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# HOME OWNER ASSOCIATION ASSESSMENT LITIGATION IN NEW YORK—AN OVERVIEW

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## I. INTRODUCTION

The Home Owner Association arrangement (hereinafter HOA) has been a familiar part of the American residential property scene since the turn of the century.<sup>1</sup> The HOA format, however, was not widely used until after World War II, when the advent of F.H.A. documentation and related texts brought new life to the concept. Thereafter, when new housing developments began to feature golf courses, swimming pools, tennis courts, and other recreational facilities, the HOA became the vehicle of choice to own and operate these amenities. In the early nineteen sixties, the advent of condominium legislation in all fifty states, as well as the appearance of the “time-sharing” arrangement, further spurred interest in residential properties that were operated, to a greater or lesser degree, by an HOA type vehicle. HOAs have also been employed to hold title to large scale amenities (such as golf courses), that are designed to be utilized and paid for by constituent owners of two or more independent condominium developments. Another impetus to the use of the HOA originated with lo-

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\* Copyright 1999, Patrick J. Rohan and John P. Healy. B.A., LL.B. St. John's University; LL.M. Harvard Law School, J.S.D. Columbia University; Professor of Law, St. John's University. In the interest of full disclosure the reader is advised that Professor Rohan served of counsel to the attorneys for the developer in the *Roxrun* case, and of counsel to the attorneys for the plaintiff-stockholders in the *Sherry Netherlands Hotel* case, both of which are referred to in this article.

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<sup>1</sup> For a detailed treatment of the origin and development of home owner associations in the United States, see 6A PATRICK J. ROHAN, REAL ESTATE TRANSACTIONS: HOME OWNER ASSOCIATIONS AND PLANNED UNIT DEVELOPMENTS—LAW AND PRACTICE (1998). This treatise also contains an analysis of applicable federal and state laws; illustrative documentation; and a comprehensive bibliography on the subject.

cal governments who refused to accept dedication of the roads in new housing developments in order to reduce municipal expenses. This, in turn, necessitated a private vehicle to take over such mundane tasks as pothole repair, snow removal, and the regulation of parking and speeding. Most recently, builders have become dissatisfied with the rigidity of many condominium statutes, which, in turn, necessitated overly-rigid condominium project documentation. Builders have also taken exception to the sizable legal, engineering and related costs associated with the preparation of such documentation. Consequently, there has been a growing trend toward building HOAs, as opposed to condominium-type projects. At this juncture, it makes sense to examine the large body of litigation surrounding HOA projects and their documentation to avoid making some of these same mistakes in the future. In the pages that follow, the authors examine the case law pertaining to the levying and collection of maintenance charges in HOA projects located in New York State.<sup>2</sup> In the process, the writers examine a number of defenses that have been interposed by individual home buyers when resisting HOA assessment collection efforts and make several recommendations for changes in HOA documents and applicable statutes to strengthen the hand of the HOA (and reduce the need to resort to the courts) in these matters.

## II. *NEPONSIT* AND ITS PROGENY

In the now famous *Neponsit*<sup>3</sup> case, the New York Court of Appeals provided the common-law basis for HOAs to levy assess-

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<sup>2</sup> See, e.g., *Douglas Manor Ass'n v. Alimaris*, 626 N.Y.S.2d 552 (App. Div. 1995); *Douglas Manor Ass'n v. Popovich*, 562 N.Y.S.2d 170 (App. Div. 1990); *Riverton Community Ass'n v. Myers*, 530 N.Y.S.2d 406 (App. Div. 1988); *Seaview Ass'n v. Williams*, 505 N.Y.S.2d 1013 (App. Div. 1986), *aff'd*, 510 N.E.2d 793 (N.Y. 1987); *Mohegan Colony Ass'n v. Picone*, 402 N.Y.S.2d 40 (App. Div. 1978); *Shrub Oak Park Community Ass'n v. Fiducia*, 410 N.Y.S.2d 666 (App. Div. 1978); *Tides Property Owners' Ass'n v. Paolillo*, 392 N.Y.S.2d 670 (App. Div. 1977); *Lincolnshire Civic Ass'n v. Beach*, 364 N.Y.S.2d 248 (App. Div. 1975); *Fieldston Property Owners Ass'n v. Decorative Trends, Inc.*, 373 N.Y.S.2d 806 (App. Term. 1975) (per curiam), *aff'd*, 391 N.Y.S.2d 828 (App. Div. 1977) (mem.); *Tomkins Lakes Estates Ass'n v. Speisman*, 273 N.Y.S.2d 457 (Sup. Ct. 1966); *Sea Gate Ass'n v. Fleischer*, 211 N.Y.S.2d 767 (Sup. Ct. 1960); *Starkey Point Property Owners' Ass'n v. Wilson*, 409 N.Y.S.2d 376 (County Ct. 1978); *Patchogue Properties, Inc. v. Cirillo*, 283 N.Y.S.2d 560 (Dist. Ct. 1967), *aff'd*, 302 N.Y.S.2d 58 (App. Term. 1969).

<sup>3</sup> *Neponsit Property Owners' Ass'n v. Emigrant Indust. Sav. Bank*, 15 N.E.2d 793 (N.Y. 1938).

ments for maintenance purposes. In so doing, the court brushed aside centuries-old prohibitions against affirmative covenants (especially covenants to pay money), and concluded that such covenants could run with the land, did "touch and concern the land," and could be enforced by an HOA as the alter ego of the constituent property owners (even though technically the association did not own any land in the project).

Subsequent cases in the New York trial courts, appellate divisions, and Court of Appeals have concluded that persons who knowingly buy into a community serviced by an HOA must pay their pro rata share of annual assessments levied by the association.<sup>4</sup> The holdings requiring recalcitrant purchasers to pay their fair share for services and facilities provided by the HOA have been grounded on a theory of implied contract between such owners and the association. Several courts have granted summary judgment to the HOA,<sup>5</sup> except in the rare instance where there is a triable issue of fact as to whether the property owner knew (or should have known) that the association furnished facilities or services at the time the recalcitrant owner acquired title.<sup>6</sup> As a practical matter, the latter defense is all but impossible to maintain because notice is often provided by such things as a view of the area, posted signs, title reports received prior to closing, or adjustments made with the seller at closing (for the unused por-

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<sup>4</sup> See *Williams*, 510 N.E.2d at 797 (noting that the proportionate payment of assessments results from an implied in fact contract that exists where there is knowledge that a homeowners' association provides facilities and services for its residents); *Fieldston Property Owners Ass'n*, 373 N.Y.S.2d at 806 (holding that the proportionate share of costs for services is due, regardless of whether the residents exercised the right to join the association); *Alimaris*, 626 N.Y.S.2d at 553 (finding that breach of implied contract and unjust enrichment allowed the payments of assessment charges); *Popovich*, 562 N.Y.S.2d at 170 (holding assessment costs due because of breach of implied contract and unjust enrichment); *Speisman*, 273 N.Y.S.2d at 460 (noting that having actual notice of the community's character and purchasing property implies an acceptance to pay one's pro rata share of costs of maintenance and services); *Fleischer*, 211 N.Y.S.2d at 781 (noting that the share of costs is dependent upon the measurement of facilities and services offered and not those actually used); *Harbor Hills Landowners v. Manelski*, 318 N.Y.S.2d 793, 796-97 (Dist. Ct. 1970) (relying on *Fleischer* to hold resident liable for proportionate share of costs for maintenance and services); *Cirillo*, 283 N.Y.S.2d at 563 (finding that purchase of property with knowledge of the private nature of the community results in implied consent to pay for services and maintenance).

<sup>5</sup> See, e.g., *Alimaris*, 626 N.Y.S.2d at 553-54; *Popovich*, 562 N.Y.S.2d at 171; *Speisman*, 273 N.Y.S.2d at 460.

<sup>6</sup> See, e.g., *Paolillo*, 392 N.Y.S.2d at 671 (remanding case to develop facts as to whether an implied contract could be found as to each particular defendant).

tion of the pre-paid annual assessment).<sup>7</sup> In addressing other defenses of delinquent property owners, the courts have ruled that, while dissatisfaction with maintenance of the common property by the HOA may be the basis for a suit against the officers of the association, it cannot be the basis for non-payment of one's annual assessment.<sup>8</sup> Similar results have been reached where property owners sought to avoid paying assessments either by refusing to join the association or by attempting to surrender their right to use common facilities and services.<sup>9</sup>

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<sup>7</sup> See, e.g., *Alimaris*, 626 N.Y.S.2d at 554 (finding delinquent property owners made adjustments at closing or paid money to the HOA in compliance with covenants and restrictions, and that property owners' deeds expressly referenced a deed tax payable to the HOA); *Popovich*, 562 N.Y.S.2d at 171 (finding sufficient notice from signs of a private development and from the content of the deed received by purchaser); *Manelski*, 318 N.Y.S.2d at 796 ("There is no question in the Court's mind that the defendant had adequate notice of the deed covenants and restrictions as set forth, and further, the defendant assumed the obligations imposed by these deeds by signing and executing the deed which was delivered to him."); *Fleischer*, 211 N.Y.S.2d at 779 ("When these defendants bought their property they knew of all of the existing conditions imposed upon ownership in the area. All others were open and visible to them and should have been known to them.")

<sup>8</sup> See, e.g., *Cirillo*, 283 N.Y.S.2d at 563 (rejecting defendant's claim that acts of board of directors were ultra vires); *Fleischer*, 211 N.Y.S.2d at 782 (finding that the plaintiffs were not able to attack the actions of the board as being ultra vires because plaintiffs were neither members nor in a contractual relationship with the board).

<sup>9</sup> See *Williams*, 510 N.E.2d at 794 (requiring residents to pay their proportionate share regardless of the fact that they did not join the association or use the facilities); *Fieldston Property Owners Ass'n*, 373 N.Y.S.2d at 806 (holding residents were required to pay even though they did not join the association); *Speisman*, 273 N.Y.S.2d at 460 (membership in the corporation is not that which gives the right to property owners to enjoy easements and services provided by the association. It is the ownership of property which effects that result).

In *Fleischer*, the court stated:

To direct an abatement of the assessments merely because the defendants chose not to pay the assessments, would be a means of destroying a private community such as is involved here. If every property owner could abate his assessment by refusing to pay the assessment, then this private community could not continue to exist.

*Fleischer*, 211 N.Y.S.2d at 783. The rule that residents cannot avoid responsibility for their fair share of assessments by opting not to use them or foregoing membership privileges finds a parallel in the Condominium Act provision that prohibits unit owners from attempting to exempt themselves from assessments by agreeing not to use common facilities. See N.Y. REAL PROP. LAW § 339-x (McKinney 1989). Furthermore, a provision has been upheld that requires owners in a subdivision to become and remain members of an association for maintenance of recreational facilities. See *Lincolnshire Civic Ass'n v. Beach*, 364 N.Y.S.2d 248, 251 (App. Div. 1975) (upholding the covenant as similar to an affirmative covenant to pay money).

The courts have also resolved the related question whether an HOA (operating under antiquated documents that went into effect in the early part of the century) is

A representative case is *Seaview Association v. Williams*,<sup>10</sup> wherein the HOA sued a delinquent property owner for unpaid annual assessments. A five-day trial led to a judgment in favor of the HOA (which was subsequently affirmed by a 4-1 vote in the Appellate Division, First Department, and by a unanimous Court of Appeals). The courts found that the following factors were *not* controlling: (a) the covenants did not originate with the original developer of the homes; (b) the defendants never joined the association; (c) the documents and posted signs stated that non-association members (as well as their tenants) could not use the facilities of the association; (d) the defendants never paid any portion of the assessments; and (e) seventy-seven percent of the funds

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barred from collecting assessments that exceed dollar or rate increase caps found in the original covenants and restrictions. Predictably, the dollar limits and caps at issue in these cases reflected the relative cost of maintenance for the times when they were drafted. These costs happened to be well below what the HOA was assessing property owners decades later. Although the judicial opinions are terse, a close reading of them, coupled with a perusal of the trial transcripts, reveals that the courts have routinely upheld the full amount of the assessments. Thus, for example, the court held a property owner liable for the full amount of the assessment in *Popovich*, even though the original documents limited levies to a tax of one dollar per lot, per year, and the HOA levy in question went far beyond that dollar limitation. See *Popovich*, 562 N.Y.S.2d at 171. In *Fieldston Property Owners' Ass'n*, the court rejected a similar defense and awarded the HOA the full amount of the assessment. See *Fieldston Property Owners' Ass'n*, 373 N.Y.S.2d at 807.

The implied contract theory judicially adopted in New York carries with it the court's innate ability to do complete justice, including the awarding of pre-judgment interest from the time the association's assessment levy was originally due and payable. See, e.g., *Fleischer*, 211 N.Y.S.2d at 783 (ordering defendants to pay the assessments they owed with interest computed from the date upon which the assessments were originally due); *Board of Managers v. Shandel*, 542 N.Y.S.2d 466, 468-69 (Civ. Ct. 1989) (awarding interest at highest legal rate permitted); *Cirillo*, 283 N.Y.S.2d at 564 (ordering recovery of overdue assessments "together with interest accruing as of the date each annual assessment became due and owing"); see also *Manelski*, 318 N.Y.S.2d at 797 (upholding corporation's by-laws that authorized interest and penalties on unpaid assessments). But see *Riverton Community Ass'n v. Myers*, 584 N.Y.S.2d 368, 369 (App. Div. 1992) (awarding "interest from the date of the commencement of trial").

Further, Judge Cardozo as well as the Weinstein, Korn & Miller treatise have taken the position that, in quasi and implied contract cases, the courts have authority to award full back interest. They also argue that such awards may be made in the interest of justice and are not limited to the rate prescribed for post-judgment interest. See JACK B. WEINSTEIN ET AL., NEW YORK CIVIL PRACTICE § 5001:1-5001:6 (1998); see also RESTATEMENT (SECOND) OF CONTRACTS § 253 (1981) (noting that an anticipatory breach gives rise to a claim for damages for total breach); RESTATEMENT OF RESTITUTION § 110 (1937) (adopting the same view); 22 N.Y. JUR. 2d *Contracts* §§ 445-447, 457-461 (1996) (discussing the contract theories of anticipatory breach and novation or substitution of parties).

<sup>10</sup> 505 N.Y.S.2d 1013 (App. Div. 1986), *aff'd*, 510 N.E.2d 793 (N.Y. 1987).

raised by the association were used to pay for sporting and recreational (i.e., non-essential) services and facilities.<sup>11</sup> Nevertheless, all three courts found the defendants liable for the assessments on the theory that an implied contract existed between the recalcitrant home buyer and the association.<sup>12</sup>

### III. MISCELLANEOUS LEGAL DOCTRINES INVOKED IN ASSESSMENT COLLECTION LITIGATION

In addition to authority stemming from covenants running with the land and the law of implied contracts, authority for levying and collecting assessments from property owners may be supported on an independent third ground, namely, the Not-for-Profit Corporation Law<sup>13</sup> (and its predecessor, the Membership Corporation Law). Where the HOA operates under the aegis of the Not-for-Profit Corporation Law, it has all of the authority conferred by that law.

While courts in the past focused almost exclusively upon the terms of recorded covenants and restrictions (in sorting out the relative rights of the HOA and its constituent owners), some have placed emphasis on the rights, obligations, and procedures found

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<sup>11</sup> *But see* Shrub Oak Park Community Ass'n v. Fiducia, 410 N.Y.S.2d 666, 666 (App. Div. 1978) (holding that property owners, whose deeds did not contain the right to use certain communal recreational facilities, did not have to pay association assessments to maintain those facilities that were of a nonessential or recreational nature).

<sup>12</sup> Although the assessment collection decisions rely on the theory of implied contract (or contracts "implied in fact") between the property owner and the association in upholding HOA assessments, occasionally references to "quasi contract" or "unjust enrichment" make their way into the opinions. It is clear that the assessment collection cases under discussion in this article, as a rule, do not draw fine theoretical distinctions. They merely employ language of "contract implied in fact," "quasi contract," "unjust enrichment," and like terms to signify that the recalcitrant property owner knew that the assessments were being levied to pay for community facilities and services (at the time such owner decided to buy into the community), and would not be heard to later argue that he was exempt from the obligation to pay the assessment on some legal technicality. In essence, he is estopped from sidestepping the assessments he knew were associated with owning the premises in question, and thereby unjustly increasing his neighbor's aliquot share of the financial burden. For discussions on the general interplay of the doctrines of quasi-contract, restitution, and contract, see JOHN D. CALAMARI & JOSEPH M. PERILLO, *THE LAW OF CONTRACTS* §1.11 (4th ed. 1998); E. ALLAN FARNSWORTH, *CONTRACTS* § 2.20 (3d ed. 1998); Joseph M. Perillo, *Restitution in the Second Restatement of Contracts*, 81 COLUM. L. REV. 37 (1981). For an extensive discussion of the various contract, restitution and other theories for enforcing HOA assessments that are otherwise questionable, see ROBERT G. NATELSON, *LAW OF PROPERTY OWNERS ASSOCIATIONS* § 6 (1989).

<sup>13</sup> *E.g.*, N.Y. NOT-FOR-PROFIT CORP. § 611(e) (McKinney 1997).

in the Not-for-Profit Corporation Law.<sup>14</sup> Other courts have abruptly terminated assessment litigation by ruling that no ultra vires or similar defense could be invoked by the property owner unless the latter had repaid the cost of the services previously provided to the home owner by the association.<sup>15</sup> In other cases, courts have found a waiver of the right to contest assessments where the property owner had failed to seek review either by way of an Article Seventy Eight proceeding or via a request for the Supreme Court to investigate the alleged malfunctioning of the Board of the Membership or Not-for-Profit Corporation.<sup>16</sup> In some instances, the courts have refused to set aside assessments on the theory that to do so might permanently disrupt the functioning, if not the very existence, of the HOA.<sup>17</sup> Still others have taken notice of the increase in property values brought about by the facilities and services furnished by the HOA,<sup>18</sup> or simply have held that the

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<sup>14</sup> See, e.g., *Gillman v. Pebble Cove Home Owners Ass'n*, 546 N.Y.S.2d 134 (App. Div. 1989) (recognizing that the business judgment rule applied to the board's exercise of its rulemaking authority); *Roxrun Estates, Inc. v. Roxbury Run Village Ass'n*, 526 N.Y.S.2d 633 (App. Div. 1988) (applying New York's Not-For-Profit Corporation Law to determine voting rights of board members).

<sup>15</sup> See, e.g., *Cirillo*, 283 N.Y.S.2d at 563-64 (delineating the general rule that "one who seeks to avoid liability on a contract on ultra vires grounds is liable upon an implied contract to restore any benefits derived therefrom"); see also 14 N.Y. JUR. 2D, *Business Relationships* §§ 425-431 (1996) (discussing the rules of Not-For-Profit corporations).

<sup>16</sup> See, e.g., *Goldens Bridge Community Ass'n v. Simon*, N.Y. L.J. Dec. 23, 1968, at 16, (Dec. 22, 1968); *Speisman*, 273 N.Y.S.2d at 460 (holding that even if the defendant was a member of the association he lost his ability to contest his assessment because he did not request court visitation as required by section 26 of the Membership Corporations Law); *Fleischer*, 211 N.Y.S.2d at 783 (finding the plaintiff's failure to request the supreme court's assistance effectively foreclosed his ability to contest the assessments).

<sup>17</sup> See, e.g., *Galvin*, 324 N.E.2d 317 (N.Y. 1974) (noting that HOAs are important to the community and have standing to sue); *Sea Gate Ass'n v. Fleischer*, 211 N.Y.S.2d 767, 783 (Sup. Ct. 1960) (noting that an abatement of assessments would destroy the existence of the private community); *Board of Managers v. Gans*, 340 N.Y.S.2d 826, 828 (Civ. Ct. 1972) (stating that if the court were to find that charges were levied improperly by the board, it would create chaos as to the administration of the condominium); see also *United States v. Certain Lands*, 49 F. Supp. 265, 267 (E.D.N.Y. 1943) (stating that where each owner bears a share of common costs, court must consider increased financial burden remaining owners must shoulder if some lots are condemned); *Caruso v. Board of Managers*, 550 N.Y.S.2d 548, 551 (Sup. Ct. 1990) (noting that literal construction of the condominium act would not result in an invalidation of the board's activities each time it failed to follow procedure).

<sup>18</sup> See, e.g., *Galvin*, 324 N.E.2d at 321 (finding that HOAs were able to keep the quality of the neighborhoods at a premium); *Riverton Community Ass'n v. Myers*, 530 N.Y.S.2d 406, 407 (App. Div. 1988) (reasoning that a person's property may benefit by HOA facilities even if that property is not adjacent to the facilities); *Roxrun Estates*,

actions of directors or board members were immune from judicial intervention because of the business judgment rule.<sup>19</sup>

#### IV. POLICY CONSIDERATIONS IN HOA ASSESSMENT LITIGATION

At first blush it would appear that the approach taken by the New York courts in HOA assessment litigation is problematical, in that a property owner is being denied the opportunity to challenge an assessment that may be irregular or invalid. The legal cost or drawback to this approach, however, may be more ap-

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*Inc.*, 526 N.Y.S.2d at 633 (noting that property values increase, as do assessments, when such property is improved with HOA facilities); *Mohegan Colony Ass'n v. Picone*, 402 N.Y.S.2d 40 (App. Div. 1978) (remanding for determination of whether the defendants benefited from the Association's expenditures).

<sup>19</sup> See, e.g., *Levandusky v. One Fifth Ave. Apartment Corp.*, 553 N.E.2d 1317, 1321-22 (N.Y. 1990) (concluding that the appropriate standard of review for actions of the cooperative board is analogous to the business judgment rule); *Van Camp v. Sherman*, 517 N.Y.S.2d 152, 153-54 (App. Div. 1987) (stating that the business judgment doctrine "bars judicial inquiry into actions of corporate directors taken in good faith and in the exercise of honest judgment in the lawful legitimate furtherance of corporate purposes"); *Breezy Point Coop., Inc. v. Young*, 506 N.Y.S.2d 366, 367 (App. Div. 1986); *Gans*, 340 N.Y.S.2d at 828; see also Alvin I. Apfelberg, *Trends in Shareholder Suits Against Co-ops and Condos*, N.Y. L.J. Aug. 31, 1990, at 1 (discussing the fiduciary responsibilities of board members that are associated with the business judgment rule).

It should also be noted that in the most recent scholarly text on this subject, Professor Robert G. Natelson analyzes various theories for allowing the HOA to collect assessments and cites the New York approach with approval:

For the association, there were two advantages to the approach taken by the *Fleicher* [sic] court. First, because recovery was in contract rather than by mere lien foreclosure, it was possible to obtain a personal judgment against the defendant property owners. Second, since recovery was in contract rather than in restitution (Justice DiGiovanna having explicitly rejected a quasi-contract theory), the association could recover the full amount of the assessments, and not just the amount by which the defendants were enriched.

Justice DiGiovanna's contractual reasoning has now been generally accepted in New York, with resultant advantages for Property Owners Associations. The DiGiovanna approach is applied whether the property owners "knew of the benefit . . . directly, by their deeds, or indirectly, by the nature of the community . . ." Some courts outside of New York may be responsive to this line of reasoning. The [original] Restatement of Property seems to adopt it for some covenants, but not for assessment covenants that may impose charges for more than a year.

NATELSON, *supra* note 12, § 6.1.2, at 221 (footnotes omitted) (quoting *Tides Property Owners' Ass'n v. Paolillo*, 392 N.Y.S.2d 670, 671 (App. Div. 1977); see also JAN Z. KRASNOWIECKI, URBAN LAND INSTITUTE, *THE HOMES ASSOCIATION HANDBOOK* 319 (1964); Jan Z. Krasnowiecki, *Townhouses With Homes Associations: A New Perspective*, 123 U. PA. L. REV. 711, 717-20 (1975) (discussing covenants for maintenance assessments and when such covenants will run with the land).

parent than real. All other home owners (who are current in meeting their assessments) are free to challenge the problematical levy.<sup>20</sup> The fact that they do not may indicate that the vast bulk of the remaining owners (if not all of them) regard the levy as necessary, proper, or both. Again, the courts have traditionally looked askance at the unjust enrichment that might occur if maverick property owners were able to sidestep their financial obligations on a technicality.

The landmark *Tulk v. Moxhay*<sup>21</sup> case, which provided the theoretical foundation for equitable servitudes, as well as the *Neponsit*<sup>22</sup> case, contain allusions to the unfair allocation of bur-

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<sup>20</sup> Thus, for example, an estoppel (or related defense based on quasi or implied contract) did not prevent the New York Court of Appeals from reaching the substantive objections raised by the recalcitrant owner in *Eagle Enterprises v. Gross*, 349 N.E.2d 816 (N.Y. 1976). It should be noted, however, that the *Eagle Enterprises* decision was handed down by the court eleven years before it fully embraced the position of the HOA in assessment cases. See *Seaview Ass'n v. Williams*, 510 N.E.2d 793 (N.Y. 1987). Moreover, the right to collect the annual assessment was being asserted by a developer (and not an HOA) in *Eagle Enterprises*. Despite these differences, the court of appeals could have dismissed the recalcitrant property owners' defenses (and not reached the substantive law merits) if it chose to do so on the theories adopted in all of the HOA assessment cases noted in this article.

For a more detailed analysis of the *Eagle Enterprises* opinion, see Patrick J. Rohan, *Preparing Community Associations for the Twenty-First Century: Anticipating the Legal Problems and Possible Solutions*, 73 ST. JOHN'S L. REV. 3, 15 (1999).

<sup>21</sup> 41 Eng. Rep. 1143 (Ch. 1848). The *Tulk v. Moxhay* opinion states, in pertinent part:

It is said that, the covenant being one which does not run with the land, this Court cannot enforce it; but the question is, not whether the covenant runs with the land, but whether a party shall be permitted to use the land in a manner inconsistent with the contract entered into by his vendor, and with notice of which he purchased. Of course, the price would be affected by the covenant, and nothing could be more inequitable than that the original purchaser should be able to sell the property the next day for a greater price, in consideration of the assignee being allowed to escape from the liability which he had himself undertaken.

That the question does not depend upon whether the covenant runs with the land is evident from this, that if there was a mere agreement and no covenant, this Court would enforce it against a party purchasing with notice of it; for if an equity is attached to the property by the owner, no one purchasing with notice of that equity can stand in a different situation from the party from whom he purchased.

*Id.* at 1144.

<sup>22</sup> *Neponsit Property Owners' Ass'n v. Emigrant Indus. Sav. Bank*, 15 N.E.2d 793 (N.Y. 1938). The court wrote:

By that conveyance the grantee, however, obtained not only title to particular lots, but an easement or right of common enjoyment with other property owners in roads, beaches, public parks or spaces and improvements in the same tract. For full enjoyment in common by the defendant

dens that would result if the covenants in question were found not to be binding. Moreover, the approach followed by the New York courts has the advantage of preserving the status quo and, thereby, affording the community the opportunity to legitimate the assessment through revision of the project's by-laws or otherwise. Nor is the contrary approach, i.e., declaring the assessment to be invalid in a particular case, free from difficulty. This approach causes economic uncertainty, undermines the day-to-day operation of the HOA, and may affect the marketability or insurability of the real property titles in question.<sup>23</sup>

To the extent that such an approach would prevent the HOA from updating its assessments (and thereby modernize its role in the community), it would also be counterproductive.<sup>24</sup> Neverthe-

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and other property owners of these easements or rights, the roads and public places must be maintained. In order that the burden of maintaining public improvements should rest upon the land benefited by the improvements, the grantor exacted from the grantee of the land with its appurtenant easement or right of enjoyment a covenant that the burden of paying the cost should be inseparably attached to the land which enjoys the benefit. It is plain that any distinction or definition which would exclude such a covenant from the classification of covenants which "touch" or "concern" the land would be based on form and not on substance.

*Id.* at 797.

<sup>23</sup> Illustrative of the disruption of the housing development's affairs that flows from a technical approach that facilitates avoidance of one's obligation to pay the assessment levied against one's property by the HOA, is *Anderson v. Lake Arrowhead Civic Ass'n*, 483 S.E.2d 209, 213-14 (Va. 1997) (deciding that the association could not assess sufficient fees because it did not qualify as a Property Owner's Association within the meaning of Property Owners' Association Act, VA. CODE ANN. §§ 55-508 to 55-516.2 (Michie 1950 & Supp. 1997)). For in-depth analysis of the jurisprudential considerations that may be put forth in favor, or against, enforcing the type of covenants and restrictions under discussion, see Stewart E. Sterk, *Freedom From Freedom of Contract: The Enduring Value of Servitude Restrictions*, 70 IOWA L. REV. 615 (1985) and Timothy C. Shepard, Comment, *Termination of Servitudes: Expanding the Remedies for "Changed Conditions"*, 31 UCLA L. REV. 226 (1983).

<sup>24</sup> Thus for example, the New York Court of Appeals has recognized an HOAs standing in zoning matters, even though the association technically did not own any land in the municipality in question. See *Douglaston Civic Ass'n v. Galvin*, 324 N.E.2d 317, 321 (N.Y. 1974). The court reasoned, in part, that such a ruling enables the affected property owners to more effectively oppose the developer's onslaught, by pooling their efforts and resources. See *id.* The New York Court of Appeals in *Douglaston* felt that an appropriate representative association should have standing to assert the rights of the individual members of the association where such persons may be affected by a rezoning, variance or an exception determination of a zoning board. See *id.* at 320. This author has commented:

The Court stated that the factors to be considered in assessing such appropriateness include: (1) the capacity of the organization to assume an adversary position; (2) the size and composition of the organization as reflecting

less, it must be recognized that the cases bailing out the HOA in assessment litigation are at best a stop-gap measure and that the long-term solution rests with modernization of the project's documentation, modernization of the applicable statutes, or both.<sup>25</sup>

## V. CONCLUSIONS AND RECOMMENDATIONS

The foregoing discussion makes clear that the legal right of the Home Owner Association to collect assessments rests almost entirely on the law of equitable servitude or covenants running with the land. The condominium arrangement stands on a much firmer footing because the authority of the Board of Managers is generated by the state's condominium enabling legislation. Similarly, the authority of the Board of Directors of a cooperative housing venture rests on well established principles of corporate law and landlord-tenant law. In marked contrast, the HOA board must proceed without these supports and proceed in the hostile environment created by strict construction principles that

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a position fairly representative of the community or interests which it seeks to protect; (3) the adverse effect of the zoning decision sought to be reviewed on the group represented by the organization as within the scope of interests sought to be protected; and (4) the openness of the organization to full participating membership by all residents and property owners in the relevant neighborhood.

1 PATRICK J. ROHAN, ZONING & LAND USE CONTROLS § 2.03[4][e] (1998). However, forward looking decisions such as the *Douglaston* case would represent a Pyrrhic victory if the authority of the HOA to levy assessments were forever governed by outmoded covenants and restrictions. Perhaps the most difficult question to resolve involves assessments made after the underlying covenants have expired by their express terms. There is little authority on the question whether a simple majority of the home owners involved may vote to extend the life of the covenants where the latter do not expressly provide for such a vote on the issue of extension. This question will become increasingly important in a related situation, i.e., where a cooperative corporation's documents have reached the end of their specified original duration. At least one court has ruled that the proprietary lease may be extended by a simple majority vote, making use of the provision governing modification of the lease generally. See *Sherry Assocs. v. Sherry-Netherland, Inc.*, N.Y. L.J., June 13, 1996, at 30 (Sup. Ct. June 12, 1996), *aff'd*, 657 N.Y.S.2d 549 (App. Div. 1997) (mem.). It should be noted that, in connection with the *Sherry Netherlands* litigation, the New York State Attorney General's office issued a letter, ruling to the effect that no new offering plan need be filed with the State (nor distributed to the stockholders) in connection with a vote to extend the project's proprietary lease.

<sup>25</sup> The New York Court of Appeals has been quite liberal in its opinions in a related area, to wit, what promises made by a landlord in a commercial lease may become binding upon a successor landlord (even though such promises may involve acts to be performed on other, unrelated premises). See *Bank of New York v. Hirschfeld*, 336 N.E.2d 710, 712 (N.Y. 1975).

have been associated with affirmative covenants for centuries. Nevertheless, there are certain changes that may be made in the HOA project documents that may go a long way toward easing the assessment collection process. Among these recommended changes may be listed the following:

*A. Legal Fees and Interest Provisions.*

The HOA project's documentation should provide that an offending property owner who defaults on his periodic assessments (or otherwise contravenes his obligations as a constituent property owner) will have to pay the reasonable legal fees of the HOA in the event their dispute ends up in litigation. Such a provision should be made applicable irrespective of whether the HOA appears in court as a plaintiff or defendant (provided, of course, the HOA ultimately prevails in the suit). Moreover, the revised documentation should make clear that unpaid assessments will bear interest at the maximum rate permitted by law, from the date it was originally due, if the assessment is not paid within a specified period after it is levied. Such a provision should remove any doubt that might otherwise exist as to whether the HOA is entitled to pre-judgment interest in the event of litigation. Wholly apart from the added authority these provisions will give the HOA board, their very presence will speed up the collection process and discourage litigation by constituent property owners who are not on sound legal footing when they commence a suit.<sup>26</sup>

*B. Creation of a Statutory Lien for HOA Assessments and a Foreclosure Mechanism.*

As matters currently stand, the HOA board seeking to enforce assessments must bring an action to establish the basis for the claimed lien and the amount thereof. This, of course, means that the HOA must bring on a plenary suit whenever it undertakes a collection effort. The collection mechanisms available to the housing cooperative and to the condominium are far more efficient and far less costly. The cooperatives' proprietary lease or by-laws mandate that assessments or fines that remain unsat-

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<sup>26</sup> For illustrative project document provisions designed to spell out the steps for an orderly assessment collection procedure, see NATELSON, *supra* note 12, at §§ 6.5-6.6. Additional illustrations of assessment procedures in current use are spelled out in the HOA project documents set forth in ROHAN, *supra* note 1, at app. C.

ified may form the basis for a summary proceeding, the object of which is to cancel the proprietary lease of the offending stockholder.<sup>27</sup> The condominium remedies are equally efficient. New York's condominium act contains statutory procedures to enable the board of managers to collect overdue assessments. In the event of non-payment, the statute gives the board of managers a lien on each unit for unpaid common charges. The lien is given priority over all other levies except:

- (i) liens for taxes on the unit in favor of any assessing unit, school district, special district, county or other taxing unit, and
- (ii) all sums unpaid on a first mortgage of record or on a subordinate mortgage of record held by the New York job development authority or held by the New York state urban development corporation.<sup>28</sup>

Any member of the board of managers can perfect the lien by filing a verified notice of the lien at the recording office where the declaration is filed. The notice must state the name and address of the property, the liber and page of the declaration, the name of the record owner of the unit, the unit designation, the amount and purpose of the charges, and the date when the charges were due. If the common charges remain unpaid upon the sale or conveyance of the unit, the statute mandates that they be paid by the grantee from the proceeds of the sale or conveyance. The lien may be foreclosed in a suit authorized by and brought in the name of the board of managers; or the board may also bring suit for a money judgment, the commencement of which does not waive the lien.<sup>29</sup> Unfortunately, there is no comparable statutory lien in New York for a private community managed by a home owner association (HOA) that is attempting to collect overdue assessments from delinquent property owners.<sup>30</sup>

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<sup>27</sup> See 2A PATRICK J. ROHAN & MELVIN A. RESKIN, REAL ESTATE TRANSACTIONS: COOPERATIVE HOUSING: LAW & PRACTICE §§ 8.01, 9.05(5) (1998).

<sup>28</sup> *Id.*

<sup>29</sup> See *id.* at § 339-aa; see also, e.g., Board of Managers v. Shandel, 542 N.Y.S.2d 466 (Civ. Ct. 1989) (granting summary judgment for Board of Managers of a condominium in suit to recover unpaid common charges from unit owner).

<sup>30</sup> The following excerpt summarizes the differences between a home owner association property association and a condominium:

The homeowners' association differs from condominium ownership primarily in the method of ownership of the common property. Unlike in the condominium, in the homeowners' association the association itself has title to this property. The individual homeowners are members of the association,

A prototype for a statutory mechanism to enable the HOA to more easily enforce its assessments is found in Virginia's "Property Owners' Association Act,"<sup>31</sup> which provides in pertinent part:

§ 55-516. Lien for assessments—A. Once perfected, the association shall have a lien on every lot for unpaid assessments levied against that lot in accordance with the provisions of this chapter and all lawful provisions of the declaration. The lien, once perfected, shall be prior to all other subsequent liens and encumbrances except (i) real estate tax liens on that lot, (ii) liens and encumbrances recorded prior to the recordation of the declaration, and (iii) sums unpaid on and owing under any mortgage or deed of trust recorded prior to the perfection of said lien. The provisions of this subsection shall not affect the priority of mechanics' and materialmen's liens. Notice of a memorandum of lien to a holder of a credit line deed of trust under § 55-58.2 shall be given in the same fashion as if the association's lien were a judgment.

B. The association, in order to perfect the lien given by

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which is generally a nonstock, nonprofit corporation. In accordance with the Declaration, the association is required to maintain, manage, and regulate the common property and, in some cases, all or a portion of the individually owned property. Another major difference is that in the homeowners' association, the individual unit owners will have title only to their own parcel of real estate and will not have an assigned percentage of ownership in the common property, as is the case with the condominium. Finally, unlike the condominium, the homeowners' association development is not usually a creature of state-enabling legislation. As a result, some substantive areas (e.g., assessments) use restrictions, and rule enforcement can be less certain in their validity and effectiveness than with a condominium.

WARREN N. FREDMAN & JONATHAN B. ALTER, *THE LAW OF CONDOMINIA AND PROPERTY OWNERS' ASSOCIATIONS* 23 (1992).

Housing cooperatives in New York may be formed under the Business Corporation Law or the Not-for-Profit Corporation Law. Some early housing cooperatives were formed under the Cooperative Corporation Law, a statute traditionally associated with cooperatives engaged in marketing farm products. Unlike some other jurisdictions, the condominium arrangement in New York usually does not give rise to a corporate entity (such as incorporation of the Board of Managers). See generally, ROHAN & RESKIN, *supra* note 27, §§ 6.01-6.04 (discussing common elements, duty of association to maintain the common elements, expenses and assessment related to such maintenance, and enforcement of payment of assessments); *id.* §§ 1.01-1.05, 9.04 (discussing structure and management of the cooperatives and cooperative law).

<sup>31</sup> VA. CODE ANN. §§ 55-509 to 55-516 (Michie 1950 & Supp. 1997). For an application of this statute, see *Lake Monticello Owners' Ass'n v. Lake*, 463 S.E.2d 652 (Va. 1995).

this section, shall file before the expiration of twelve months from the time such assessment became due and payable in the clerk's office in the county or city in which such development is situated, a memorandum, verified by the oath of the principal officer of the association, or such other officer or officers as the declaration may specify, which contains the following:

1. The name of the development;
2. A description of the lot;
3. The name or names of the persons constituting the owners of that lot;
4. The amount of unpaid assessments currently due or past due relative to such lot together with the date when each fell due;
5. The date of issuance of the memorandum;
6. The name of the association and the name and current address of the person to contact to arrange for payment or release of the lien; and
7. A statement that the association is obtaining a lien in accordance with the provisions of the Virginia Property Owners' Association Act as set forth in Chapter 26 (§ 55-508 et seq.) of Title 55.<sup>32</sup>

An argument could be made that, to the greatest extent possible, the machinery for realizing upon a lien for unpaid maintenance charges or special assessments should be the same for a condominium, cooperative, or HOA project, to encourage uniformity of treatment and to minimize the chance of confusion on the part of the layman property owner. However, the format of the condominium, cooperative, and HOA may differ in so many ways that practitioners in these fields may prefer the unique remedies already associated with each of them. Accordingly, it may be argued that uniformity is not an essential element of a sound assessment collection program. Moreover, the requirement of the Martin Act<sup>33</sup> that condominium, cooperative,

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<sup>32</sup> *Id.* § 55-516. The balance of the section provides legal machinery for foreclosing upon the lien, and makes provisions for interest costs and reasonable attorney fees for the HOA. *See id.* The statute makes clear that the lien foreclosure procedure does not supplant any other remedy the HOA might have, as, for example, a suit to recover the debt. *See id.*

<sup>33</sup> N.Y. GEN. BUS. LAW § 352-e (McKinney 1996). *See generally* VINCENT DI

and HOA housing projects originate in an Offering Plan, and pass muster in an Attorney General's Office review, may go a long way towards ensuring that whatever collection procedures are ultimately decided upon are reasonable and workable.

*C. Revision of the By-Laws of the Not-for-Profit Corporation to Allow for Two Classes of Membership*

As originally enacted, the Not-for-Profit Corporation Law allowed for only one class of stock. As a consequence, all stockholders would have the same rights and obligations. However, it is sometimes essential to provide the flexibility of having different types of stockholders with different rights and obligations (including different rates of assessment). This is typically the case at the inception of the project where the developer insists upon specialized provisions that enable the builder to exercise the vote attached to the unbuilt or unsold homes; and to pay only a lesser or stepped-down assessment on such properties (as opposed to the full assessment payable by owner-occupied units).

In at least one case,<sup>34</sup> the developer surrendered valuable property rights, in exchange for the extension of these two prerogatives for a period beyond that specified in the original HOA project documentation. This agreement was duly approved by the HOA and memorialized in amended covenants and restrictions that were recorded in the land records. Unfortunately, the parties failed to complete the paper work, in that they failed to amend the Not-for-Profit Corporation's documents to create two classes of stock—with one class to be held by the builder until the project was completed and the other class to be held by the constituent home buyers. When a dispute arose between the developer and the HOA, the former was found to have lost all of the bargained-for prerogatives, because the corporate documents had not been amended to create two classes of stock. This case points out the necessity for attention to detail in managing the affairs of the HOA and its constituent owners.<sup>35</sup>

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LORENZO, NEW YORK CONDOMINIUM AND COOPERATIVE LAW §§ 2:8-2:13, 4:1, 4:2 (2d ed. 1995 & Supp. 1998) (discussing the application of, and exemption from, the Martin Act in real estate syndication and other securities offerings).

<sup>34</sup> See *Roxrun Estates, Inc. v. Roxbury Run Village Ass'n, Inc.*, 526 N.Y.S.2d 633 (App. Div. 1988).

<sup>35</sup> The Appellate Division's decision in *Roxrun* appears to be overly formalistic in its approach and may result in an unwarranted forfeiture of the developer's assets. The constituent owners had worked out a mutually acceptable settlement and me-

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morialized the same by amending the project's previously recorded covenants and restrictions. Should the developer be deprived of his interest in the project merely because the parties neglected to amend the Not-for-Profit Corporation's by-laws to make allowance for two classes of stock, each with different rights and obligations? Would it not have produced a more equitable solution to regard as done what the parties agreed to do (and thought they had already done), by ordering the HOA and its constituent members to amend the Bylaws as they had agreed in principle? Compare the forward looking approach of the Supreme Court in *United Housing Found., Inc. v. Forman*, 421 U.S. 837 (1975), wherein the Court found that the employment of stock as a vehicle in housing cooperatives was merely incidental to the overall picture, and, therefore no registration of such stock with the SEC was required.

