. 2307 offered homeowners significant protection from foreclosure by stringently limiting the foreclosure power of HOAs.<sup>273</sup>

Conversely, California A.B. 2289 did not restrict the foreclosure powers of HOAs, and provided less protection from foreclosure for homeowners. While the bill did protect homeowners by requiring HOA board members to work out payment plans with residents, the bill offered more protection for the foreclosure powers of HOAs.<sup>274</sup> This bill only created a thirty day waiting period after an HOA files a lien to institute a foreclosure proceeding, and did not provide for a right of redemption for homeowners.<sup>275</sup> Additionally, under A.B. 2289, attorney's fees are the debt of the homeowner.<sup>276</sup>

The state legislature in Texas also favored protecting the foreclosure powers of HOAs.<sup>277</sup> Of the four bills proposed, Texas S.B. 507, the only bill to become law,<sup>278</sup> afforded homeowners the least protection from foreclosure by putting the fewest restrictions on HOA foreclosure powers.<sup>279</sup>

Unlike S.B. 507, S.B. 699 protected homeowners by providing a notice requirement for the homeowner, methods to stop the foreclosure proceeding, and a right of redemption.<sup>280</sup> The bill also allowed for a hearing and the use of alternate dispute resolution methods.<sup>281</sup> Additionally, the bill would not allow an HOA to recover any more money than it was owed in delinquent assessments.<sup>282</sup> S.B. 699 would also have severely limited the circumstances in which an HOA could foreclose.<sup>283</sup> Finally, under S.B. 699, an owner's liability for attorney's fees was also limited only to such fees that would be

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anniversary of the date the association mails written notice of the sale to the owner.”  
*Id.*

272. See *supra* notes 178-235 and accompanying text.

273. See *supra* note 183 and accompanying text.

274. See *supra* note 194 and accompanying text.

275. See *supra* note 197 and accompanying text.

276. See *supra* note 198 and accompanying text.

277. See *supra* notes 200-35 and accompanying text.

278. See *supra* notes 215-20 and accompanying text.

279. See *infra* notes 280-91 and accompanying text for a comparison of the restrictions set forth in all HOA bills proposed in Texas.

280. See *supra* notes 204-05 and accompanying text.

281. See *supra* notes 204, 206 and accompanying text.

282. See S.B. 699, 1999 Leg., 76th Reg. Sess., § 207.125(c) (Tex. 1999), at <http://www.capitol.state.tx.us/tlo/76R/billtext/SB006991.HTM>.

283. See *id.* § 207.125 (i), (j).

reasonable.<sup>284</sup> S.B. 1834 created even more protection for homeowners than S.B. 699 because it called for homeowners to be reimbursed for any difference in the sale price and the appraisal value of the home.<sup>285</sup> S.B. 949, the most recent bill to be proposed in Texas, was meant to afford the utmost protection for homeowners.<sup>286</sup> S.B. 949 created more limitations as to when foreclosure proceedings could be instituted and for board approval of such proceedings.<sup>287</sup> Finally, the bill provided for a redemption period of two years post-foreclosure.<sup>288</sup>

In comparison, S.B. 507, the current law governing HOAs in Texas, does little to protect homeowners from foreclosure and instead maintains the foreclosure powers of the HOA.<sup>289</sup> While the bill created limitations on when a foreclosure proceeding can occur<sup>290</sup> and created a 180 day redemption period,<sup>291</sup> the bill does not require notice of foreclosure to homeowners.<sup>292</sup> If more states wish to pass meaningful HOA statutes, states must meet the needs both of HOAs and homeowners. Part III suggests ways to improve HOA legislation to meet such needs.

### III. IMPROVING HOMEOWNERS' ASSOCIATION LEGISLATION BY BALANCING THE NEEDS OF HOMEOWNERS AND THEIR ASSOCIATIONS

#### A. *A Novel Approach*

With Arizona, California, and Texas as three of the states with the largest concentration of HOAs,<sup>293</sup> it follows that the bills eventually passed into law do not restrict the foreclosure powers of HOAs. A state legislature is more likely to protect the interests of HOAs if its state has a large presence of HOAs. HOA lobbyists have a strong argument: Restricting the foreclosure powers of HOAs would be a monumental blow to the economic health and survival of homeowners associations. Statutes restricting the foreclosure powers of HOAs could devastate these associations and keep them from serving a

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284. *Id.* § 207.127(c)(3).

285. *See supra* notes 210-12 and accompanying text.

286. *See supra* notes 227-31 and accompanying text.

287. *See supra* notes 228-30 and accompanying text.

288. *See supra* note 231 and accompanying text.

289. *See supra* notes 215-20 and accompanying text.

290. *See supra* note 217 and accompanying text.

291. *See supra* note 218 and accompanying text.

292. *See supra* note 219 and accompanying text.

293. E-mail from Alta Schmidt, Community Associations Institute, to Author, author (Nov. 17, 2003, 08:11 a.m. EST) (on file with author). The five states with the largest number of HOAs are: Arizona, California, Florida, New York, and Texas. *Id.*

meaningful function in society.<sup>294</sup>

In order to create the most efficient and effective legislation, HOAs and homeowners must reach a compromise. State legislatures must aim to balance the need to protect homeowners with the financial viability of HOAs. In order to create such a compromise, this Note argues that statutes should include the following provisions:

(1) HOA regulating statutes should require that HOAs provide all members with the relevant rules and regulations stating that their property is subject to foreclosure in the event of the nonpayment of assessments.<sup>295</sup> At the most basic level, all HOA members must be made aware of the rules and regulations of their respective communities so they can live up to their agreed upon obligations. In addition to accessibility to community members, the rules and regulations should be written clearly, and should be easily understood by the lay person. To be sure that homeowners are aware of the possibility of foreclosure, HOA boards might require a separate signature where the foreclosure procedures are outlined. For emphasis, perhaps, the foreclosure information should be in a separate document, requiring signatures of homeowners.

(2) HOA statutes must require that, in the event of foreclosure, a homeowner receive written notice that a foreclosure proceeding has been instituted within a reasonable period of time after institution.<sup>296</sup> Additionally, the statutes should give homeowners “the chance to present their case in an informal hearing before the association’s board of directors prior to any legal action.”<sup>297</sup> Notice and an informal board hearing are necessary to ensure that homeowners have an opportunity to remedy their delinquencies before actual foreclosure occurs. Such notice may save both homeowners and HOAs time and expenses in resolving their disputes through litigation or protracted foreclosure proceedings.

(3) If the homeowner takes no steps to remedy this situation, even after the opportunities for notice and hearing have passed, the HOA

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294. One scholar has outlined the function of an HOA to protect property values through the maintenance of the property itself and through preservation of the property’s character and appearance. McKenzie, *supra* note 22, at 128-29.

295. See Snyder, *supra* note 201.

296. See, e.g., N.C. Gen. Stat. § 45-21.16(a) (2003), providing in pertinent part that an HOA seeking to foreclose “shall file with the clerk of court a notice of hearing” and such notice shall be served upon each party entitled to notice no less than ten days prior to the date of the foreclosure proceeding. While this statute provides notice to homeowners subject to foreclosure proceedings, ten days may not be reasonable. This Note suggests thirty days as a reasonable period of time for the delinquent homeowner to be able to prepare a case or pay his debt to the association.

297. Snyder, *supra* note 201. North Carolina law goes even further than requiring an informal hearing before the association, and instead requires a hearing to be held before “the clerk of the court in the county where the land, or any portion thereof, is situated.” N.C. Gen. Stat. § 45-21.16(d).

*must* have the power to follow through with the foreclosure proceeding.<sup>298</sup> However, a statutory right of redemption is imperative. Homeowners should have the opportunity to redeem foreclosed property “by paying all liens and costs within ninety days after the foreclosure sale.”<sup>299</sup>

(4) Additionally, statutes would better serve the interests of both homeowners and HOAs if they included an option for ADR methods to solve delinquent assessment problems. Such methods can be mandatory or permissive, and binding or nonbinding.<sup>300</sup> According to the California Law Revision Commission, each year HOA disputes become serious enough to require litigation once per every two hundred units.<sup>301</sup> Many of these serious disputes begin as minor disagreements and escalate when the parties begin to entrench themselves in their positions. It is very costly to pursue litigation to resolve these disputes, and often the cost of the litigation is disproportionate to the character of the dispute.<sup>302</sup> Moreover, there is an “inherent inequality of position” between the HOA and the homeowner in such disputes.<sup>303</sup> While the association is able to fund litigation costs from community assessments, the unit owner must bear the cost of litigation on his or her own.<sup>304</sup> Further, “[a]side from such cost considerations, litigation is not [always] a satisfactory way of resolving” disputes between members of a community who must continue to have interactions in the future.<sup>305</sup> More frequent use of ADR methods could substantially improve HOA law as they provide a more balanced and affordable means to ensure compliance, while at the same time resolving disputes among HOAs and community members more amicably.<sup>306</sup>

298. See *supra* notes 155-67 and accompanying text.

299. Snyder, *supra* note 201. In Texas, homeowners have the opportunity to redeem their property on “(1) the 90th day after the date the owner is served with citation in a forcible entry and detainer action; or (2) the second anniversary of the date of the foreclosure sale.” Tex. Prop. Code. Ann. § 209.011 (Vernon 2001).

300. See *supra* notes 127-40 and accompanying text.

301. *Alternative Dispute Resolution in Common Interest Developments*, 33 Cal. L. Revision Comm’n Rep. 7 (2003), available at <http://www.ahrc.com/new/contents/media/uploads/207RECcpp-CID-ADR.pdf> [hereinafter *ADR*]. For instance, in California, a state with 3.5 million HOA units, approximately 175,000 serious HOA disputes arise each year. *Id.*

302. *Id.* at 7; see also Mollen, *supra* note 130, at 76.

303. *ADR*, *supra* note 301, at 7-8.

304. Mollen, *supra* note 130.

305. *ADR*, *supra* note 301, at 8; Mollen, *supra* note 130, at 75-77.

306. See McKenzie, *supra* note 22, at 132. McKenzie describes the benefits of ADR as

a way to resolve disputes more quickly and less expensively than in courts[; to do] away with the need for attorneys, judges, and most of the other elements of a legal system[; to divert] flood[s] of cases that often seem trivial, but are hotly contested by the litigants[; to help litigants to develop] a

If state legislators were to implement this approach when drafting HOA legislation, the statute would meet both the needs of homeowners and HOAs. This balanced approach allows HOAs to maintain the foreclosure powers necessary to ensure their integrity, while also including built-in protections to help homeowners fend off unwarranted foreclosures.<sup>307</sup> As compared to the enacted bills in California<sup>308</sup> and Texas,<sup>309</sup> the proposed approach represents a significant compromise between homeowners and HOAs. Neither California's A.B. 2289, nor Texas's S.B. 507 create a requirement that HOAs provide all members with the rules and regulation of their community.<sup>310</sup> These statutes do not include provisions to ensure that homeowners are aware of the possibility of foreclosure.<sup>311</sup> In the event of foreclosure, neither enacted statute requires that homeowners receive written notice of the proceeding, nor do they give homeowners the opportunity for an informal hearing.<sup>312</sup> In fact, S.B. 507 explicitly states that the notice and hearing provisions provided in the statute do not apply to foreclosure proceedings.<sup>313</sup> Furthermore, while A.B. 2289 requires notice, but no hearing, before implementing a lien for nonpayment of assessments, it does not create notice and hearing requirements for foreclosure.<sup>314</sup> Moreover, only S.B. 507 provides homeowners with a right of redemption following foreclosure. S.B. 507 goes beyond what is necessary under this approach<sup>315</sup> and allows for a 180 day statutory redemption period.<sup>316</sup> A.B. 2289, however, does not create a statutory right of redemption for homeowners.<sup>317</sup> The availability of ADR methods is the most

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more balanced attitude, and [to view] disputes as problems among neighbors that must be resolved amicably.

*Id.*

307. See *supra* notes 295-306 and accompanying text.

308. See *supra* notes 191-99 and accompanying text.

309. See *supra* notes 215-20 and accompanying text.

310. See generally A.B. 2289, 2001-02 Leg., Reg. Sess., §§ 1367, 1367.1 (Cal. 2002) (enacted), Cal. Civ. Code §§ 1367, 1367.1 (West 2003); S.B. 507, 2001 Leg., 77th Reg. Sess. (Tex. 2001) (enacted); Tex. Prop. Code Ann. §§ 209.001-209.011 (Vernon 1984 & Supp. 2004).

311. See generally A.B. 2289, 2001-02 Leg., Reg. Sess., (Cal. 2002) (enacted); Cal. Civ. Code §§ 1367, 1367.1 (West 2003); S.B. 507, 2001 Leg., 77th Reg. Sess. (Tex. 2001) (enacted); Tex. Prop. Code Ann. §§ 209.001-209.011 (Vernon 1984 & Supp. 2004).

312. See generally A.B. 2289, 2001-02 Leg., Reg. Sess., (Cal. 2002) (enacted), Cal. Civ. Code §§ 1367, 1367.1 (West 2003); S.B. 507, 2001 Leg., 77th Reg. Sess. (Tex. 2001) (enacted); Tex. Prop. Code Ann. §§ 209.001-209.011 (Vernon 1984 & Supp. 2004).

313. See *supra* note 219 and accompanying text.

314. See *supra* note 197 and accompanying text.

315. See *supra* note 299 and accompanying text.

316. See *supra* note 218 and accompanying text.

317. See generally A.B. 2289, 2001-02 Leg., Reg. Sess., §§ 1367, 1367.1 (Cal. 2002) (enacted); Cal. Civ. Code. §§ 1367, 1367.1.

important statutory mechanism to avoid unwarranted foreclosures by HOAs.<sup>318</sup> S.B. 507 provides that an owner or property owners' association may use ADR methods.<sup>319</sup> While A.B. 2289 does not specifically call for the use of ADR methods, it does allow an HOA to meet with homeowners to discuss any delinquent assessments and to work out a payment plan before foreclosure at the request of the homeowner.<sup>320</sup>

### B. Possible Opposition

Advocates for homeowners may criticize this approach, mainly on the ground that it guarantees that HOAs will maintain their foreclosure powers. These critics may point to examples like Wenonah Blevins<sup>321</sup> to show the dangers of foreclosure and how easy it is for HOAs to abuse and exploit their powers. However, when applied, the built-in protections for homeowners contained in this proposed approach will guard all homeowners from unwarranted foreclosures. The protections provided under this approach are made for a homeowner like Wenonah Blevins. If Blevins's HOA had been required to make certain that all members of the HOA were aware of the rules and regulations of the community, especially the foreclosure rules, Wenonah Blevins may not have stopped paying her maintenance fees because she would have been aware of the extreme repercussions. Additionally, if Blevins had been given notice and had had the opportunity to be heard, she would have been able to find a way to get the money to pay her fees and to explain her financial situation to her peers before they decided to foreclose on her home. The right of redemption may not help someone in Wenonah Blevins's financial position, but if Blevins and her HOA had taken advantage of available ADR methods, foreclosure might not have been the final outcome. Blevins and her HOA could have worked out a payment plan or other compromise so that her home would not have been sold at auction. The critics are correct—the foreclosure power of HOAs has the potential for abuse when it is exercised without any restraints. However, as evidenced above, when this approach is applied in situations like Wenonah Blevins's, foreclosure becomes a last resort, rather than a first step.

Conversely, in a situation like that of Jerre E. Epps,<sup>322</sup> where a recalcitrant homeowner stops making payments for reasons other than financial inability, foreclosure may be a necessity. When applied,

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318. See *supra* notes 300-06 and accompanying text.

319. S.B. 507, 2001 Leg., 77th Reg. Sess., § 209.007(e) (Tex. 2001) (enacted); Tex. Prop. Code Ann. § 209.007(e) (Vernon 1984 & Supp. 2004).

320. See *supra* note 194 and accompanying text.

321. See *supra* notes 1-7 and accompanying text.

322. See *supra* notes 8-11 and accompanying text.

the approach put forth by this Note may prevent situations like Epps's. Epps stopped making payments because he felt that his HOA had breached its duty to make repairs.<sup>323</sup> If Epps has been aware of the rules of his HOA, he would have known that assessments must be paid notwithstanding any complaints against the POA. If aware of this rule, Epps may not have stopped paying his assessments and both he and his HOA could have saved money on litigation fees. Additionally, if Epps had been given notice and an opportunity for an informal hearing, he too would have been able to pay his debts and to explain himself to his peers before the association filed suit. ADR methods would also have been beneficial to Epps. Through mediation or arbitration, Epps would have also been able to voice his grievance with his HOA in hopes of keeping the dispute between neighbors. ADR methods may have helped Epps and his HOA come up with their own solution before resorting to litigation.

It is possible that even after these three steps, Epps may still have refused to pay his debt to his HOA. In this scenario, it is apparent why an HOA must have the power to follow through with a foreclosure proceeding. If Epps stopped paying his assessments because he was unhappy with the performance of his HOA, other members of the association may have followed his lead; this snowball effect would put the financial integrity of the HOA in jeopardy. Finally, even if the HOA had been left with no other option but to foreclose on Epps's home, under this approach, Epps would have had a statutory right of redemption for up to at least ninety days. For someone like Epps, who is not under financial constraints, a right of redemption proves to be very useful in getting his home back if so desired. The proposed approach is an effective and efficient compromise. It provides mechanisms to prevent HOAs from using their powers unnecessarily and without restraint, while it supports the power of HOAs to foreclose on wayward members.

#### CONCLUSION

HOAs have become commonplace in our society, especially in light of their tremendous growth since the 1970s.<sup>324</sup> To some, the benefits of HOAs outweigh the costs of living in fear of foreclosure. From this point of view, foreclosure is a necessary remedy that allows HOAs to continue to serve their communities.<sup>325</sup> However, others find that HOAs abuse their power simply with the mere threat of foreclosure.<sup>326</sup> HOAs and their members must reach a compromise to reduce the

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323. See *supra* note 11 and accompanying text.

324. See *supra* notes 23-27 and accompanying text.

325. See *supra* notes 155-67 and accompanying text.

326. See *supra* notes 169-74 and accompanying text.



tensions between them. Legislators must enact laws that allowing HOAs to retain their foreclosure power in order to keep a smoothly running community, while at the same time allow residents to live their lives free from the threat of an unwarranted foreclosure. State legislatures must perform a balancing act to make certain that homeowners, like Wenonah Blevins, are protected, while ensuring that HOAs maintain their foreclosure powers to safeguard the financial viability of the association and to fend off recalcitrant homeowners.