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In Search of the Middle-Ground: Protecting the Existing Rights of Prior Purchasers in Common Interest Communities

Terrell R. Lee*

I. Introduction

During the last half-century, private residential communities governed by homeowners associations ("HOAs") have rapidly proliferated, becoming the fastest growing form of housing in the United States.[1] Unfortunately, there continues to be widespread disagreement among courts, legislatures, and association members concerning the administration of these common interest communities, including the degree to which an HOA's authority should be limited.[2] Many jurisdictions have afforded the governing boards of these communities considerable discretion, recognizing common interest communities as private regimes by which community members have consented to be governed.[3] However, some legal theorists have questioned whether participation in a common interest community is entirely voluntary.[4]

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1. Armand Arabian, *Condos, Cats, and CC&Rs: Invasion of the Castle Common*, 23 PEPP. L. REV. 1, 24 (1995).

2. *Compare, e.g.*, Breene v. Plaza Tower Ass'n, 310 N.W.2d 730, 734 (N.D. 1981) (holding that restrictions subsequently adopted by the HOA are not enforceable against prior purchasers) *with* Apple II Condo. Ass'n v. Worth Bank & Trust Co., 659 N.E.2d 93, 97 (Ill. App. Ct. 1995) (holding that "[i]n the absence of a provision either in the Amendment or in the original Declaration, condominium owners do not have vested rights in the status quo ante.").

3. *See, e.g.*, Levandusky v. One Fifth Ave. Apartment Corp., 553 N.E.2d 1317, 1320 (N.Y. 1990); David C. Drewes, *Putting the "Community" Back in Common Interest Communities: A Proposal for Participation-Enhancing Procedural Review*, 101 COLUM. L. REV. 314, 317 (2001).

4. *See* Gregory Alexander, *Freedom, Coercion, and the Law of Servitudes*, 73 CORNELL L. REV. 883, 901-02 (1988) (discussing the "coercive nature" of membership in a homeowners association); *see also* Note, *The Rule of Law in Residential Associations*, 99 HARV. L. REV. 472, 481-83 (1985) (noting that a popular objection to consent theories is the argument that "neither individuals nor a community can legitimately consent to

Since available housing options are limited, they argue, some home buyers may submit to HOA authority by necessity instead of through "fully informed choice."[5]

Much of the debate concerning common interest communities has centered on the standards that govern judicial review of a community's covenants and restrictions.[6] This Comment, however, focuses primarily on inequities arising from enactments adopted subsequent to a homeowner's purchase. Part II examines the development and proliferation of common interest communities, as well as the implementation of standards for judicial review of a community's covenants, conditions, and regulations. Part III analyzes various statutory and common law approaches involving restrictions and covenants enacted subsequent to a community's original declaration, focusing particularly on their impact on prior purchasers. Part IV concludes by urging courts and legislatures to limit the enforceability of covenants and restrictions against prior purchasers and to resolve ambiguities in favor of the free and unrestricted use of property.

II. Historical Background

A. Creation of Common Interest Communities

Common interest communities are real estate developments in which individually owned units are burdened by servitudes, usually referred to as covenants, conditions, and regulations ("CC&Rs").[7] These communities include planned unit developments, condominiums, and housing cooperatives of all sizes.[8] A common interest community is

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enslave themselves and that the abandonment of certain basic civil rights constitutes self-enslavement").

5. Wayne S. Hyatt, *Symposium: Common Interest Communities: Evolution and Reinvention*, 31 J. MARSHALL L. REV. 303, 312 (1998); *see also* Note, *The Rule of Law in Residential Associations*, 99 HARV. L. REV. 472, 481-82 (1985). As the popularity and acceptance of common interest communities becomes more widespread, and alternative forms of housing more scarce, this argument may develop even greater significance.

6. *Compare* Nahrstedt v. Lakeside Vill. Condo. Ass'n, 878 P.2d 1275, 1278 (Cal. 1994) (adopting reasonableness standard) *with* Levandusky v. One Fifth Ave. Apartment Corp., 553 N.E.2d 1317, 1318 (N.Y. 1990) (adopting the business judgment standard).

7. Drewes, *supra* note 3, at 316; *see also* RESTATEMENT (THIRD) OF PROPERTY: SERVITUDES § 6.2 (2000).

8. The four primary forms of common interest communities are condominiums, planned housing developments, stock cooperatives, and community apartments. EVAN MCKENZIE, PRIVATOPIA: HOMEOWNER ASSOCIATIONS AND THE RISE OF RESIDENTIAL PRIVATE GOVERNMENT 126 (1994). Although there are distinctions between the various types of common interest communities, this Comment does not distinguish between them.

established through a governing document known as a "declaration" or "master deed,"[9] which contains the "plan of development and ownership, the proposed method of operation, and the rights and responsibilities of owners within the association."[10] The declaration may also empower the community's governing board to modify, change, or adopt new CC&Rs by amending the community's original declaration.[11] In this way, an HOA board acts as a mini-government, serving the individual property owners within the community.[12]

Proponents of common interest communities have recognized several advantages to their operation. For example, members of these communities can help maintain high property values[13] through the implementation of use restrictions,[14] such as prohibitions on leasing[15] or pets.[16] Members of a common interest community may also be afforded the use of swimming pools, tennis courts, or other amenities which might ordinarily be too expensive to purchase or maintain by themselves.[17]

Despite these advantages, common interest communities have been criticized for a number of shortcomings. For instance, some have derided these communities for their failure to promote a sense of community among their residents.[18] Others have criticized common interest communities for their exclusive character, recognizing their growth as an indication of the widening schism between socio-economic

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9. Nahrstedt v. Lakeside Village Condominium Ass'n, 878 P.2d 1275, 1278 n.1 (Cal. 1994).

10. Paula A. Franzese, *Common Interest Communities: Standards of Review and Review of Standards*, 3 WASH. U. J. L. & POL'Y 663, 672 (2000) (quoting Wayne S. Hyatt, CONDOMINIUM AND HOMEOWNER ASSOCIATION PRACTICE: COMMUNITY ASSOCIATION LAW § 1.05 (b)(3) (2d ed. 1988)).

11. *See* Villa De Las Palmas Homeowners Ass'n v. Terifaj, 90 P.3d 1223, 1232-33 (Cal. 2004) (affording amendments the same judicial deference as covenants and restrictions found in the original declaration).

12. Levandusky v. One Fifth Ave. Apartment Corp., 553 N.E.2d 1317, 1320 (N.Y. 1990).

13. *See Nahrstedt*, 878 P.2d at 1282 (noting that a significant factor contributing to the popularity of common interest communities is the "ability of homeowners to enforce restrictive CC&R's against other owners (including future purchasers) of project units"). For example, a community may impose a requirement that houses within the community adhere to a designed color scheme. Because the property owners are prohibited from painting their houses bright pink with purple polka dots, community owners can rest assured that their property values will not be lowered by a creative neighbor with the desire for self expression.

14. Drewes, *supra* note 3, at 322.

15. *See, e.g.*, Woodside Vill. Condo. Ass'n v. Jahren, 806 So. 2d 452, 459-60 (Fla. 2002) (upholding restriction on leasing).

16. *See Nahrstedt*, 878 P.2d at 1277 (upholding pet restriction as reasonable).

17. Drewes, *supra* note 3, at 322.

18. Paula A. Franzese, *Does it take a Village? Privatization, Patterns of Restrictiveness and the Demise of Community*, 47 VILL. L. REV. 553, 571-72 (2002).

classes and the polarization of society.[19]

Critics have also characterized common interest communities as inflexible and overly restrictive.[20] This is due, in part, to the nature of community association law itself. Attorneys and property managers routinely advise HOA board members to aggressively and uniformly enforce CC&Rs to avoid setting a precedent which might bar future enforcement.[21] In addition, failure to enforce the rules can place board members in jeopardy of being sued for breach of a fiduciary duty to the HOA.[22] On the other hand, a lack of flexibility can lead to resentment and hostility by community members, which may also result in litigation.[23] HOA board members thus find themselves between the proverbial rock and a hard place, for which courts and legislatures struggle to find the appropriate middle-ground.

B. *Standards for Judicial Review of CC&Rs*

As courts have faced litigation between property owners and HOA governing boards, they have frequently been asked to determine the standards by which an HOA's rules and regulations should be reviewed.[24] This issue has been a hotbed of litigation and scholarly commentary, from which two basic standards have emerged.

1. Business Judgment Rule

The business judgment rule prohibits judicial inquiry into actions "taken in good faith and in the exercise of honest judgment in the lawful and legitimate furtherance of corporate purposes."[25] Although this rule

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19. *See* Drewes, *supra* note 3, at 322; *see also* McKenzie, *supra* note 8, at 186-87 (noting the potential for social division and conflict arising from the "privatization for the few"); Robert B. Reich, *Secession of the Successful*, N.Y. TIMES, Jan. 20, 1991, § 6 (Magazine), at 16 (discussing the quiet secession of the rich from traditional communities and cities); David J. Kennedy, Note, *Residential Associations as State Actors: Regulating the Impact of Gated Communities on Nonmembers*, 105 YALE L.J. 761, 763 (1995) (indicating harms imposed on society by common interest communities).

20. Hyatt, *supra* note 5, at 314.

21. *Id.* at 314; *see also* McKenzie, *supra* note 8, at 130-32 (discussing various reasons HOA board members strictly enforce CC&Rs, including advice by legal practitioners and a desire to wield power over their neighbors).

22. McKenzie, *supra* note 8, at 131; *see also* Raven's Cove Townhomes, Inc. v. Knuppe Dev., 171 Cal. Rptr. 334, 343-44 (Cal. Ct. App. 1981) (holding that directors of a common interest community owe a fiduciary to their members).

23. McKenzie, *supra* note 8, at 131.

24. *See, e.g.*, Nahrstedt v. Lakeside Vill. Condo. Ass'n, 878 P.2d 1275, 1277 (Cal. 1994); Hidden Harbour Estates, Inc. v. Norman, 309 So. 2d 180, 182 (Fla. Dist. Ct. App. 1975).

25. Levandusky v. One Fifth Ave. Apartment Corp., 553 N.E.2d 1317, 1321 (N.Y. 1990) (quoting Auerbach v. Bennett, 393 N.E.2d 994, 1000 (N.Y. 1979)).

has generally been applied to shareholder derivative actions,[26] some courts have used it to evaluate the actions of HOA boards,[27] recognizing the similarities between common interest communities and corporations.[28] The business judgment rule generally requires board members or directors to perform their duties "in a manner such director believes to be in the best interests of the corporation and its shareholders and with such care, including reasonable inquiry, as an ordinarily prudent person in a like position would use under similar circumstances."[29]

The New York Court of Appeals adopted the business judgment rule in *Levandusky v. One Fifth Avenue Apartment Corp.*[30] This oft-cited case involved a dispute between a proprietary lessee and a co-op board concerning renovations to the lessee's apartment.[31] A provision in the lease provided that no alteration or addition could be made to the water, gas or steam risers or pipes without the co-op board's prior written consent.[32] Although the co-op board authorized the lessee's remodeling plans, the board denied permission to move the steam riser in his kitchen.[33] Notwithstanding this prohibition, the lessee had the kitchen steam riser moved and eventually filed suit against the board.[34] In response, the board cross-petitioned the court to compel the lessee to return the steam riser to its original location.[35] Applying the business judgment rule, the court of appeals found in favor of the co-op board, concluding that "the responsibility for business judgments must rest with the corporate directors; their individual capabilities and experience peculiarly qualify them for the discharge of that responsibility."[36]

Although the business judgment rule protects HOA boards from excessive judicial interference, it limits the ability of community members to combat arbitrary or unreasonable restrictions on the personal

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26. Franzese, *supra* note 10, at 676 (quoting *Levandusky*, 553 N.E.2d at 1325 (Titone, J., concurring)).

27. Franzese, *supra* note 10, at 676; *see also* Papalexiou v. Tower W. Condos., 401 A.2d 280, 285-86 (N.J. Super. Ct. Ch. Div. 1979); In re Croton River Club, Inc. v. Half Moon Bay Homeowners Ass'n, 52 F.3d 41, 44-45 (2d Cir. 1995).

28. *Levandusky*, 553 N.E.2d at 1321. The court justified its application of a doctrine similar to the business judgment rule, noting: "Application of a similar doctrine is appropriate because a cooperative corporation is—in fact and function—a corporation, acting through the management of its board of directors, and subject to the Business Corporation Law." *Id.*

29. McKenzie, *supra* note 8, at 130 (quoting CAL. CORP. CODE § 309(a) (1990)).

30. *Levandusky*, 553 N.E.2d at 1317.

31. *Id.* at 1319.

32. *Id.*

33. *Id.*

34. *Id.*

35. *Id.*

36. *Levandusky*, 553 N.E.2d at 1322 (quoting Auerbach v. Bennett, 393 N.E.2d 994, 1000 (N.Y. 1979)).

use of property.[37] By focusing on the similarities between a common interest community and a corporation, the business judgment rule overlooks some of the risks associated with an HOA's quasi-governmental functions, such as "arbitrary and malicious decision-making, favoritism, discrimination and the like."[38] Recognizing this disparity, a growing number of jurisdictions have rejected the business judgment doctrine, adopting instead a standard of "reasonableness."[39]

2. The Reasonableness Standard

Under the reasonableness standard, CC&Rs and HOA board decisions must be "reasonable" to withstand judicial scrutiny.[40] An early formulation of this test was established in *Hidden Harbour Estates, Inc. v. Norman*,[41] in which the Court of Appeals of Florida held:

> [A homeowner's] association is not at liberty to adopt arbitrary or capricious rules bearing no relationship to the health, happiness and enjoyment of life of the various unit owners. On the contrary, we believe the test is reasonableness. If a rule is reasonable, the association can adopt it; if not, it cannot. It is not necessary that conduct be so offensive as to constitute a nuisance in order to justify regulation thereof.[42]

Although application of this standard varies from state to state, four basic areas of HOA governance are generally examined.[43] The first inquiry is "whether or not the action taken or proposed to be taken is reasonably related to the association's purposes. Next, is the action reasonably related to or within the association's powers? Third, is it reasonable in scope, and finally, has it been reasonably enacted or reasonably enforced?"[44]

Several states have adopted some form of the reasonableness

37. Carl B. Kress, *Beyond Nahrstedt: Reviewing Restrictions Governing Life in a Property Owner Association*, 42 UCLA L. REV. 837, 868 (1995); *see also* Randolph C. Gwirtzman, *An Exception to the Levandusky Business Judgment Rule: Owner and Shareholder Interests in Condominium and Cooperative Board Decisions*, 14 CARDOZO L. REV. 1021, 1041-44 (1993) (contending that the business judgment rule does not sufficiently protect individual rights of community members).

38. *Levandusky*, 553 N.E.2d at 1320.

39. *See, e.g.*, Nahrstedt v. Lakeside Vill. Condo. Ass'n, 878 P.2d 1275, 1277 (Cal. 1994); Hidden Harbour Estates, Inc. v. Norman, 309 So. 2d 180, 182 (Fla. Dist. Ct. App. 1975).

40. *See Norman*, 309 So. 2d at 182.

41. *Id.*

42. *Id.*

43. Hyatt, *supra* note 10, at § 6.02 (a)(3).

44. *Id.*

standard, either through common law or by statute.[45] One of the more notable and oft-cited discussions concerning the reasonableness doctrine is found in *Nahrstedt v. Lakeside Village Condominium Association, Inc.*,[46] a case decided by the Supreme Court of California. The controversy in that case centered on a restriction against pets which was contained in a condominium project's original declaration.[47] The condominium owner asserted that the restriction was "'unreasonable' as applied to her because she kept her three cats indoors and because her cats were 'noiseless' and 'created no nuisance.'"[48] The court rejected this argument, finding that "the reasonableness or unreasonableness of a condominium use restriction . . . is to be determined not by reference to facts that are specific to the objecting homeowner, but by reference to the common interest development as a whole."[49]

The Supreme Court of California also held in *Nahrstedt* that recorded land use restrictions found in a common interest community's declaration are entitled to "a presumption of validity."[50] This presumption, the court noted, "discourages lawsuits by owners of individual units seeking personal exemptions from the restrictions."[51] In addition, this presumption promotes stability and predictability.[52] According to the court, "[i]t provides substantial assurance to prospective condominium purchasers that they may rely with confidence on the promises embodied in the project's recorded CC&R's. And it protects all owners in the planned development from unanticipated increases in association fees to fund the defense of legal challenges to recorded restrictions."[53] Applying this reasoning to the facts of the case, the court upheld as reasonable the pet restriction found in the condominium project's original declaration.[54]

45. *See, e.g.*, ALA. CODE § 35-8-9(3) (1991); CAL. CIV. CODE § 1354 (1982); MISS. CODE ANN. § 89-9-17 (1972 & Supp. 1999); N.J. STAT. ANN. § 46:8B-13(d) (2003); R.I. GEN. LAWS § 34-36-10 (1995); UTAH CODE ANN. § 57-8-10(1) (2000 & Supp. 2005).

46. Nahrstedt v. Lakeside Vill. Condo. Ass'n, 878 P.2d 1275, 1277 (Cal. 1994).

47. *Id.*

48. *Id.* at 1278.

49. *Id.* at 1290.

50. *Id.* at 1288.

51. *Id.*

52. *Nahrstedt*, 878 P.2d at 1288.

53. *Id.*

54. *Id.* at 1292.

III. Analysis

A. *Distinguishing Between Covenants and Restrictions in a Community's Declaration and Subsequent Enactments by the HOA Board.*

In *Nahrstedt*, the Supreme Court of California limited its analysis to those covenants and restrictions found in the community's originating documents.[55] However, the court cited with apparent approval the holdings in other jurisdictions, distinguishing between covenants and restrictions found in a community's originating documents and those subsequently promulgated by the HOA.[56] Accordingly, it appeared until recently[57] that California would recognize this distinction, becoming one of a number of jurisdictions[58] to espouse the reasoning originally invoked by the Florida District Court of Appeals in *Hidden Harbour Estates, Inc. v. Basso.*[59]

Basso involved a dispute between a mobile home condominium association and the Bassos, who were owners of one of the mobile home units.[60] The Bassos sought permission by the association to drill a shallow well on their property.[61] Despite evidence that the well would not affect the condominium water supply, the association board denied the request.[62] When the Bassos went forward with plans to drill the well, the association board sought an injunction through the Florida courts.[63] On appeal from the trial court's denial of injunctive relief, the Florida District Court of Appeals distinguished between restrictions found in the declaration, and those "promulgated by the association's board of directors or the refusal of the board of directors to allow a particular use when the board is invested with the power to grant or deny a particular use."[64] According to the court, restrictions found in the original declaration are "clothed with a very strong presumption of validity,"[65]

55. *See* Lamden v. La Jolla Shores Clubdominium Homeowners Ass'n, 980 P.2d 940, 949 (Cal. 1999); Villa De Las Palmas Homeowners Ass'n v. Terifaj, 90 P.3d 1223, 1232 (Cal. 2004).

56. *Nahrstedt*, 878 P.2d at 1283-84; *see also Terifaj*, 90 P.3d at 1232.

57. *See infra* notes 74-81 and accompanying text.

58. *See, e.g.*, Noble v. Murphy, 612 N.E.2d 266, 270 (Mass. App. Ct. 1993); Apple II Condo. Ass'n v. Worth Bank & Trust Co., 659 N.E.2d 93, 98 (Ill. App. Ct. 1995).

59. Hidden Harbour Estates, Inc. v. Basso, 393 So. 2d 637, 639 (Fla. Dist. Ct. App. 1981).

60. *Id.* at 638.

61. *Id.*

62. *Id.*

63. *Id.*

64. *Id.* at 639.

65. *Basso*, 393 So. 2d at 639.

reasoning that "[s]uch restrictions are very much in the nature of covenants running with the land and they will not be invalidated absent a showing that they are wholly arbitrary in their application, in violation of public policy, or that they abrogate some fundamental constitutional right."[66] Under this standard, even restrictions with "a certain degree of unreasonableness" might "yet withstand attack in the courts."[67]

The court held, however, that subsequently promulgated restrictions by the association's board must satisfy the reasonableness requirement.[68] The court noted that under this standard, "the board is required to enact rules and make decisions that are reasonably related to the promotion of health, happiness and peace of mind of the unit owners."[69] Applying the reasonableness standard to the facts of the case, the court upheld the trial court's decision to deny the association an injunction, noting that "where the decision to allow a particular use is within the discretion of the board, the board must allow the use unless the use is demonstrably antagonistic to the legitimate objectives of the condominium association, i.e., the health, happiness and peace of mind of the individual unit owners."[70]

Although the approach taken by the Florida District Court of Appeals in *Basso* is arguably more deferential to an HOA board's decisions than the general application of the reasonableness standard used in *Nahrstedt*, the *Basso* analysis recognizes an important distinction between covenants and restrictions in a community's original declaration and subsequent enactments by an HOA board.[71] This approach acknowledges that too much flexibility vested in an HOA board may lead to unpredictable and inequitable results. While those who purchase units in a common interest community should be aware that the HOA board may be empowered to make decisions regarding the use of individually owned property, such power must be limited to protect homeowners' legitimate expectations. Accordingly, courts and legislatures should require that such decisions by the HOA board be reasonable, with the burden of proving the reasonableness of the decision resting with the HOA board.

The HOA board should, however, be afforded greater flexibility in making decisions regarding the common areas within the community, such as roads, hallways, and recreation areas. Because these decisions will generally have a less significant impact on a homeowner's individual expectations, and will usually impact members of the

66. *Id.* at 639-40.
67. *Id.* at 640.
68. *Id.*
69. *Id.*
70. *Id.*
71. *See Basso*, 393 So. 2d at 639.

community equally, the burden of proving their unreasonableness should rest with the challenging homeowner(s).

B. Retroactive Enforcement of Covenants and Restrictions Against Prior Purchasers

Some courts have recognized a distinction between covenants and restrictions adopted prior to a homeowner's purchase and those enacted by the HOA subsequent to the purchase of the homeowner's unit. For instance, in *Noble v. Murphy*,[72] the Appeals Court of Massachusetts recognized "that a somewhat different standard of review may be implicated where . . . a restriction is promulgated after the owner who is in violation of the rule acquires his unit."[73] Other jurisdictions have rejected this reasoning altogether. In *Villa De Las Palmas Homeowners Association v. Terifaj*,[74] the Supreme Court of California held that "subsequently promulgated and recorded use restrictions are entitled to the same judicial deference accorded covenants and restrictions in original declarations; that is, they are presumptively valid, and the burden of proving otherwise rests upon the challenging homeowner."[75]

Terifaj involved a no-pet restriction, which was adopted and recorded in the community's amended declaration after the condominium owner had purchased her unit.[76] Although the California Supreme Court had previously suggested in *Nahrstedt v. Lakeside Village Condominium Association, Inc.*[77] that it "would not necessarily apply the same deferential standard to subsequently enacted use restrictions,"[78] the court found in *Terifaj* that the statutory language of the Davis-Stirling Act[79]

72. Noble v. Murphy, 612 N.E.2d 266, 270 (Mass. App. Ct. 1993).

73. *Id.*

74. Villa De Las Palmas Homeowners Ass'n. v. Terifaj, 90 P.3d 1223, 1232-33 (Cal. 2004).

75. *Id.* Note that the judicial standard of review in California is the reasonableness standard, both for covenants and restrictions in the original declaration, and those subsequently adopted. *Id.* at 1231. The issue in *Terifaj*, then, was whether subsequently adopted restrictions should be afforded a presumption of validity similar to covenants and restrictions found in the original declaration or whether the burden of proof should rest with the HOA. *See id.*

76. *Terifaj*, 90 P.3d at 1225-26.

77. *See* Nahrstedt v. Lakeside Vill. Condo. Ass'n, Inc., 878 P.2d 1275, 1283-84 (Ca. 1994).

78. *Terifaj*, 90 P.3d at 1232.

79. Section 1355(b) of the Davis-Stirling Act provides:

> Except to the extent that a declaration provides by its express terms that it is not amendable, in whole or in part, a declaration which fails to include provisions permitting its amendment at all times during its existence may be amended at any time. For purposes of this subdivision, an amendment is only effective after (1) the proposed amendment has been distributed to all of the owners of separate interests in the common interest development by first-class mail

was controlling.[80] Since the act provided for the amendment of a community's declaration without exempting prior purchasers, the court reasoned that any duly adopted amendment must be effective against all homeowners.[81]

The Supreme Court of California's approach in *Terifaj* failed to recognize a distinction between the amendment of previously established regulations and the adoption of entirely new covenants and restrictions. Without more, a provision in a community's declaration establishing amendment procedures does not provide adequate notice to a purchaser that they may be subjected to wholly new burdens and restrictions after purchase.[82] Because a community's declaration constitutes the instrument by which covenants and use restrictions are applied to individual property, interpretation of such an instrument should instead be applied in accordance with the long-standing principle that doubts and ambiguities must be resolved in favor of the free and unrestricted use of property.[83] Accordingly, absent an express provision authorizing the HOA to adopt new affirmative covenants or use restrictions, courts should not extend this power by implication. To do so can result in harsh deprivations of homeowners' vested property interests, a point illustrated by some of the cases addressing post-purchase enactments by the HOA.[84]

Despite such results, courts continue to be sharply divided regarding the enforceability of amendments against prior purchasers.[85] This division extends to affirmative covenants as well as use restrictions.[86] Inasmuch as courts have analyzed these two categories separately, it is

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> postage prepaid or personal delivery not less than 15 days and not more than 60 days prior to any approval being solicited; (2) the approval of owners representing more than 50 percent, or any higher percentage required by the declaration for the approval of an amendment to the declaration, of the separate interests in the common interest development has been given, and that fact has been certified in a writing, executed and acknowledged by an officer of the association; and (3) the amendment has been recorded in each county in which a portion of the common interest development is located. A copy of any amendment adopted pursuant to this subdivision shall be distributed by first-class mail postage prepaid or personal delivery to all of the owners of separate interest immediately upon its recordation.

CAL. CIV. CODE § 1355 (1982 & Supp. 2006).

80. *Terifaj*, 90 P.3d at 1233. Referring to Section 1355(b) of the Davis-Stirling Act, the court insisted that "[p]lainly read, any amendment duly adopted under this subdivision is effective against all homeowners, irrespective of when the owner acquired title to the separate interest or whether the homeowner voted for the amendment." *Id.* at 1228.

81. *Id.*

82. *See infra* text accompanying note 107.

83. *See* Hines v. Heisler, 439 So. 2d 4, 5 (Ala. 1983).

84. *See infra* notes 89-99 and accompanying text.

85. *See infra* notes 87-123 and accompanying text.

86. *See id.*

necessary to present their arguments and analysis according to this framework.

1. Use Restrictions

In *Terifaj*, the Supreme Court of California regarded use restrictions adopted subsequent to a community's original declaration as presumptively valid, regardless of when the homeowner purchased the property.[87] Most courts that have addressed the issue of retroactive enforcement of use restrictions against prior purchasers have taken a similar approach.[88] For example, in *Woodside Village Condominium Association, Inc. v. Jahren*,[89] the Supreme Court of Florida upheld a leasing restriction as valid against two condominium owners who had purchased their units prior to the adoption of the restriction, reasoning that the condominium owners "were on notice that the unique form of ownership they acquired when they purchased their units . . . was subject to change through the amendment process, and that they would be bound by properly adopted amendments."[90]

In *Jahren*, the two affected condominium owners each purchased multiple units specifically for the purpose of leasing them.[91] One of these owners had been leasing these condominiums for eighteen years before the declaration was amended.[92] At the time of purchase, leasing was permitted by the original declaration, which specified that a condominium could be leased "without prior approval, for any period of one (1) year or less, and [could] be leased by successive leases for periods in excess of one (1) year without the approval of the Board of Directors of the Association."[93] Because some of the other owners became concerned that the occupation of condominium units by non-

87. Villa De Las Palmas Homeowners Ass'n v. Terifaj, 90 P.3d 1223, 1232-33 (Cal. 2004).

88. *See* Woodside Vill. Condo. Ass'n v. Jahren, 806 So. 2d 452, 459-460 (Fla. 2002); Hill v. Fontaine Condo. Ass'n, Inc., 334 S.E.2d 690, 691 (Ga. 1985); Apple II Condo. Ass'n v. Worth Bank & Trust Co., 659 N.E.2d 93, 97 (Ill. App. Ct. 1995) (holding that "[i]n the absence of a provision either in the Amendment or in the original Declaration, condominium owners do not have vested rights in the status quo ante."); Breezy Point Holiday Harbor Lodge-Beachside Apartment Owners' Ass'n v. B.P. P'ship, 531 N.W.2d 917, 920 (Minn. Ct. App. 1995) (in dicta); McElveen-Hunter v. Fountain Manor Ass'n, Inc., 386 S.E.2d 435, 436 (N.C. Ct. App. 1989), *aff'd*, 399 S.E.2d 112, 112 (N.C. 1991); Shorewood West Condo. Ass'n v. Sadri, 992 P.2d 1008, 1012 (Wash. 2000); *cf.* Burgess v. Pelkey, 738 A.2d 783, 788 (D.C. 1999).

89. Woodside Vill. Condo. Ass'n v. Jahren, 806 So. 2d 452, 461 (Fla. 2002).

90. *Id.*

91. Woodside Vill. Condo. Ass'n v. McClernan, 754 So. 2d 831, 832 (Fla. Dist. Ct. App. 2000).

92. *Jahren*, 806 So. 2d at 465 (Quince, J., specially concurring).

93. *Id.* at 453.

owners could negatively impact the community, the declaration was amended to prohibit owners from leasing a condominium for more than nine months of any twelve month period or leasing more than three units at one time.[94]

At trial, the affected condominium owners asserted that the amendment to the declaration was "confiscatory and deprived them of lawful uses which were permissible at the time of purchase."[95] The District Court agreed, holding as follows:

> General classifications of restrictions contained within declarations of condominium which apply to all owners equally and are not arbitrarily and discriminately applied need not pass a strict scrutiny test. We conclude, however, that amendments to declarations of condominium that are adopted subsequent to a unit owner's purchase and that significantly alter substantial rights that existed in unit owners at the time of purchase do require a strict scrutiny as to whether they have unreasonably altered existing rights. When such an amendment is determined to be discriminatory, arbitrary or oppressive in its application to any particular unit owner, it will be held invalid as to that owner.[96]

On appeal, the Supreme Court of Florida quashed the district court's decision, reasoning that "[a]lthough we believe such concerns are not without merit, we are constrained to the view that they are better addressed by the Legislature."[97] In a special concurrence, one justice urged "the Legislature to seriously consider placing some restrictions on present and/or future condominium owners' ability to alter the rights of existing condominium owners."[98] Supporting the suggestion by the district court, he noted that "there should at least be some type of 'escape' provision for those 'unit owners whose substantial property rights are altered by amendments to declarations adopted after they acquire their property.'"[99]

Jahren characterizes the difficult questions and harsh results ensuing from the enforcement of use restrictions against prior purchasers. While the Florida Supreme Court's plea to the legislature to afford greater protection to prior purchasers was commendable, its holding did not adequately balance the benefits of HOA governance against the individual property rights of community members. Common interest communities must be viewed as neither pure conveyances of property

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94. *Id.* at 454.
95. *Id.* at 455.
96. *McClernan*, 754 So. 2d at 833.
97. *Jahren*, 806 So. 2d at 464.
98. *Id.* at 465 (Quince, J., specially concurring).
99. *Id.*

nor pure contractual agreements to submit to HOA governance, but a hybrid of both characterizations. In this case, the district court's reasoning more adequately recognized the dual nature of the common interest community because it established limits on the power of an HOA to disregard a property owner's legitimate expectations at the time of purchase.

Like the district court and concurring justice in *Jahren*, some other jurisdictions have recognized the potential for inequitable alterations to the property rights of homeowners in common interest communities. The most comprehensive protection against retroactive enforcement of amendments was provided by the Supreme Court of North Dakota in *Breene v. Plaza Tower Association.*[100] Like *Jahren, Breene* involved a restriction on leasing that was adopted after the condominium owner (Breene) purchased her unit.[101] At the time of purchase there was no restriction against leasing, except a provision in the declaration which gave the association the right of first refusal in leasing a unit.[102] After Breene had purchased her unit, the association adopted an amendment to its bylaws which substantially limited the ability of condominium owners within the community to lease their units.[103] The association later passed similar amendments to the declaration.[104]

In considering whether a use restriction in an amendment to a condominium's declaration could be applied retroactively to prior purchasers, the court examined the North Dakota statutory provisions relating to condominiums. In particular, the court noted the requirement that "[t]he owner of a project shall, *prior to the conveyance of any condominiums therein,* record a declaration of restrictions relating to such project which restrictions shall be enforceable equitable servitudes where reasonable, and shall inure to and bind all owners of condominiums in the project."[105] The court interpreted this language to mean that "notice of the restrictions through the recording procedures must be given to prospective buyers prior to the conveyance of any condominium unit."[106]

Although the court acknowledged that the declaration provided for its own amendment, it reasoned that "knowledge of the provisions for amendment does not, without more, constitute the degree of knowledge necessary to establish a voluntary and intentional relinquishment of the

100. Breene v. Plaza Tower Ass'n, 310 N.W.2d 730, 734 (N.D. 1981).

101. *Id.* at 731.

102. *Id.*

103. *Id.* at 732.

104. *Id.*

105. *Id.* at 733 (quoting N.D. CENT. CODE, § 47-04.1-04).

106. *Breene*, 310 N.W.2d at 734.

statutory right to notice of a restriction prior to the purchase of a condominium unit."[107]

The Supreme Court of North Dakota's approach in *Breene* directly conflicts with the analysis favored by the Supreme Court of California in *Terifaj*.[108] While the statutory language in each state may be partly responsible for this discrepancy, the analysis in *Breene* is preferable because it favors the free and unrestricted use of property. Although use restrictions admittedly play an important role in common interest communities,[109] the *Breene* approach does not limit enforceability of use restrictions which are contained in the original declaration. Accordingly, developers and attorneys are encouraged to better define the limits of a common interest community's interference during the early stages of the community's development. Although this may result in a greater number of restrictions being included in a community's original declaration, the HOA is still empowered to relax these restrictions, or do away with them altogether. Moreover, since this alternative is more deferential to a property owner's expectations at the time of purchase, it better reflects the dual nature of common interest communities.

2. Affirmative Covenants

Disagreement concerning retroactive enforcement of amendments

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107. *Id.* Unfortunately, other jurisdictions have been unwilling to recognize such broad protections against retroactive enforcement of HOA amendments. For instance, the Court of Appeals of Ohio called the reasoning in *Breene* "unpersuasive" in *Worthinglen Condominium Unit Owners' Association v. Brown*, 566 N.E.2d 1275, 1279 (Ohio Ct. App. 1989), despite acknowledging similarities in the statutes of North Dakota and Ohio. *Id.* The court reasoned that if a declaration provides notice to potential purchasers that it may be amended by the HOA, "then the fact that the purchaser has not foreseen a *particular* amendment is not dispositive." *Id.* Instead, "the validity of condominium rules is measured by whether the rule is reasonable under the surrounding circumstances." *Id.* at 1277. Despite such criticism, the Supreme Court of North Dakota recently suggested that *Breene* continues to be valid law in that jurisdiction. In *Riverside Park Condominiums Unit Owners Association v. Lucas*, 691 N.W.2d 862, 871 (N.D. 2005), the court adopted the language used by the Supreme Court of California in *Terifaj*, holding that "[s]ubsequently promulgated and recorded use restrictions are entitled to the same judicial deference accorded covenants and restrictions in original declarations. . . ." *Id.* (quoting Villa De Las Palmas Homeowners Ass'n v. Terifaj, 90 P.3d 1223, 1232-33 (Cal. 2004)). However, the court distinguished pre-purchase amendments from post-purchase amendments, noting that "although *Breene* recognizes that restrictions in a declaration of restrictions may be adopted after such a declaration has been recorded and after condominium units have been conveyed, it also recognizes that restrictions adopted after condominium units have been purchased would not be enforceable against prior purchasers, except by acquiescence." *Lucas*, 691 N.W.2d at 872. Since the affected owner in *Lucas* was not a prior purchaser, the court upheld the amendment in question. *Id.*

108. *See supra* text accompanying notes 79-81.

109. *See* Nahrstedt v. Lakeside Vill. Condo. Ass'n, 878 P.2d 1275, 1281 (Cal. 1994).

against prior purchasers has not been limited to use restrictions. Courts are similarly divided on the issue of whether new affirmative covenants should be enforceable against prior purchasers.[110] The Supreme Court of Colorado addressed this issue in *Evergreen Highlands Association v. West*.[111] That case involved a dispute between a lot owner and the HOA concerning an assessment levied by the HOA. When the lot owner (West) purchased his unit in 1986, membership in the HOA and payment of assessments was voluntary.[112] However, the declaration provided that the HOA could "*change or modify any one or more of said restrictions*" through a vote of seventy-five percent of the lot owners.[113]

In 1995, the association voted to add an article to the community's covenants, requiring all lot owners to be members of the association and pay assessments.[114] West objected, claiming that voluntary HOA membership and payment of assessments "positively influenced" his decision to purchase a lot in the community.[115] The court concluded, however, that "the terms 'change' and 'modify,' as used in the Evergreen Highlands covenants, are expansive enough to allow for the addition of a new covenant."[116] As a result, the court held that this covenant was binding on all lot owners, even those who had purchased their property before the amendment.[117]

The Missouri Court of Appeals took the opposite view in *Webb v. Mullikin*.[118] *Webb* involved an amendment requiring community members to pay a fifty-dollar assessment per year to provide for the maintenance of a private swimming and tennis club located adjacent to the community.[119] The community's original declaration did not require lot owners to join the club, though they were eligible to do so.[120] The club had been in operation for several years, supporting itself with fees paid by club members, including non-residents.[121] Although the community's original declaration included a modification clause which permitted amendments by a majority vote,[122] the Missouri Court of Appeals interpreted the phrase "'may amend these restrictions' as permitting a majority of lot owners to change existing covenants but not

110. Evergreen Highlands Ass'n v. West, 73 P.3d 1, 4-6 (Colo. 2003).
111. *Id.* at 3.
112. *Id.*
113. *Id.* at 2.
114. *Id.* at 3.
115. *Id.*
116. *Evergreen Highlands*, 73 P.3d at 3-4.
117. *Id.*
118. Webb v. Mullikin, 142 S.W.3d 822, 827 (Mo. Ct. App. 2004).
119. *Id.* at 824-25.
120. *Id.* at 824.
121. *Id.*
122. *Id.* at 823.

to add new or different covenants, as is the case with the amended agreement."[123]

When viewed together, *Evergreen Highlands* and *Webb* demonstrate that as with use restrictions, the adoption of new affirmative covenants in a common interest community can substantially alter a prior purchaser's existing rights, at times trampling the property owner's legitimate expectations at the time of purchase. In order to enhance the stability and predictability of covenants in the common interest community, the *Webb* approach should be adopted by courts addressing this issue. Moreover, state legislatures should offer greater protection for homeowners by enacting laws prohibiting HOAs from burdening individually owned property with entirely new covenants and use restrictions. Where no such statutory protection exists, courts should resolve ambiguities in a community's governing documents in favor of the free and unrestricted use of property.

C. *Promoting Stability by Limiting the Enforceability of Covenants and Restrictions to Subsequent Purchasers.*

In *Terifaj*, the Supreme Court of California argued that "[t]o allow a declaration to be amended but limit its applicability to subsequent purchasers would make little sense,"[124] because covenants and restrictions must be "uniformly applied and burden or benefit all interests evenly."[125] Although this uniformity is desirable, it should not take priority over a homeowner's existing rights and legitimate expectations. By analogy, this principle is supported through the application of the non-conforming use doctrine in zoning law.[126]

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123. *Id.* at 827.

124. Villa De Las Palmas Homeowners Ass'n v. Terifaj, 90 P.3d 1223, 1228 (Cal. 2004).

125. *Id.*

126. In a concurring opinion of *Worthinglen Condo. Unit Owners' Ass'n v. Brown*, 566 N.E.2d 1275, 1280 (Ohio Ct. App. 1989), Judge Whiteside drew an analogy between community association law and zoning law, stating as follows:

> Likewise, I cannot concur in the statement in the majority opinion that we cannot 'derive a solution by comparison to real estate or zoning law.' First, it is solely real estate law issues that confront us; an analogy would be to deed restrictions. Second, zoning law is directly analogous and we are remiss if we fail to consider the real estate law issues before us in light of the existing law pertaining to use restrictions, namely, deed restrictions and zoning. The test for both is the test adopted in the majority opinion, namely, reasonableness. Even the nonconforming-use doctrine of zoning is a rule of reasonableness, it being unreasonable to prohibit a use which is in existence because of the economic hardship imposed. Additionally, the analogy to nonconforming-use principles is as about as close as any analogy can be. A legislative body (the unit owners' association in this instance) has previously adopted use restrictions and now changes them to make "illegal" a use that was previously permitted, about as

The Supreme Court of California further reasoned in *Terifaj* that unequal application to all community members would "undermine the stability of the community, rather than promote stability as covenants and restrictions are intended to do."[127] This argument recognizes the importance of stability within a common interest community while simultaneously undermining the source of such stability in the law of property.[128] When individual sticks in a homeowner's bundle of rights can be taken away by the vote of the HOA general membership, the extent and value of a homeowner's rights are perpetually uncertain. Of course, a certain degree of discretion must be afforded an HOA in the furtherance of its legitimate objectives. However, this discretion should not be extended to permit the HOA to enforce entirely new use restrictions and affirmative covenants against prior purchasers, except in cases where the homeowner acquiesces to the restriction or covenant. Instead, where an amendment substantially alters existing rights of community members through the implementation of restrictions and covenants, such covenants and restrictions should be unenforceable against prior purchasers.

Under this proposed approach, an HOA would still be empowered to modify or suspend current use restrictions and affirmative covenants,[129] enforcing such changes against prior purchasers, so long as the amendment does not amount to a new covenant or restriction. By application, such a rule would promote greater stability within a common interest community. First, the original declaration of a common interest community would play a greater role in defining the character of the community. As such, developers and attorneys would have greater incentive to draft a community's originating documents more carefully, and in some cases more rigidly. Moreover, the market would have greater influence on the development of common interest communities. For instance, those who are attracted to common interest communities for their ability to maintain high property values would be more likely to select communities with stricter covenants and restrictions. As a result, such communities would be more likely to attract purchasers with common interests. In addition, the character of the community and its CC&Rs would be more predictable, resulting in fewer lawsuits. Not

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close as any analogy can be.

Id.

127. *Terifaj*, 90 P.3d at 1228.

128. The Supreme Court of California's argument favors the stability of property values and the uniformity of application of covenants and restrictions to all members of the community. However, it fails to address the importance of stable and predictable restrictions and covenants burdening a homeowner's property.

129. *See supra* text accompanying note 123.

only would homeowners have greater certainty concerning their rights, but HOA boards would be less likely to pursue restrictions and covenants that unreasonably target a particular minority of homeowners.

IV. Conclusion

In the case of the homeowners association, less is more. Less flexibility in amendment procedures will lead to more stability and a better sense of community. It will also make it more difficult for an HOA to substantially alter existing rights of homeowners. Accordingly, courts and legislatures should adopt a reasonableness standard for post-declaration enactments by an HOA board and subsequent amendments adopted by the HOA general membership. When the action or amendment concerns individually owned property, the burden of proving its reasonableness should rest with the HOA. However, when the action or amendment involves common areas within the community, the burden of proving its unreasonableness should rest with the challenging homeowner.

While the reasonableness doctrine offers some protection to existing owners within a common interest community, it does not sufficiently protect them from substantial alterations to existing property rights. Accordingly, legislatures should enact laws prohibiting HOAs from burdening individually owned property with entirely new covenants and use restrictions. Where no such statutory protection exists, courts should resolve ambiguities and uncertainties in favor of the free and unrestricted use of property. This approach recognizes not only the HOA's power to govern a common interest community, but also the vested rights of individual property owners within that community. Finding this "middle-ground" is the surest way to protect the interests of individuals within a community without overlooking the purposes for which the community was established.

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