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COMMUNITY ASSOCIATION USE RESTRICTIONS: APPLYING THE BUSINESS JUDGMENT DOCTRINE

JEFFREY A. GOLDBERG

There is often more to the purchase of a home than the mere acquisition of ownership rights to a house and lot. Unwary purchasers may be surprised to find that they have also enrolled in a community association governing their neighborhood.[1] Exercising a broad range of powers over its members[2] through the ability to impose restrictions on the use and occupancy of the property, the association is formed by virtue of a recorded declaration of covenants, conditions, and restrictions.[3] The declaration is the governing instrument for the association, providing the groundwork for the operation of the association; establishing the rights, benefits, and obligations of the members; and granting authority and power to a board of managers elected by the members to regulate and manage the property as a whole. Accepting a deed to a residence encumbered by such a declaration automatically imposes mandatory membership in the association and subjects the purchaser to the obligations set forth in the declaration.[4]

One method of regulating the property is the imposition of restrictions on the members' use of the property. Use restrictions may appear directly in the form of restrictive covenants in the recorded declaration

1. The term "community association" is used to designate residential housing characterized by mandatory membership in a governing association. W. HYATT, CONDOMINIUM AND HOMEOWNER ASSOCIATION PRACTICE: COMMUNITY ASSOCIATION LAW 10 (2d ed. 1988). A condominium is a form of separate ownership of an individual dwelling unit in fee simple and an undivided interest as a tenant in common in the underlying fee and in the common elements (common spaces and building). P. ROHAN & M. RESKIN, CONDOMINIUM LAW AND PRACTICE § 1.01 (rev. ed. 1987) [hereinafter CONDOMINUM LAW]. A homeowner association is a form of home ownership in which the owner has a fee simple ownership of a lot and a membership interest in a homeowners association which owns the common property. W. HYATT, *supra*, at 20. A cooperative apartment is a form of housing in which a corporation has a fee simple ownership in the entire property and its stockholders enter into proprietary leases for an apartment in the building. P. ROHAN & M. RESKIN, COOPERATIVE HOUSING LAW AND PRACTICE § 2.01 (rev. ed. 1988). Although the differences in these forms of ownership are significant, the policies and principles of use restriction by the governing boards are identical so that the discussion in this Note will be generally applicable to all of the forms of residential community ownership. Commercial cooperative associations are beyond the scope of this Note.

2. *See* Reichman, *Residential Private Governments: An Introductory Survey*, 43 U. CHI. L. REV. 253 (1976).

3. For examples of such declarations, see CONDOMINIUM LAW, *supra* note 1, at app. C.

4. Ritchey v. Villa Nueva Condominium Ass'n, 81 Cal. App. 3d 688, 693-94, 146 Cal. Rptr. 695, 699 (1978).

and bylaws. Many declarations also grant to the board the power to promulgate rules and regulations which govern both the use of the property and the behavior of the members.[5]

Problems arise when a recalcitrant owner knowingly violates a use restriction or openly rejects or challenges the board's authority to impose the restriction. Enforcement of the use restriction then requires resort to the courts.[6] Courts are tempted to reexamine all of the policies, evidence, and rationales behind a restriction and will often modify or replace the board's approach to enforcement with the court's own solution.[7] This process undermines the board's authority. There is a need, therefore, for a standard of judicial review that will avoid second-guessing, but at the same time safeguard the interests and rights of individual owners from the majority's tyranny as represented by the board. Judicial review and enforcement must balance the interest of the association in having a relatively unfettered power to govern the community against the interest of the individual in owning and residing on his property without unnecessary and burdensome interference.

The courts have adopted an active role in reviewing the decisions and actions of association boards. This Note will question the prevailing assumption that the courts must necessarily intervene in the affairs of the community association. This paper will begin by reviewing the three different standards of review applied by the courts. The next section will evaluate and critique how each of these standards furthers the policy interests underlying their application. The final section will propose an assimilated standard which adopts a noninterventionist role for the

5. Hidden Harbour Estates v. Basso, 393 So. 2d 637 (Fla. Dist. Ct. App. 1981). Some courts have used differing approaches to enforcement of use restrictions depending on whether or not they are in the declaration or are adopted as rules by the board. *Id.* at 639-40. However, the only distinction is that the declaration and bylaws are written by the developer and the prospective purchaser has prior "notice" of the recorded restrictions. Rules and regulations can be created or modified by the board any time after purchase. Since most buyers either never read the documents prior to purchase or do not understand them, a better approach is to treat all the restrictions the same. *See* Note, *Condominium Rulemaking—Presumptions, Burdens and Abuses: A Call for Substantive Judicial Review in Florida*, 34 U. FLA. L. REV. 219, 227-28 (1982); *see also* Thanasoulis v. Winston Tower 200 Ass'n, 214 N.J. Super. 408, 423, 519 A.2d 911, 919 (1986) (Cohen, J., dissenting), *rev'd*, 110 N.J. 650, 542 A.2d 900 (1988) (following dissent). This Note focuses on the review of an association board's attempt to enforce and apply the use restriction, regardless of whether the restriction was written by the developer or by the board.

6. Although many declarations contain provisions granting self-help remedies to the board, concern for potential liability probably restrains most associations from attempting to exercise such remedies. However, one effective method of enforcement is for the board to levy a fine for an infraction of any association regulation, after giving notice and an opportunity to be heard. *See, e.g.*, UNIF. CONDOMINIUM ACT § 3-102(a)(11) (1978). Nevertheless, failure to pay the fine would then require enforcement by the courts.

7. *See infra* notes 140-52 and accompanying text.

courts while preserving the interests that the courts have heretofore attempted to protect.

I. JUDICIAL STANDARDS OF REVIEW

Each of the prevailing standards of review focuses on a different concept of the community association. Since the association is essentially a device for managing real property, some courts apply an equitable reasonableness test in the same manner as if adjudicating any other restrictive covenant. Other courts seem to concentrate on the governmental nature of an association and apply principles of constitutional law. Still others emphasize the organization of an association as a corporate entity and apply the law of corporate fiduciary duty. The strength or weakness of these three approaches depends, in large part, upon the propriety of exclusively characterizing a community association as a manager of real property, a quasi-governmental entity, or a corporation.

A. Equitable Reasonableness Test

The most common standard of review is equitable reasonableness. This test treats the governing documents of the association as any real covenant running with the land. The use and occupancy restrictions, and the grant of rule-making authority to the association, contained in the recorded declaration are treated in accordance with the established law of real property. The court will only enforce the restrictions if it finds them to be reasonable. The test is commonly attributed to *Hidden Harbour Estates v. Norman*,[8] in which the court reviewed a rule adopted by the board of directors of a condominium association prohibiting the use of alcoholic beverages in its clubhouse and adjacent areas. Finding that condominium unit owners form a democratic subsociety, the court held that the board was empowered to adopt reasonable rules but not arbitrary or capricious rules which bore no relationship to the unit owners' health, happiness and enjoyment of life.[9] The court in *Hidden Harbour* was reluctant to establish a uniform rule of reasonableness because "each case must be considered upon the peculiar facts and circumstances thereto appertaining."[10]

Adopting this approach, many courts evaluate use restrictions and the board's creation or enforcement of such restrictions by questioning

8. 309 So. 2d 180 (Fla. Dist. Ct. App. 1975). The test is here designated as "equitable reasonableness" to distinguish it from the constitutional reasonableness tests discussed below.

9. *Id.* at 182. The test is succinctly set forth by the court: "If a rule is reasonable the association can adopt it; if not it cannot." *Id.*

10. *Id.*

whether they are arbitrary or capricious. The application of this standard, however, has turned out to be very unpredictable.

The reasonableness test was explained further in *Hidden Harbour Estates v. Basso*.[11] The court noted that the reasonableness requirement was designed to fetter a board's discretion so that it can enact only those rules reasonably related to the promotion of the health, happiness and peace of mind of the unit owners.[12] Thus, the court rejected a condominium board's denial of a unit owner's request for permission to drill a shallow water well. The court reasoned that the Board must allow any use of the property by an owner unless it was "demonstrably antagonistic" to the condominium association's objective of promoting the health, happiness and peace of mind of the owners.[13]

On the other hand, in deciding whether a board acted arbitrarily or capriciously, a court in one case has approved a board's denial of a unit owner's request to replace a porch wire screen with glass jalousies because the "individual ought not be permitted to disrupt the integrity of the common scheme through his desire for change, however laudable that change might be."[14] In another case, the court upheld the validity of a condominium board's rules which severely limited unit rentals and the occupancy rate, and which required the board's approval of the transfer of the unit to guests. The court found that the rental and occupancy of units are legitimate subjects of rulemaking, so that the rules were valid and within the scope of the board's authority.[15] Another court found that a rule prohibiting dogs in a unit was reasonably consistent with the board's authority to promote health, happiness and peace of mind of the unit owners.[16] Still another court held that a restriction against dogs was reasonably consistent with the board's authority to promote the health, happiness and peace of mind of the unit owners.[17]

A court in another case upheld an age restriction that both limited occupancy of units to persons twelve years of age or older, and that required a couple who gave birth after the purchase of the unit to move out.[18] In another case, a court also upheld an age restriction limiting

11. 393 So. 2d 637 (Fla. Dist. Ct. App. 1981).
12. *Id.* at 640.
13. *Id.*
14. Sterling Village Condominium v. Breitenbach, 251 So. 2d 685, 688 (Fla. Dist. Ct. App. 1971).
15. Beachwood Villas Condominium v. Poor, 448 So. 2d 1143, 1144-45 (Fla. Dist. Ct. App. 1984).
16. Johnson v. Keith, 368 Mass. 316, 331 N.E.2d 879 (1975).
17. Wilshire Condominium Ass'n v. Kohlbrand, 368 So. 2d 629 (Fla. Dist. Ct. App. 1979).
18. Constellation Condominium Ass'n v. Harrington, 467 So. 2d 378 (Fla. Dist. Ct. App. 1985).

occupancy to persons eighteen years of age or older.[19] The age restriction was passed as an amendment to an association's bylaws after the plaintiff had purchased the unit. In addition, the U.S. Housing and Urban Development (HUD) property report, issued before the plaintiff purchased the unit, referred to the project as "family home units"[20] and the purchase agreement emphasized the close proximity of schools and a "fenced tot play area"[21] in the association. Nevertheless, the court found the amendment to the bylaws to be a reasonable exercise of the association's authority to prevent activity or conduct that might be a nuisance or annoyance to the residents.[22] On the other hand, the similarly retroactive application of an amendment to the bylaws of an association that prohibited keeping dogs in a unit (except for dogs registered with the association at the time of the amendment) was not permitted when a unit owner's dog gave birth to puppies.[23]

Thus, the equitable reasonableness test permits the board to prohibit buildings or improvements in some cases but not others; and to prohibit rents, children, and pets in some cases but not others. The reasons for the differences in outcome are not clear. Application of the reasonableness test, with its emphasis on, and sensitivity to, evaluating facts and circumstances of the particular case, does not establish a predictable guideline for determining what use restrictions are enforceable.

Although steeped in the language of constitutional law, the equitable reasonableness test probably derives from the modern law of restraints on the alienation of real property.[24] According to established law, a restriction on the use of real estate must be imposed for a just reason, must be designed to protect the interests of the party in whose favor it runs, and must be reasonable.[25] Although the guiding principle in the interpretation of restrictive covenants is the intent of the parties,[26]

19. Ritchey v. Villa Nueva Condominium Ass'n, 81 Cal. App. 3d 688, 146 Cal. Rptr. 695 (1978).

20. *Id.* at 695, 146 Cal. Rptr. at 700.

21. *Id.* at 696 n.10, 146 Cal. Rptr. at 700 n.10.

22. *Id.* at 697-98, 146 Cal. Rptr. at 701.

23. Winston Towers 200 Ass'n v. Saverio, 360 So. 2d 470 (Fla. Dist. Ct. App. 1978).

24. There has been speculation, however, that the reasonableness test has arisen out of a loose analogy with the judicial review standards of governmental administrative agency rulemaking. *See generally* Note, *supra* note 5, at 222-23; Note, *Judicial Review of Condominium Rulemaking*, 94 HARV. L. REV. 647, 662-63 (1981).

25. Le Febvre v. Osterndorf, 87 Wis. 2d 525, 533, 275 N.W.2d 154, 159 (Wis. Ct. App. 1979) (injunction action to enforce prohibition against renting a unit without the prior consent of the board).

26. Montoya v. Barreras, 81 N.M. 749, 751, 473 P.2d 363, 365 (1970) (restrictive covenants are used to assure uniformity of development and used to give owners a degree of environmental stability—owners have a right to rely on the restrictions so that effect will be given to the intention of the

their enforcement nevertheless is judged in terms of reasonableness.[27]

The reasonableness test as it applies to both the board of a community association and its power to create and enforce use restrictions requires both substantive and procedural analysis.[28] Substantively, the court must ask whether the board has acted within the scope of its authority (statutory or from the recorded documents),[29] and the court must look to the restriction itself to ensure that it has a reasonable relationship to the unit.[30] Procedurally, the court must determine whether the owners in question had adequate notice, and whether the board followed the association's procedures for enforcing the restriction. The analysis of the equitable reasonableness test therefore resembles the analysis of constitutional review.

B. Constitutional Reasonableness Standard

A second approach to review, the constitutional reasonableness standard, emphasizes the quasi-governmental nature of the community association rather than its real property characteristics. The focus of the analysis is, therefore, directed toward the protection of the property owners' rights rather than the protection of the purposes of the association. If a court finds that the association's enforcement of a use restriction is the equivalent of state action, and if such a use restriction substantially interferes with the constitutional rights of an owner, then the use restriction will be unenforceable.[31]

parties, after consideration of the language of the whole instrument and the surrounding circumstances).

27. Flamingo Ranch Estates v. Sunshine Ranches Homeowners, 303 So. 2d 665 (Fla. Dist. Ct. App. 1974) (covenant permitting land developer to modify, alter, amend, or repeal restrictions at any time was valid as long as it was exercised in a reasonable manner); *see* Holleman v. Mission Trace Homeowners Ass'n, 556 S.W.2d 632 (Tex. Ct. App. 1977) (covenants permitting free use of common property subject to parking restrictions made by board of "Planned Unit Developments" will be enforced if reasonable).

28. Johnson v. Hobson, 505 A.2d 1313, 1317 (D.C. 1986) (regulation prohibiting unlicensed vehicles and authorizing towing by police department was held not unreasonable).

29. *Id.*

30. *Id.* at 1318.

31. *See* Franklin v. White Egret Condominium, 358 So. 2d 1084, 1089 (Fla. Dist. Ct. App. 1977), *aff'd*, 379 So. 2d 346 (Fla. 1979). If the Constitution is found applicable to community associations, various restrictions and practices of associations would be subject to attack. Some associations have voting systems that would violate the constitutional equal protection principle of "one person—one vote." Association requirements that limit occupancy of units to members of a particular class or age also may violate the equal protection clause. Requirements that authorize associations to enter units or restrict the use of units may violate the right of privacy. Rules against solicitation by religious groups could violate freedom of religion. Restrictions against signs, distribution of literature, or access by non-residents may infringe freedom of speech. Restrictions on leasing and sale of units or architectural prohibitions may be considered the taking of property without just compensation or due process. Rosenberry, *The Application of the Federal and State Constitutions to*

Courts have found state action under three basic theories. The first is the "judicial involvement" theory. Under the theory, as defined in *Shelley v. Kraemer*,[32] the court's involvement in the matter by enforcing the restrictive covenant itself amounts to state action. The petitioners in *Shelley* purchased a parcel of land, but a deed restriction prohibited consummation of the sale because the petitioners were black. Neighbors sought to divest the petitioners of title.[33] The United States Supreme Court found state action to be present because the restrictive covenants could not have been enforced if not for the active intervention of the state courts.[34]

The second rationale is provided by the "state involvement" theory as set forth in *Jackson v. Metropolitan Edison Co.*[35] In that case, a privately owned, but highly regulated, utility was sued by a customer alleging that termination of her electric service was state action depriving her of her property without due process.[36] The Court stated that in order to find state action because of the extensive state regulation of the utility, there must be a "sufficiently close nexus between the State and the challenged action of the regulated entity so that the action of the latter may be fairly treated as that of the State itself."[37] The Court held that in this case heavy regulation by the State was not sufficient to constitute state action.[38] Close interdependence between a private party and a state, however, under some circumstances, can be sufficient to constitute participation by the state in the private conduct.[39] Although the Court in *Jackson* stated that regulation of private conduct alone is not ordinarily sufficient to constitute state action, the Court based its decision on the fact that the state regulation did not require the utility to shut off the

Condominiums, Cooperatives, and Planned Unit Developments, 19 REAL PROP. PROB. & TR. J. 1, 2-5 (1984).

32. 334 U.S. 1, 18-23 (1948).

33. *Id.* at 6-7. The neighbors sought an order of court to enforce the covenant by nullifying the transfer and declaring the grantor or other person to be the owner of the property.

34. *Id.* at 19. The court noted that the case did not merely involve the State's refusal to interfere with private individuals by leaving them free to discriminate, but rather that "the states have made available to such individuals the full coercive power of government to deny to petitioners, on the grounds of race or color, the enjoyment of property rights in premises which petitioners are willing and financially able to acquire and which the grantors are willing to sell." *Id.* The decision in *Shelley* does not support the proposition that states must outlaw all private facts of racism when judicial enforcement is sought. The state action in *Shelley* was the application of Missouri common law that actively chose to enforce only racially restrictive covenants while refusing to enforce other alienability restraints. L. TRIBE, CONSTITUTIONAL CHOICES 260 (1985).

35. 419 U.S. 345 (1974).

36. *Id.* at 347-48.

37. *Id.* at 351.

38. *Id.* at 358-59.

39. *See generally* Rosenberry, *supra* note 31, at 11-20.

electric source.[40] If the state regulation does compel or encourage the private conduct, there may be state action.[41]

The third theory finding state action is the "functional equivalent" theory formulated in *Marsh v. Alabama*.[42] The Court found in *Marsh* that a prohibition of the distribution of religious literature by a privately-owned company town was state action because the town functioned like a municipality.[43] In order to sustain this theory, however, the private property must be the functional equivalent of a municipality by providing a full range of public services such as fire, police, and medical services, schools, and a business district.[44]

These theories have been applied to community associations with varying degrees of success. The judicial involvement theory's application to a community association has had support. In *Franklin v. White Egret Condominium*,[45] for example, the Florida District Court of Appeal, considering the judicial involvement theory, ruled that when the association requested enforcement of the restrictive covenant at issue,[46] it invoked the sovereign powers of the State to legitimize the restriction. Therefore, the court had a "duty to carefully scrutinize [the] covenant with a view toward forbidding its enforcement should it fail to pass constitutional muster."[47] An Arizona court has also indicated approval of the judicial involvement theory,[48] although with some reservations.[49]

The activities of community associations, although regulated, have not generally been found to be state action through state involvement in community associations.[50] There is, however, considerable legislative in-

40. Jackson v. Metropolitan Edison Co., 419 U.S. 345, 358 (1974).

41. *See* Rosenberry, *supra* note 31, at 14-15.

42. 326 U.S. 501 (1946).

43. *Id.* at 506-08.

44. Rosenberry, *supra* note 31, at 23.

45. 358 So. 2d 1084, 1089-91 (Fla. Dist. Ct. App. 1977), *aff'd*, 379 So. 2d 346 (Fla. 1979).

46. The association requested that the court set aside the transfer to the grantor's brother of a one-half interest in a unit because of the declaration's prohibition of ownership of a unit by more than one family, and because the grantee had a child under the age of 12 in violation of the rules. *Id.* at 1085-86.

47. *Id.* at 1089.

48. Riley v. Stoves, 22 Ariz. App. 223, 526 P.2d 747 (1974) (upholding prohibition against persons under 21 years of age residing in mobile home subdivision).

49. The court distinguished between the stricter judicial standard applicable to an inherently suspect classification of race in *Shelley* and the age classification system involved in *Riley*, which is a classification subject to a lesser degree of judicial scrutiny. *See generally* L. TRIBE, AMERICAN CONSTITUTIONAL LAW 1610-18 (2d ed. 1988). The court noted the problem of examining the covenant in terms of state objectives, which was not an issue in *Shelley*. *Riley*, 22 Ariz. App. at 228 n.2, 526 P.2d at 752 n.2. The standard of review was confusing because the State did not write the age-limit restriction. Thus, it is not appropriate to examine the restriction in terms of the state's objective. The restriction was privately drawn so it must be examined in terms of a permissible private objective. *Id.* at 228, 526 P. 2d at 752.

50. *See* Owens v. Tiber Island Condominium Ass'n, 373 A.2d 890, 895 (D.C. 1977) (rejected

volvement in the creation, operation and management of condominium associations which might lead to a finding of state involvement.[51] For example, a statute that required the association to follow its declaration and bylaws might be found to coerce the association into enforcing its use restrictions. Thus, under the compulsion language of *Jackson*, such a statute could establish the necessary relationship to the state.[52]

This state involvement theory was raised in *Thanasoulis v. Winston Tower 200 Association*,[53] in which the plaintiffs challenged an association's parking rule.[54] The court refused to attribute the parking rule to the State because the plaintiff failed to demonstrate a "sufficiently close nexus" between the State's regulation of condominiums and the parking rule.[55] The State regulation did not require passage of the rule and did not affect the administration of the rule.[56]

In contrast, a California court held invalid a restrictive covenant containing age restrictions and limiting the number of persons in a residence to three because it violated the right of privacy under the California Constitution.[57] Here, the court found State action under the "state involvement" theory noting that the City of Redland had entered into an agreement with the developer to issue a special use permit in exchange for the developer's act of placing the restrictions and including a provision that prohibited amendment without the approval of the city.[58]

The application of the functional equivalent theory of community associations has sparked much interest.[59] One commentator has argued that if an association takes on a government role by attempting to regulate areas beyond its scope of authority and thereby imposes itself on an unconsenting public, the courts should subject it to constitutional scrutiny because "by acting like a government, the association will be treated like a government."[60] Other commentators disagree, noting that an asso-

argument that association's assessment schedule based on unit owners' percentage of ownership was state action).

51. *See* Rosenberry, *supra* note 31, at 11-13.

52. *Id.* at 14-15.

53. 214 N.J. Super. 408, 519 A.2d 911 (App. Div. 1986).

54. The rule increased the parking fee for tenants of nonresident owners but did not raise the fee for resident owners. *Id.* at 410, 519 A.2d at 912.

55. *Id.* at 412, 519 A.2d at 913. *Accord* Brock v. Watergate Mobile Home Park Ass'n, 502 So. 2d 1380, 1382 (Fla. Dist. Ct. App. 1987).

56. *Thanasoulis*, 214 N.J. Super. at 412-13, 519 A.2d at 913.

57. Park Redlands Covenant Control Comm. v. Simon, 181 Cal. App. 3d 87, 226 Cal. Rptr. 199 (1986).

58. *Id.* at 99, 226 Cal. Rptr. at 206.

59. *See, e.g.*, Weakland, *Condominium Associations: Living Under the Due Process Shadow*, 13 PEPPERDINE L. REV. 297, 320-22 (1986).

60. *Id.* at 329.

ciation is inescapably private in every respect. The legal structure is created by private developers at their private initiative, on private property, and using their private money, and the property is then transferred to private individuals.[61] The "municipal" attributes of an association that so often give rise to the quasi-government label, such as private taxation (assessments) and public services (street maintenance, snow removal and recreational facilities) are not taken on in the same manner as municipal services.[62] That is, municipal services are imposed by law and include a vast range of services for the entire community, while the services provided by an association are limited and are not imposed by force of law. Rather, the owners are acting in unison for the sake of convenience and economic efficiency to obtain services they desire, or would have to obtain anyway, as individual homeowners.[63]

After a court determines that state action is present, it must next determine the constitutionality of the use restriction by analyzing it in terms of equal protection and both substantive and procedural due process. In order for a use restriction to be substantively invalid, the court must ascertain that fundamental property or liberty interests are being infringed by the use restriction, and that such an infringement is not reasonably related to the goals of the condominium or that the means to the end is not the least restrictive of the owner's property and liberty interests.[64] The court applies a balancing test between the individual unit owner's rights and the association's community goals. This analysis is similar to the equitable reasonableness test in that the goals of the association are balanced against the effect of the use restriction. However, the constitutional standard places a greater emphasis on evaluating the impact of the use restriction on the individual in an attempt to guard against unduly oppressive restrictions.

Application of substantive due process analysis has led to unpredictable results. For example, a board's approval of the construction of a second story on a unit was found to be an appropriation to the common elements of the property rights of other unit owners, represented by the air space occupied by the addition.[65] The assignment of parking spaces

61. *See* Reichman, *supra* note 2, at 255-56.

62. *Contra* Weakland, *supra* note 59, at 304. The definition of a municipal corporation is a political subdivision created by the state, governed by an electoral body, and entrusted by the state with many powers of self-government. A community association is often created by the state with powers of self-government and is governed by an elected board of managers. *Id.* at 304-05.

63. *See* Reichman, *supra* note 2, at 259-60; *see also Brock*, 502 So. 2d at 1382 (homeowner's association lacks a municipal character because the services provided *supplement* rather than replace those provided by a municipality).

64. Weakland, *supra* note 59, at 310-11.

65. Makeever v. Lyle, 125 Ariz. 384, 609 P.2d 1084 (1980) (holding that the association had no

to individual owners by a board was held not to be an unlawful taking of property in *Juno By The Sea North Condominium Association v. Manfredonia*.[66] The court found that the regulation was fair and made sense under the circumstances.[67] In *Monell v. Golfview Road Association*,[68] the court found that construction of a speed bump in a private road was an appropriation of the plaintiff's easement rights because the speed bump substantially diminished the convenience of the roadway.[69]

The court must also analyze a use restriction in terms of procedural due process. The court must determine whether a use restriction was imposed after an owner received adequate notice of a hearing, whether the hearing was fair and impartial, and whether the owner had an opportunity to be heard.[70] An association may meet this requirement by holding a hearing to permit the owners to produce evidence and offer arguments before the association imposes or enforces a use restriction. There is some authority that procedural due process is satisfied if the owner has constructive or actual notice of the restriction, the association has made a reasonable demand for compliance with the restriction, and notice of commencement of litigation and an opportunity to be heard is given to the owner in the context of a judicial proceeding.[71]

Many declarations provide for a thirty-day notice of default and a subsequent ten-day notice of termination before a board can take legal action to enforce either the declaration's use restrictions or its own rules.[72] It appears that the mailing of such notices would meet procedural due process notice requirements, especially because no infringement of rights is enforced until after the safeguards of the judicial proceeding are met.[73] Finally, the courts must apply equal protection analysis[74] to determine whether use restrictions discriminate among the

right to convert a portion of the common elements to the exclusive use and control of an apartment owner).

66. 397 So. 2d 297 (Fla. Dist. Ct. App. 1981).

67. *Id.* at 304-05. The alternative to the board's assignment of parking spaces was chaos. *Id.* at 305.

68. 359 So. 2d 2 (Fla. Dist. Ct. App. 1978).

69. *Id.* at 4.

70. Weakland, *supra* note 59, at 314.

71. Majestic View Condominium Ass'n v. Bolotin, 429 So. 2d 438 (Fla. Dist. Ct. App. 1983).

72. *See* Board of Managers of Village Square I Condominium Ass'n v. Amalgamated Trust & Sav. Bank, 144 Ill. App. 3d 522, 531, 494 N.E.2d 1199, 1205 (1986).

73. *Id. But see* Breene v. Plaza Tower Ass'n, 310 N.W.2d 730, 734 (N.D. 1981). The court in *Breene* ruled that a first right of refusal restriction on purchase or lease of units could not be enforced unless the owners had notice of the restriction by recording in the office of the registrar of deeds, before they purchased the unit, because the owners had a statutory right to notice of a restriction.

74. There are three different standards of review applied by the courts in equal protection decisions; the rational relationship test is applied to economic legislation. The court analyzes only

unit owners. In *Riley v. Stoves*,[75] the Arizona Court of Appeals reviewed a covenant in a mobile home subdivision restricting occupancy of a unit to persons twenty-one years of age and older. The court upheld the covenant because the "Fourteenth Amendment does not require a state to treat all people identically. State action, even though discriminatory, generally will not be held violative of the equal protection clause where it can be shown that the classification bears some rational relationship to a permissible state objective."[76] Because the restriction was privately drawn the court examined the private objective to determine if the restriction was a reasonable means to accomplish that objective.[77] The court stated that the obvious purpose of the restriction preventing children was to create a quiet and peaceful neighborhood.[78] Age limitations, the court concluded, are not arbitrary.[79] Similarly, a Massachusetts court found that limiting to two the number of units owned by the same person or entity was rationally related to the purpose of the association[80] because the restriction reasonably contributed to a stable population.[81]

C. *Business Judgment Doctrine*

The third approach to judicial review of a board's enforcement of use restrictions is the business judgment doctrine. Based on the corporate nature, rather than the real property or quasi-governmental characteristics of the community association, the business judgment doctrine arises out of the fiduciary duties owed by corporate directors to the corporation and its shareholders.[82] The fiduciary duty is twofold: 1) the duty of loyalty, which prohibits faithlessness and self-dealing; and, 2) the

whether the discriminatory activity bears a rational relationship to the government purpose. The strict scrutiny test is applied in cases involving a fundamental constitutional right or involving a suspect classification such as race or national origin. The court will not accept the legislation unless the government demonstrates a compelling need for the discriminatory action. The final test is an intermediate test applied to classifications based on gender or citizenship, whereby the court analyzes the activity in terms of whether the discriminatory classification bears a substantial relationship to an important governmental objective. *See generally* R. ROTUNDA, J. NOVAK & J. YOUNG, CONSTITUTIONAL LAW § 4 (1986).

75. 22 Ariz. App. 223, 526 P.2d 747 (1974).

76. *Id.* at 228, 526 P.2d at 751-52.

77. *Id.* at 228-29, 526 P.2d at 752.

78. *Id.* at 229, 526 P.2d at 753.

79. The court stated that age is not a suspect class. Therefore, the heightened review by the court of strict scrutiny is not necessary. *Id.* at 228 n.2, 526 P.2d at 752 n.2. However, the federal Fair Housing Amendments Act of 1988 (effective March 12, 1989), Pub. L. 100-430 (codified as amended in 42 U.S.C. §§ 3601-3619), renders unlawful most association restrictions on occupancy based on age.

80. Franklin v. Spadafora, 388 Mass. 764, 447 N.E.2d 1244 (1983) (the court avoided deciding whether amendment to bylaws involved state action).

81. *Id.* at 775, 447 N.E.2d at 1250.

82. D. BLOCK, N. BARTON & S. RADIN, THE BUSINESS JUDGMENT RULE 1 (2d ed. 1988).

duty of care, which requires the exercise of care that an ordinarily prudent person would follow under similar circumstances.[83]

The business judgment doctrine is a tool of judicial review for determining whether the directors' fiduciary duties have been met.[84] Although commonly considered as a defensive shield to protect directors from liability arising out of their decisions when sued by the stockholders, the doctrine is actually a test for judicial review of corporate decisions which will shield a decision from challenge unless impropriety is demonstrated.[85] There are four elements of the doctrine, presumed to be satisfied unless rebutted by the challenger of the decision. All four elements must be present to shield corporate decisions from judicial scrutiny.[86] The first element is that the decision must be a business decision. Inaction is not protected unless a decision was exercised to refrain from acting.[87] The second element is disinterestedness and good faith. The directors must not be acting out of any personal interest, self-dealing, or other improper purpose.[88] The third element is informed decision. The directors' action must demonstrate an informed exercise of business judgment or it will not be protected.[89] The fourth element is rational business purpose. Even if the other three elements are satisfied, this element precludes the directors from acting with a reckless indifference to the affairs of the corporation.[90]

83. *Id.* The stockholders grant to the directors their power of control over the business. The directors must carry out their power of control and management for the purposes for which the corporation was organized. *See* D. BAYNE, THE PHILOSOPHY OF CORPORATE CONTROL 50-51 (1986).

84. D. BLOCK, N. BARTON & S. RADIN, *supra* note 82, at 3.

85. *Id.* A useful distinction can be made between the business judgment *rule* and the business judgment *doctrine*—the former refers to action against the directors for damages and the latter refers to actions against the decisions. *See* Hinsey, *Business Judgment and the American Law Institute's Corporate Governance Project: The Rule, the Doctrine, and the Reality*, 52 GEO. WASH. L. REV. 609, 611-12 (1984). For the purpose of this Note, "doctrine" will be used for describing the standard of judicial review for enforcement of association use restrictions even though the distinction has not been universally adopted.

86. Treadway Cos. v. Care Corp., 638 F.2d 357, 382 (2d Cir. 1980). Once the challenger demonstrates that self-dealing, fraud, or bad faith is involved, the burden shifts to the director to prove that the action was fair and reasonable. *Id.*

87. Aronson v. Lewis, 473 A.2d 805, 813 (Del. 1984) (stockholder derivative action challenging compensation terms and loans made to corporation's director).

88. Guth v. Loft, Inc., 23 Del. Ch. 138, 167, 5 A.2d 503, 510 (1939). Any gain or advantage acquired by a director in violation of his duty of loyalty is treated as being held in trust for the benefit of the corporation regardless of whether actual injury is caused to the corporation. For purposes of public policy, a director may not profit from a breach of fiduciary duty. *Id.*

89. Smith v. Van Gorkom, 488 A.2d 858, 872 (Del. 1985). Fiduciary duty requires more than the absence of good faith. A director must act in an informed and deliberate manner. There is an affirmative duty of care to assess critically all of the information under the circumstances. *Id.* at 872-73.

90. *See* Muschel v. Western Union Corp., 310 A.2d 904 (Del. Ch. 1973). Shareholders of Western Union challenged a merger with National Sharedata Corporation (NSC) alleging that the plan

The business judgment doctrine has been applied to community associations in several instances.[91] In *Rywalt v. Writer Corp.*,[92] the association of owners in a subdivision was sued by property owners to enjoin the association from constructing a tennis court on common property in the vicinity of their lots.[93] The trial court found that the board had kept incomplete minutes of meetings; had used the annual meeting of members only for electing directors; had held closed board meetings; had failed to submit the tennis court plan to its architectural control committee; had failed to place greater priority upon drainage problems and camper and boat parking; had inadequately polled its members regarding the location of the tennis court; and had failed to poll any of the members with respect to the need for a new tennis court.[94] Thus, the trial court concluded that the board had acted arbitrarily and capriciously and entered an order enjoining construction of the tennis court.[95] The Colorado Court of Appeals dissolved the injunction and adopted the business judgment doctrine:

> The good faith acts of directors of profit or non-profit corporations which are within the powers of the corporation and within the exercise of an honest business judgment are valid. Courts will not, at the instance of stockholders or otherwise, interfere with or regulate the conduct of the directors in the reasonable and honest exercise of their judgment and duties.[96]

The Superior Court of New Jersey also applied the business judgment doctrine in an action against a condominium association questioning its right to assert a lien against units of owners who failed to pay their

was designed by the directors to maintain control of the corporation, and that Western Union was paying an inflated price for NSC's stock. *Id.* at 905-06. Western Union claimed that the deal was part of a long-term business plan for expansion into computer information services. *Id.* at 907. The court held that the board was entitled to a presumption of good faith attributed to a rational business purpose. *Id.* at 909.

91. *See, e.g.*, Schwarzmann v. Association of Apartment Owners, 33 Wash. App. 397, 655 P.2d 1177 (1982), in which the court stated that "[l]ike their corporate counterparts, condominium directors have a fiduciary responsibility to exercise ordinary care in performing their duties and are required to act reasonably and in good faith. . . . Absent a showing of fraud, dishonesty, or incompetence, it is not the court's job to second-guess the actions of directors." *Id.* at 403, 655 P.2d at 1181 (citation omitted).

92. 34 Colo. App. 334, 526 P.2d 316 (1974).

93. *Id.* at 335-36, 526 P.2d at 316. The plaintiffs alleged that the decision to build the tennis court was not only beyond the scope of the authority of the board, but was also an arbitrary and capricious action. The plaintiffs also alleged that construction of the tennis court would constitute unreasonable interference with their view, their access to other common property, and would be an unreasonable invasion of their privacy.

94. *Id.* at 336, 526 P.2d at 317. The governing documents of the association, however, did not contain provisions specifying the conduct of board meetings or membership meetings and did not require the board to act in the manner that the trial court apparently required.

95. *Id.* The funds for the project were provided by the developer of the subdivision. As a result, there was no issue concerning the right of the board to expend funds for the project.

96. *Id.* at 337, 526 P.2d at 317.

share of a special assessment. In *Papalexiou v. Tower West Condominium*,[97] the court refused to review the board's action of levying an emergency special assessment.[98] The court held that no demonstration of lack of good faith, self-dealing, dishonesty or incompetency was made, and determined that the board had demonstrated, by its deliberate actions and consideration of all of the possibilities, "its good faith intent to act within the scope of its authority and to do what was necessary in the best interest of all concerned."[99]

New Jersey's business judgment doctrine was clarified in *Thanasoulis v. Winston Tower 200 Association*.[100] An owner challenged a rule adopted by the board which increased the parking fee for tenants of nonresident owners, claiming it unfairly and unreasonably discriminated against nonresident owners.[101] The court limited the scope of its inquiry to two questions. First, it asked whether the board's action was authorized by statute or its governing documents and then whether the action was fraudulent, self-dealing, or unconscionable.[102] This two-part test clarified the manner of determining whether a board acts with good faith intent. The nonresident owners might have considered the board's action as hostile to them, but the court's determination of good faith did not include subjective considerations.

In Illinois, the business judgment doctrine was applied in *Yorkshire Village Community Association v. Sweasy*.[103] The owner challenged the board's interpretation of a restriction requiring board approval of any structure, alleging that a flower box is not a structure. The court held that the association is entitled to interpret its own declaration and restrictions.[104]

The business judgment doctrine is suited to thwarting the subjective gripes of an owner who merely does not agree with the decision of the

97. 167 N.J. Super. 516, 401 A.2d 280 (Ch. Div. 1979).

98. *Id.* at 527, 401 A.2d at 286. The board passed a special assessment of $100,000 to pay for unpaid bills from vendors and suppliers, a management fee, fuel and electricity bills, and extensive repair to the building's air conditioning, heating and fire systems. *Id.* at 520-24, 401 A.2d at 282-84.

99. *Id.* at 529, 401 A.2d at 286. The court noted that the financial problems of the association were inherited from its predecessors, and that the board had carefully weighed all of the alternatives and sought legal advice before reaching its decision.

100. 214 N.J. Super. 408, 519 A.2d 911 (App. Div. 1986), *rev'd*, 110 N.J. 650, 542 A.2d 900 (1988).

101. *Id.* at 410, 519 A.2d at 912.

102. *Id.* at 411, 519 A.2d at 912.

103. 170 Ill. App. 3d 155, 524 N.E.2d 237 (1988).

104. *Id.* at 159, 524 N.E.2d at 239. The court then went on to discuss the merits of the board's interpretation of the word "structure" and found that a flower box was the type of object for which the architectural control restrictions were designed. *Id.* at 160-61, 524 N.E.2d at 240.

board. One of the ways it accomplishes this is by placing the burden of proof upon the challenger of the board's decision.

For example, the court in *Dockside Association v. Detyens*[105] held that the burden of demonstrating a board's lack of good faith, by a preponderance of the evidence, falls upon the challenger of the board action.[106] The rationale behind the business judgment doctrine is that the directors need broad discretion in taking actions. Judicial second-guessing is counter-productive and is something the courts are not competent to carry out successfully.[107] To avoid this problem, the doctrine creates a rebuttable presumption that the directors have acted in good faith, on an informed basis, and in the honest belief that the action was taken in the best interests of the corporation.[108]

The application of this doctrine can be illustrated by a common example. Many associations have restrictions against the conduct of a business enterprise in the units. A parent who baby-sits a number of children may not consider this activity as a day care business. The conduct in the home is arguably no different than the private activity normally occurring in any large family—a number of children playing, eating, and sleeping in the unit. Yet, the association might consider that the activity results in profit, causes daily business traffic as parents come in and out of the unit, and creates increased noise, maintenance, and insurance problems. Thus, the association could appropriately decide that the owner must cease this business activity.[109] The owner might resent this "intrusion" by the board. The individual owner's challenge would be properly blocked by the business judgment doctrine unless the owner first demonstrated that the directors acted in violation of their fiduciary duty. Once the presumption of good faith action is overcome, then the burden would shift to the board which would have to defend its actions. However, if the owner could not show bad faith, the board's authority would remain intact. In a jurisdiction that does not follow the business judgment doctrine, however, the court would review the circumstances, history, and factual details surrounding the decision of the board and then

105. 291 S.C. 214, 352 S.E.2d 714 (S.C. Ct. App. 1987), *aff'd*, 294 S.C. 86, 362 S.E.2d 874 (1987).

106. *Id.* at 217, 352 S.E.2d at 716.

107. D. BLOCK, N. BARTON & S. RADIN, *supra* note 82, at 5-6; illustrative of this hands-off approach is the Illinois Appellate Court case which left the discretion to operate a major league baseball team with its directors. Shlensky v. Wrigley, 95 Ill. App. 2d 173, 181, 237 N.E.2d 776, 780 (1968) (stockholders sued directors of corporation which owned the Chicago Cubs alleging mismanagement in relation to decision not to install lights in Wrigley Field).

108. Aronson v. Lewis, 473 A.2d 805, 812 (Del. 1984).

109. *See* Board of Managers of Village Square Condominium Ass'n v. Amalgamated Trust & Sav. Bank, 144 Ill. App. 3d 522, 494 N.E.2d 1199 (1986).

decide for itself whether baby-sitting is a prohibited business. Following this latter approach, the board's decision is too vulnerable to judicial second-guessing.

II. POLICY INTERESTS UNDERLYING JUDICIAL REVIEW

Three major approaches to judicial review of community association use restrictions have been discussed: the equitable reasonableness test based on the equitable considerations of the law of restraints on the alienation of real property; the constitutional reasonableness standard based on the notion of the association as a private quasi-government and on the prevailing theories of state action in private situations; and the business judgment doctrine, borrowed from corporate law. All three of these approaches have common themes and similar purposes.[110] This Note will now identify the underlying policies of these standards and evaluate how well these standards serve the policy interests which they were designed to further.

A. Preventing Abuse of Power—The Individual Interest

In the cases involving community association use restrictions, the prevention of abuse of power is the central theme of judicial review. The power of a community association's board is enormous. Architectural control committees, for example, have nearly unlimited discretion to approve or reject even the smallest details of the property's appearance, from the color of the paint to the size of the garage.[111] Association "house rules" regulate a wide spectrum of activities, including the number of occupants living in a unit, the volume of playing music, hours for social gatherings, social room activities, storage of property, garbage storage and removal, use of patio furniture and barbecues, swimming pool and tennis court use, rental of units, vehicle parking, and ownership of pets.[112] Some rules and regulations even govern such matters as the frequency of flushing the toilet in the unit and the kind of soap used in owners' dishwashers.[113] The broad scope of a board's asserted authority

110. *See infra* notes 123-32 and accompanying text.

111. Reichman, *supra* note 2, at 269-70.

112. The examples listed are from a comprehensive set of rules and regulations, prepared by Marshall N. Dickler, Ltd. (1988), commonly used by condominium associations in the Chicago area. *See generally* Note, *Promulgation and Enforcement of House Rules*, 48 ST. JOHN'S L. REV. 1132 (1974).

113. The following are examples of such rules:

> When a resident plans to be away from his or her apartment for some length of time, the Management Office should be informed. It is advisable when planning a prolonged absence to arrange with a neighbor or friend to flush the toilet every two weeks. The water seal in the toilet may be sucked out or evaporate permitting the entrance of sewage gases and

over the conduct of an individual owner is so extensive that the potential for harassment and malicious abuse of power is great.[114] Furthermore, the inability to determine precisely what activity an individual is permitted to do in his own home creates a puzzling sense of helpless vulnerability.

The potential for abuse includes: economic exploitation of some homeowners by the majority;[115] malicious actions directed toward specific individuals;[116] taking of bribes for special favors;[117] harassment of "undesirables;"[118] manipulating the assessment system to eliminate the low-income population;[119] coercive imposition of political, economic, or religious principles;[120] and establishment of "illiberal" private govern-

> causing possible foul odors in the apartment. Water should also be run in the sink, lavatory, bath and shower for a short time to maintain the water seals in their drains. Dishwashing machines may be operated in a unit but the detergent used must be of the low-sudsing type specifically intended for use in an automatic dishwasher. High-foaming type washing compounds commonly used with open dishpans are not acceptable. Some low-sudsing detergents, suitable for automatic dishwashers are Dishwasher All, Electrosol, Finish, Palmolive Crystal-Clear, Calgonite, Cascade, etc. Brand selection is for the user within the restriction that a low-sudsing detergent be used. Any overflow will be considered to have been caused by the act or neglect of the owner/tenant. The owner will be held responsible for any damage.

114. Cohen v. Kite Hill Community Ass'n, 142 Cal. App. 3d 642, 651, 191 Cal. Rptr. 209, 214 (1983) (challenge of architectural control committee's arbitrary approval of fence).

115. Ellickson, *Cities and Homeowners Associations*, 130 U. PA. L. REV. 1519, 1532 (1982). A classic example of this problem occurs in phased developments. The developer builds the subdivision in phases over several years. By the time the later phase is occupied, the earlier phases may require substantial repair and structural replacement work at great expense. The owners of the new units may find themselves subsidizing the rehabilitation of the older homes owned by their neighbors in the association who have levied significantly high assessments to pay for the work. Economic exploitation does not always occur at the hands of the majority. In Barclay v. Deveau, 11 Mass. App. Ct. 236, 415 N.E.2d 239 (1981), *vacated*, 384 Mass. 676, 429 N.E.2d 323 (1981), the developer maintained control over the board of a community association even after a majority of the units had been sold to the individual members. The developer-controlled board raised the assessments by 38 percent against the wishes of the majority of the members.

116. *See* Note, *supra* note 5, at 231. Since the board of a community association is elected by the majority of the members, the board is naturally not immune from political pressure which can lead to the harassment of individuals who have opposed the actions of those in power. Since members of a community association board are generally not compensated for the work they perform on behalf of the association, the incentive for serving on the board for some may be the opportunity to wield power over their neighbors.

117. Reichman, *supra* note 2, at 275.

118. *Id.* Enforcement of use restrictions against certain classes of members may be particularly vigorous if the majority of the members perceive that the class possesses undesirable characteristics. For example, while cooking odors are normally tolerated, the cooking smell of certain ethnic foods may be considered offensive to other members so that an attempt will be made to prohibit the creation of such odors in a building.

119. *Id.* By adopting a particularly ambitious budget, or by passing a sudden special assessment, the wealthier homeowners can force low-income owners to sell their units and leave the association.

120. Note, *The Rule of Law in Residential Associations*, 99 HARV. L. REV. 472, 473-74 (1985). One useful method of insuring uniformity of the members to a particular standard established by an association is the exercise of a right of first refusal by the board. Typically, notice of a sale or lease of a unit must be given to the board by the proposed seller. The board will have thirty days to buy or lease the unit on the same terms as the prospective transaction and thereby prevent the sale or lease

mental systems which renounce basic constitutional freedoms[121] and subject homeowners to surveillance and intimidation in their own homes.[122]

The courts have acted out of concern about this great potential for abuse. In *River Terrace Condominium Association v. Lewis*,[123] the association sought an injunction to obtain access to a unit to spray insecticides for exterminating cockroaches. The right of an association to do this is not normally questioned, considering the obvious health hazard posed by cockroach infestation. The unit owner argued that the residue of the insecticide was dangerous to her health and claimed that her dog had died a few years before because of an excess of phenols in the dog's system from past sprayings. Upholding the board's decision to enter the unit, the court engaged in an exhaustive inquiry of the hazards of cockroach infestation, the habits of cockroach migration, the safety of the insecticides used, and the nondiscriminatory manner of the board's carrying out its decision. The court concluded that the board acted reasonably and in good faith,[124] but only after the court carefully sought to establish that the need for spraying cockroaches was reasonable in application and not excessive or injurious to the health of the occupants.[125]

The District of Columbia Court of Appeals specifically stated the policy underlying judicial review in *Johnson v. Hobson*.[126] After acknowledging the broad authority granted to the board to regulate the property, the court noted that its equitable power to review the actions of the board is exercised to limit and restrain the power of the board.[127] To do this, the court said a rule will be scrutinized to determine whether the board had the legal power to enact it, whether the rule had a relationship to the health and happiness of the owners, whether the rule affected certain unit owners unfairly or disproportionately, whether the owners had adequate notice of the rule, and whether the procedures of the associa-

of a unit to an individual whom the board deems to be undesirable. This effectively prevents nonconforming and dissenting members from joining the association and perpetuates the ideological standard established for the association.

121. *Id.* at 473-75. An "illiberal" community "repudiate[s] norms embodied in traditional civil rights." *Id.* at 473. An argument could be made that extreme religious or political factions ought to have the right to create a community in which their ideological views are enforced. However, such illiberal communities are difficult to justify when their ideology conflicts with the traditional values of the community.

122. *Id.* at 487. It should be noted, however, that the average community association in the United States generally does not regulate the conduct of the members inside of their units, except under limited circumstances. Nevertheless, the potential for greater abuse inarguably exists.

123. 33 Ohio App. 3d 52, 514 N.E.2d 732 (1986).

124. *Id.* at 58, 514 N.E.2d at 738.

125. *Id.* Considering that control of cockroach infestation is such an obviously necessary course of action, the court's careful analysis of the situation is surprising.

126. 505 A.2d 1313 (D.C. 1986).

127. *Id.* at 1317.

tion were followed in enacting the rule.[128]

In passing on a board's enforcement of a restriction against commercial baby-sitting in a unit, the Illinois court in *Board of Managers of Village Square I Condominium Association v. Amalgamated Trust & Savings Bank*,[129] concentrated on the board's fiduciary duty. The court held that the proper exercise of such duty required strict compliance with the association's declaration and bylaws, and the procedures set forth therein which govern board actions.[130] Therefore, the policy of the court was strictly to limit the board to the exercise of powers specifically granted to the association, as a way of preventing potential abuse. In *Hidden Harbour Estates v. Basso*,[131] the court noted its function to fetter the discretion of the board and stated in strong terms that the board's obligation was to permit any use of the property unless it was antagonistic to the legitimate objectives of the association.[132]

In summary, the courts recognize the vast potential for abuse of power by a community association due to the broad powers available to a board. The decisions of the courts reflect a concern that individuals must not be unduly harmed by the exercise of the majority's power. In reviewing use restrictions, the courts attempt to limit the authority of the board whenever such authority might threaten the freedom or well-being of the individual. The courts uphold the board's authority when possible, but only after careful deliberation to guard against any threat to the individuals concerned.

B. Promoting Cooperative Living—The Collective Interest

The interest in safeguarding individuals from the potential tyranny and corruption of the board is indisputably a powerful one. There is also a significant interest in protecting the condominium association and the majority of unit owners from the excesses of individuals.

The following statement taken from *Hidden Harbour Estates v. Norman*[133] is widely quoted to support the right of a community association to regulate its members:

> It appears to us that inherent in the condominium concept is the principle that to promote the health, happiness, and peace of mind of the majority of the unit owners since they are living in such close proximity and using facilities in common, each unit owner must give up a

128. *Id.* at 1317-19.
129. 144 Ill. App. 3d 522, 494 N.E.2d 1199 (1986).
130. *Id.* at 529-30, 494 N.E.2d at 1204.
131. 393 So. 2d 637 (Fla. Dist. Ct. App. 1981).
132. *Id.* at 640.
133. 309 So. 2d 180 (Fla. Dist. Ct. App. 1975).

> certain degree of freedom of choice which he might otherwise enjoy in separate, privately owned property. Condominium unit owners comprise a little democratic sub society of necessity more restrictive as it pertains to use of condominium property than may be existent outside the condominium organization.[134]

The very purpose of a community association is to establish a governing body which will take on the burdensome and vital task of management of the property for the benefit of the owners.[135] The entire group of owners cannot meet, gather information, plan, formulate policies, review the circumstances and adopt management decisions every time a problem arises.[136] One commentator has noted that multiple ownership of buildings, such as modern community associations, flourished for a time during the Middle Ages in the cities of Europe. Multiple ownership was abandoned, however, because of the disputes among owners arising out of a lack of governing rules.[137] Cooperative home ownership vitally needs a governing board with broad discretionary power to maintain, preserve, and control the property and to protect the rights and interests of all owners.

Enforcement of a community association's use restrictions is vital to the protection of the interests of owners for a stable planned environment.[138] Many owners depend upon the integrity of the communities. They require that the community remain stable and that the members of the community retain control over their living arrangements.[139] The enforcement of use restrictions protects the property from deteriorating and from decreasing in value, enhances the desirability of living in the unit, provides personal security, avoids property damage, and maintains an essential harmony and attractiveness for both the economic and personal well-being of the owners.

C. Balancing the Interests

Judicial review ultimately aims to balance the interests of the majority of homeowners in stability, economic efficiency, and the quiet enjoyment of their property with the individual homeowner's interests in enjoying the prerogatives of home ownership, in living free of coercion and harassment, and in being protected from corruption and the malicious exercise of authority. The equitable reasonableness and constitu-

134. *Id.* at 181-82.
135. *See* P. KEHOE, COOPERATIVES AND CONDOMINIUMS 34-35 (1974).
136. *Id.*
137. *Id.* at 6.
138. Note, *supra* note 24, at 652-53.
139. Ellickson, *supra* note 115, at 1527.

tional reasonable tests attempt to strike this balance.[140]

However, a critical look at the reasonableness standards for judicial review demonstrates that, rather than achieving a *balance* of interests, the test actually *undermines* both interests. Reasonableness review undervalues the consensual grant of authority to the board, ignores the unique private contractual purposes of the cooperative living arrangement, and incorrectly invalidates association decisions on the basis of extraneous standards.[141] The reasonableness review results in the court's substitution of its own concepts of behavior and condominium operation for the board's exercise of discretion.[142] The end result undermines the authority of the association since its every decision can be made subject to second-guessing.

For example, if an owner is merely dissatisfied with a particular decision, the matter can be completely reopened before the court. After the court reexamines every one of the facts and the underlying rationales for the board's decision, its relatively detached and uninformed perspective may cause the court to view the circumstances differently. Therefore, the owner may be granted relief from the decision. One result may be that the majority of the association members who live in the condominium and are intimately familiar with the particular circumstances and problems of the association would be deprived of authority over their property by a judge who never may have seen the property. Furthermore, uncertainty and confusion would prevail within the association as the homeowners attempted to operate and manage the property with an ineffective governing authority[143] and with the prospect of having every decision questioned and overturned.

The constitutional reasonableness standard attempts to establish a framework for the reasonableness test in order to achieve uniformity and the balancing of interests. Constitutional law is concerned precisely with

140. *See supra* notes 123-32 and accompanying text.

141. *See* Ellickson, *supra* note 115, at 1530. The reasonableness standard is viewed by some judges as an invitation to undertake a cost-benefit analysis, which allows the decision of the board to be judged by general societal standards rather than in terms of its consonance with the purpose of the association. *Id.*

142. Weakland, *supra* note 59, at 298.

143. *See id.* Weakland criticizes the results of the reasonableness test as follows:

> One obvious problem created by the rule of reasonableness as a legal concept is the uncertainty arising from these case by case applications of the rule. Condominium unit owner associations rarely can be absolutely sure that their actions will be viewed as reasonable by the court. Attorneys specializing in condominium law are continually frustrated by their inability to counsel their clients with certainty and confidence. In addition, the unit owner, whose fighting cause may be to plant tomatoes in his limited common area . . . often has only the vague and ethereal rule of reasonableness as guardian of his property rights.

Id.

achieving a kind of necessary balance between the rights of the state and of the individual. However, a close look at this approach also demonstrates that it, in practice, *undermines* both interests.

Community associations are private governing bodies. The essential difference between a community association and a governmental authority is the voluntary nature of the association. Although in a broad sense the heart of public democratic government is the consent of the governed, public government is an imperfectly voluntary authority.[144] Public government is coercive, while the community association is voluntary in the purest sense. No one is ever forced to accept ownership of a unit in an association. Thus, the forces of the market naturally cause associations to safeguard members from coercive activity. If associations were to become coercive in the sense that a public government is, the demand for the property, and therefore its value in the marketplace, would presumably decrease.[145] Thus, the process of safeguards in an association is self-regulating.

Another problem with the constitutional reasonableness test is the essential failure of the analogy between public and private government. Constitutional tests require an evaluation of the public interest being served by the regulation under review.[146] The public interest is not readily apparent in the context of a community association.[147] There are a myriad of conflicting private interests. For example, an association may consist of resident unit owners, nonresident owners, investors, mortgage companies, lessees, and contract purchasers. The inherent paradox of applying constitutional standards to an essentially private housing arrangement results in the protection of some owners' civil rights at the expense of the rights of other owners. In concurring with a California appellate court decision applying constitutional tests to a community association, Judge Kaufman stated:

> [W]hile I am bound by the decisions of the California Supreme Court prohibiting age discrimination in housing, I find those decisions legally and practically inane. They invoke First Amendment guarantees, freedom of association, to strike down age limitations, failing to recognize that in so doing they infringe to the same extent the same constitutional right, the freedom of association, of the other owners, not to mention their reasonable expectations, property rights and their right freely to enter into binding contracts. The rights overlooked are at

144. *See* Ellickson, *supra* note 115, at 1523-24.

145. *Id.* at 1524-26. But see Note, *supra* note 120, at 481-83, in which the concepts of consent are criticized as self-enslavement and democratic suicide. The freedom to consent to the abandonment of one's freedom is no freedom at all. *Id.* at 480-81.

146. *See* L. TRIBE, *supra* note 49, at 1454.

147. *See* Rosenberry, *supra* note 31, at 28.

> least as significant and as sacrosanct as the rights of those for whom our high court in its paternalistic wisdom is so solicitous.[148]

In order to apply constitutional principles properly in a community association setting, the court must identify and balance the private interests,[149] which brings the inquiry back to the equitable basis of the reasonableness test with its attendant judicial second-guessing.

The reasonableness tests attempt, but fail, to achieve a balance of the interests of the association with the interests of individual owners. Rather than serving these interests, the courts undermine both. The association's attempt to exercise control and enhance the value and desirability of the association is undermined by the uncertainty of which use restrictions will be enforced. Similarly, an owner legitimately faced with an abuse of power by a malicious or overreaching board is not certain whether in the court's discretion the malicious acts of the board might seem reasonable under the circumstances.

The community association's purpose is to enhance the value, desirability and attractiveness of the community by managing the affairs of the association, to provide for maintenance and repair, and to formulate administrative and operative policies on behalf of all the unit owners. The owners delegate this authority to the board, giving up a certain degree of individual rights and privileges of ownership which are voluntarily subordinated in order to achieve these ends.[150] The collective interest of the unit owners is not separable from the interests of individual unit owners who make up the association. Therefore, the usurpation of the board's authority by the courts does not serve anyone's interests. A court's influence is injurious to the association because the board's decisions are questioned and delayed. The advantage to an individual who may benefit from a court's interference is small compared to the overall harm done.

Perhaps the fundamental reason for the failure of the reasonableness tests is that a community association is primarily a corporation. The assumption of the reasonableness tests is that the association should be considered in the light of real property law or constitutional law. Although the association does have characteristics of real property and government, it is nonetheless primarily organized as a corporation with specific corporate duties. The principles of corporate law are therefore

148. Park Redlands Covenant Control Comm. v. Simon, 181 Cal. App. 3d 87, 100-01, 226 Cal. Rptr. 199, 207 (1986) (Kaufman, J., concurring).

149. *See* Riley v. Stoves, 22 Ariz. App. 223, 526 P.2d 747 (1974).

150. Ryan v. Baptiste, 565 S.W.2d 196, 198 (Mo. Ct. App. 1978).

the proper standards to measure the actions of the community association board.

In sharp contrast to the failure of the equitable and constitutional reasonableness tests, the balance of the individual and collective interest is achieved by the business judgment doctrine. The business judgment doctrine is a tool of judicial review whereby the court will not scrutinize a decision of a corporation's board unless the challenger of the decision first demonstrates that some breach of the directors' fiduciary duty to the corporation or its stockholders has occurred.[151] Thus, the business decisions and the authority of the board to run the corporation are protected from superfluous and indiscriminate challenge while, at the same time, there is an opportunity for a review of any truly improper decision.[152]

III. AN ASSIMILATED STANDARD OF REVIEW

The business judgment doctrine adequately balances the association members' collective interests against the members' individual interests. However, there is a significant problem in applying the business judgment doctrine, which was formulated in the context of the law of commercial corporate entities, to community associations which involve noncommercial forms of disputes.

The business judgment doctrine is well-suited to commercial enterprises. The emphasis is on avoiding financial self-dealing and profiteering at the expense of the corporation and the stockholders.[153] The difficulty of applying the business judgment doctrine to a not-for-profit residential association may account for the failure by the courts universally to embrace the concept, since the doctrine is otherwise promising.[154] Nevertheless, it is possible to identify noncommercial fiduciary responsibilities.

This section will attempt to assimilate the law of corporate fiduciary

151. *See supra* notes 84-85 and accompanying text.

152. In many respects the business judgment doctrine operates to protect a corporate decision in the way that arbitration protects a private judicial decision. Arbitration is the process of voluntarily submitting a dispute to an impartial person for his decision. Once decided, there is no appeal *unless the arbitrator acted fraudulently or improperly*. C. WEHRINGER, ARBITRATION PRECEPTS AND PRINCIPLES 1 (1969). The purpose of arbitration is to have the parties agree in advance that the arbitrator's decision will be final and binding. *Id.* at 3. The arbitrator is impartial and especially learned in the particular field of dispute. *Id.* at 10-11. Arbitration is expeditiously and accurately carried out. If the court were to re-open an arbitration and second-guess the arbitrator's decision, the very purpose of arbitration would be undermined. Likewise, the business judgment doctrine attempts to limit the court's interference with the operation of a corporation while retaining some ability to correct wrongs.

153. *See generally* D. BLOCK, N. BARTON & S. RADIN, *supra* note 82, at 47-71.

154. *See* Note, *supra* note 24, at 666.

duty with the interests of community association members underlying the reasonableness tests and as applied by the courts. In this way, a non-interventionist standard of judicial review will emerge, whereby the courts could refrain from disrupting the decisions of an association while maintaining protection of individual members from the malicious or tyrannical actions of the majority.

The courts clearly recognize that community association board members owe a fiduciary duty to the members of the association.[155] The meaning of this duty, however, is ambiguous. Basically, it is necessary to determine where the duty of loyalty lies and what interests the law will protect from abuse of the power entrusted to the board.

Loyalty is one of the central themes of fiduciary duty.[156] Loyalty may be defined as "the willing and practical and thoroughgoing devotion of a person to a cause."[157] The acts of the loyal person must follow from his own impulses; he must be guided by the cause in determining his actions.[158] Fiduciary duty does not permit subjective considerations to cloud the essential requirement to act for the benefit of the cause. The law of fiduciary duty, then, is primarily concerned with protection from abuse of power without undermining that power.

There are two basic features of the fiduciary relationship: the fiduciary acts as a substitute for the entrustor, for the entrustor's benefit; and the entrustor delegates to the fiduciary power to act effectively in the performance of the fiduciary's duties.[159] The central problem of the fiduciary relationship is the potential for abuse of power inherent in its structure. The fiduciary can only act effectively for the entrustor's benefit if he possesses power, but at the same time this very possession of power creates the risk that the fiduciary will use the power to the entrustor's

155. Wolinsky v. Kadison, 114 Ill. App. 3d 527, 533, 449 N.E.2d 151, 157 (1983); Thanasoulis v. Winston Tower 200 Ass'n, 214 N.J. Super. 408, 411, 519 A.2d 911, 912 (1986), *rev'd*, 110 N.J. 650, 542 A.2d 900 (1988).

156. D. BLOCK, N. BARTON & S. RADIN, *supra*, note 82, at 71-105.

157. J. ROYCE, THE PHILOSOPHY OF LOYALTY 16-17 (1924).

> A man is loyal when, first, he has some cause to which he is loyal; when, secondly, he willingly and thoroughly devotes himself to this cause; and when, thirdly, he expresses his devotion in some *sustained and practical way*, by acting steadily in the service of his cause. Instances of loyalty are: The devotion of a particular patriot to his country, when this devotion leads him actually to live and perhaps to die for his country; the devotion of a martyr to his religion; the devotion of a ship's captain to the requirements of his office when, after a disaster, he works steadily for his ship and for the saving of his ship's company until the last possible service is accomplished, so that he is the last man to leave the ship, and is ready if need be to go down with his ship.

Id. at 17 (emphasis in original).

158. *Id.* at 18.

159. Frankel, *Fiduciary Law*, 71 CALIF. L. REV. 795, 808-09 (1983).

detriment.[160]

The law regulates fiduciaries by imposing on them a high standard of morality, while at the same time permitting freedom of discretion. Although the fiduciary must be loyal to the entrustor,[161] and the fiduciary is obligated by law to act in an altruistic manner,[162] at the same time the law must encourage prospective fiduciaries to be willing to serve because a fiduciary position is purely voluntary. Therefore, the law must not impede the ability of the fiduciary to carry out his duties and must not burden the fiduciary with excessive interference and liability.[163] To do this, the law applies the concept of business judgment. If the corporate fiduciary is exercising business judgment, the court will not interfere unless there is evidence that the fiduciary has breached his duty of loyalty. The difficult question in terms of community associations is how the courts can define the breach.

In terms of financial transactions, the specific behavior of a fiduciary who violates the moral obligation to serve and treat the entrustor's interests is easily identified and understood. When a fiduciary takes an opportunity for economic enrichment for himself at the expense of the entrustor's financial condition, there is a measurable, understandable, and unquestionable offense. In the economic sense, bad faith could be generally defined as an illegitimate method of competing for scarce resources.[164] An illegitimate means of competing is one that is inconsistent with the established rules of behavior.[165] All may compete for resources in the market by bargaining, advertising, and innovating, but not by force, fraud, corruption or unfair competition. Bad faith arises when the individual is tempted by an opportunity to obtain a greater share of resources by unauthorized means rather than by established rules for allocating resources.[166]

160. *Id.* at 809. It is this risk of abuse of power that characterizes the fiduciary relationship, and thus triggers the safeguards of fiduciary law.

161. *Id.* at 830.

162. *Id.* Unlike the self-interest norm of the marketplace morality of contract law, the fiduciary is required by law to prefer the interests of another above his own.

163. *Id.* at 833-36. The fiduciary relationship must be protected and encouraged because of its value to society. It enables the transfer of resources by many persons to a small number of experts. Risk is shifted from individuals to larger groups and creates the means of accomplishing projects that are not possible with the limited resources of individuals. *Id.* at 804. Examples of this are the pooling of individual resources accomplished by financial institutions, and the management specialization of large public corporations.

164. Anderson, *Conflicts of Interest: Efficiency, Fairness and Corporate Structure*, 25 UCLA L. REV. 738, 741-42 (1978).

165. *Id.* Since resources are limited, society must develop rules and mechanisms for the distribution and allocation of resources to individuals. Otherwise, each person would attempt to acquire and maintain as much wealth as possible using any means available, including force.

166. *Id. See generally* Scott, *The Fiduciary Principles*, 37 CALIF. L. REV. 539 (1949).

The established rules of behavior are based on fairness.[167] One's sense of fairness is especially offended when a fiduciary acts in bad faith because the fiduciary has induced the cooperation of the entrustor and then taken advantage of the other's reliance.[168] In addition, there is a sense of diminished efficiency. The fiduciary relationship is a necessary one for society because specialization requires that we entrust our affairs to others.[169] Bad faith in such relationships disrupts society because it increases the cost and discourages the use of the fiduciary mechanism.[170]

The basic principles of corporate fiduciary duty have now been identified: 1) the fiduciary must be loyal to the entrustor and act in good faith on behalf of the entrustor—good faith is acting for the benefit of the entrustor, for no other purpose, and without regard to any subjective considerations; 2) bad faith is acting for a purpose other than the interests of the entrustor, such that the act could be considered illegitimate and thereby diminish the efficiency of the fiduciary mechanism; and 3) the law must enforce the obligation to act in good faith without undermining the discretion of the fiduciary. Both a fiduciary's act of bad faith and a court's interference with the discretion of the fiduciary in policing the relationship destroy the foundation of the fiduciary system which exists because of the necessity for giving broad discretion to the fiduciary.

Application of these principles to community associations requires identification of the interest that the board is created to serve so that a definition of bad faith in the context of a community association may be formulated. The board owes its duty of loyalty to the cause of the association. This duty is to maintain and conserve the development with a view toward enhancing the value and desirability of the property, for the benefit of all its members. To the extent that a board acts in the best interests of the association to serve the purposes of the association, the act is taken in good faith, even if the result would be to harm the interests of an individual member. To the extent, however, that a board acts to serve any other purpose, the act is taken in bad faith.

The interests of the association have been identified by the courts in the cases in which the reasonableness tests are applied. It thus is possible

167. *See* Anderson, *supra* note 164, at 746.

168. *Id.* This sense of fairness is essentially an intuitive understanding that cheating by a fiduciary is particularly disturbing.

169. *See generally* J. ROYCE, *supra* note 157, at 140-41.

170. Anderson, *supra* note 164, at 747. Efficiency of society would be undermined if individuals were forced to forego specialization because of the fear of cheating. In order to maintain specialization, society has to bear the increased costs of transactions created by the allocation of resources for the prevention and detection of cheating.

to assimilate the interests identified by the reasonableness tests with the concepts of fiduciary duty in the business judgment doctrine.

The central interests of the members would be correlated with the elements of the business judgment doctrine: a business decision, disinterestedness and good faith, an informed decision, and a rational business purpose.[171]

The first element, a business decision, is straight forward. The board is the governing board of the association with broad authority to regulate the association.[172] The business of the association is the management and administration of the property on behalf of its members.[173] The second element, disinterestedness and good faith, is not as easily discernible. Self-dealing or bad faith, in the context of a community association, would involve action that does not serve the health, happiness and enjoyment of life of the unit owners.[174] This is a broad interest, however, and it is arguable that every restriction promulgated by an association would serve the majority's happiness and enjoyment of life.[175] But it is possible for a board to devise a use restriction that would have no legitimate relationship to the owner's happiness and welfare. For example, a prohibition of certain models of automobiles on the property or a regulation detailing the requirements for the interior decorating of a unit could be struck down by the courts as having no conceivable legitimate relation to the community's welfare. Another example of bad faith use restrictions might be a rule singling out an individual or classes of individuals in the association for the purpose of harassment or improper discrimination.[176] Finally, a failure to give the unit owners adequate notice of the restriction or to follow due process would be in bad faith.[177] The third element, an informed decision, correlates with the notion that rules will not be enforced if they are arbitrary and capricious.[178] In considering a rule, a board must review all of the facts and circumstances, consider the alternatives, call a meeting of the owners, if necessary, and weigh the opinions of the owners.[179] The board should have a record of delibera-

171. *See supra* notes 86-90 and accompanying text.

172. Johnson v. Hobson, 505 A.2d 1313, 1317 (D.C. 1986).

173. *Id.* at 1319.

174. Hidden Harbour Estates v. Norman, 309 So. 2d 180, 182 (Fla. Dist. Ct. App. 1975).

175. *Johnson*, 505 A.2d at 1318 n.8.

176. *See* White Egret Condominium v. Franklin, 379 So. 2d 346, 351 (Fla. 1980); *see also* Le Febvre v. Osterndorf, 87 Wis. 2d 525, 533, 275 N.W.2d 154, 159 (Ct. App. 1979).

177. *See* Juno by the Sea North Condominium Ass'n v. Manfredonia, 397 So. 2d 297, 304 (Fla. Dist. Ct. App. 1981); Breene v. Plaza Tower Ass'n, 310 N.W.2d 730, 734 (N.D. 1981).

178. *See* Holleman v. Mission Trace Homeowners Ass'n, 556 S.W.2d 632, 636 (Tex. Civ. App. 1977).

179. *See id.*

tion to support the use restriction which reflects a reasonable effort to consider all relevant information. Otherwise, the decision will not be protected from judicial review.[180]

Finally, the decision must involve a rational business purpose, or in other words, be within the scope of authority of the board. Strict compliance with the statutory requirements of the provisions of the association's declaration and bylaws has been deemed an essential requirement for use restrictions.[181] The corporate business judgment doctrine, then, can be applied to community association use restrictions by correlating the elements of the doctrine with the interests of the association's members, as identified in the reasonableness cases. The law of corporate fiduciary duty recognizes the importance of the fiduciary mechanism. The court must not undermine the discretion of the fiduciary or else the whole purpose of the relationship is defeated. The law accomplishes this by placing the burden on the challenger of a fiduciary's actions to demonstrate a breach of fiduciary duty before it will review the case.

In the context of a community association, the challenger of a use restriction would have to demonstrate a breach of the fiduciary duty of the board by showing either that the board acted in a manner that did not serve the owners' health, happiness and enjoyment of life, or singled out a class of individuals for injurious treatment, or failed to provide notice of the restriction, or arrived at the restriction without properly considering all of the relevant facts, or acted outside the scope of the board's authority. Unless the challenger first demonstrates one of these breaches of the board's fiduciary duty to the owners, as identified herein, the court would not review the decision and would leave the board's decision intact. The legitimate operation of the association would then not be hampered. For an example of how the assimilated business judgment doctrine would operate to protect both the association and the individual members, a hypothetical case can be analyzed. A common use restriction is the prohibition against keeping of household pets or other animals in the unit. Perhaps the rules prohibit dogs weighing more than twenty pounds from being on the property. When a unit owner's Saint Bernard puppy grows up, the association would be suddenly found with a violation of its rules.

A challenge of the rule in a court applying the reasonableness tests would probably result in an analysis of how the use restriction came

180. D. BLOCK, N. BARTON & S. RADIN, *supra* note 82, at 17-18.

181. *See* Beachwood Villas Condominium v. Poor, 448 So. 2d 1143, 1145 (Fla. Dist. Ct. App. 1984); Wolinsky v. Kadison, 114 Ill. App. 3d 527, 534, 449 N.E.2d 151, 157 (1983).

about, the rationale and purpose of the prohibition, whether the owner had proper notice, and whether all of the procedures were followed and documented. Then, depending on the disposition of the court, the court could find either that the imposition of the dog restriction bears no reasonable relationship to the health, safety and welfare of the owners, or that prohibiting large dogs indeed protects the health, safety and welfare of the owners. The fact that the board was acting in good faith to carry out its mandate would not be an issue.

On the other hand, a challenge of the rule in a court applying the business judgment doctrine would preliminarily only analyze whether or not the board acted in good faith. If so, the rule would undergo no further scrutiny and the purpose of the board, which is to make such decisions, would not be undermined. If the court finds that the board did not act in good faith, then the court would appropriately weigh all of the factors and properly substitute its judgment for the board's discretion.

IV. CONCLUSION

The reasonableness standards used to scrutinize community association use restrictions correctly identify the interest of the association's members, but fail to protect these interests. Instead, the court replaces the board's discretion with its own, so that a situation of judicial second-guessing is established. The interests of the owners, individually and collectively, would be served by a refusal by the courts to review board use restrictions unless it is first shown that the restrictions violate the fiduciary duty owed by the board to the owners. By assimilating the interests identified by the reasonableness standards with the business judgment doctrine's mechanism to protect the decision of the board, the court can protect both the association's purposes for a stable and efficiently operated development and the individual owner's interest in not being unfairly or oppressively treated by the majority.