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# Condominium Associations: Living under the Due Process Shadow\*

BRIAN L. WEAKLAND\*\*

## I. INTRODUCTION

Within an area bounded by four walls, a ceiling and a floor, the condominium unit owner dwells. He has paid tens of thousands of dollars for the right to occupy this space. Beyond these walls are other areas which he may own but cannot exclusively possess. Within the walls, his activities are circumscribed by rules made by others. The owner's existence in this place is based on intricate and intertwined legal relationships that the law has yet to fully define.

Such is the conundrum of those who choose to buy condominium units. What appears to be a fee interest in property often behaves like nothing more than a much-fettered right of possession. The condominium form of ownership, touted as convenient, maintenance-free and economical, is also a Gordian knot of frustrating legal complexity. Many of us would more readily comprehend Einstein's theory of a finite universe than understand precisely where an owner's unit begins and ends. Moreover, because the owner's three different forms of ownership — fee, common and limited common — carry different prescribed rules of use, the owner must observe where his feet are located before he determines how to act.

State condominium statutes, case law and the individual condominium's documents, of course, provide much guidance for the unit owner who strives to understand his "lot in life." The statutes, which vary from state to state,<sup>1</sup> permit various property interests to be created by dedicating land to the condominium form of ownership. Case

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\* The author is grateful for the assistance of Wayne S. Hyatt, Esq., of Hyatt & Rhoads, P.C., Atlanta, Ga. and Professor Cyril Fox of the University of Pittsburgh School of Law in the preparation of this article.

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1. See, e.g., UNIF. CONDOMINIUM ACT §§ 1-101 to 5-110, 7 U.L.A. 421 (1985). The

law attempts to define the legal relationships arising among and between unit owners, the condominium association, the condominium board of directors and the condominium developer. The documents, including the condominium declaration, bylaws and rules, serve as an owner's manual, explaining how the condominium operates and describing what the owner must do to ensure that the operation will be successful.

However, statutes, case law interpreting the statutes and the condominium documents alone do not completely oversee the operation of a condominium. Courts have employed a gap-filling device for resolving condominium disputes, because condominiums depend on the cooperation of the unit owners and because breakdowns invariably result in any situation where more than one person is involved. Using the rule of reasonableness,<sup>2</sup> the court examines the conduct of the unit owner or association and determines whether that conduct is reasonable in a condominium setting. This device, which is not really a rule at all, allows the court to substitute its concepts of how people should act in a condominium, a practice that necessarily countenances ad hoc decisions by the court. Condominium case law holdings are usually limited to the facts of the case, do not carry the heavy baggage of legal precedent and are not consistent from jurisdiction to jurisdiction because the rule is applied on a case by case basis.

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 or to protect his dog from the clutches of an association board that seeks to enforce a "no pets" covenant, often has only the vague and ethereal rule of reasonableness as a guardian of his property rights.

Lurking above the rule of reasonableness, the statutes and the condominium documents, is the United States Constitution. When an association takes action affecting the basic liberty and property rights of its unit owners, fundamental constitutional concerns arise, specifically the rights of due process and equal protection. This article ex-

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Act has been adopted in Maine, Minnesota, Missouri, New Mexico, Pennsylvania, Rhode Island and West Virginia. *Id.*

2. For an explanation of the rule of reasonableness and the constitutional implications of association actions, see Rosenberry, *The Application of the Federal and State Constitutions to Condominiums, Cooperatives and Planned Development*, 19 REAL PROP. PROB. & TR. J. 1 (1984).

amines the proper role of the Constitution in the operation of condominiums. It will explain forms of association governance, with an emphasis on whether the association has "government" attributes, and whether state action is present so that due process protections should apply in the condominium setting. Finally, the article will conclude that the rule of reasonableness should comport with the law of due process when an association acts in a municipal capacity and not when an association acts primarily to protect the investment interests of its unit owners.

## II. TRAITS OF THE COMMUNITY ASSOCIATION

The condominium form of real property ownership is a creature of state statutes. The Uniform Condominium Act, which has been adopted by a few states,<sup>3</sup> gives broad-ranging powers to the unit owners' association. Among these powers are: the power to adopt and amend bylaws, rules and regulations, to adopt and amend budgets, to collect assessments for common expenses from unit owners to hire and fire managing agents, to institute or defend litigation, to make contracts, to regulate the use and maintenance of common elements, and to acquire and convey real property.<sup>4</sup> Although the association must look to state law for its powers, the powers conferred are expansive. With these powers, the association can govern fairly thoroughly the condominium development.

These powers can be restricted by the condominium declaration or master deed. The declaration, which when recorded creates the condominium, describes the size of the condominium, the number of units and the real estate interests created.<sup>5</sup> The declaration also establishes the condominium association which, in turn, enacts bylaws to outline association procedures.<sup>6</sup> The association promulgates rules and regulations to manage the day-to-day operation of the development and to promote harmony among the unit owners.<sup>7</sup> By agreeing to the various covenants in the declaration (through his purchase of a condominium unit), each unit owner impliedly consents to the reasonable exercise of those powers by the association.<sup>8</sup> Therefore, the

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3. See *supra* note 1.

4. UNIF. CONDOMINIUM ACT § 3-102 (1985).

5. *Id.* § 2-101.

6. *Id.* § 3-101.

7. *Id.* § 3-102(a)(1).

8. See, e.g., *Raines v. Palm Beach Leisureville Community Ass'n, Inc.*, 413 So. 2d 30 (Fla. 1982).

association's powers are granted by the state law and defined through the consent of unit owners.<sup>9</sup> As the Virginia Supreme Court held in *Unit Owners Association of BuildAmerica-1 v. Gillman*:<sup>10</sup>

"The power exercised by the Association is contractual in nature and is the creature of the condominium documents to which all unit owners subjected themselves in purchasing their units. It is a power exercised in accordance with the private concensus [sic] of the unit owners."<sup>11</sup>

The *Gillman* holding offers a good general explanation of condominium governance. The reader should be careful not to rely too heavily on contractual analysis. By agreeing to enter into a condominium form of ownership, the unit owner is not consenting to have his individual investment expectations protected by the association; to the contrary, he is consenting to have the association protect the investment expectations of the unit owners collectively. It is this mutual interest that prevents the use of pure contract law analysis in a condominium setting.

Another, and perhaps better, definition of the consensual relationship between the unit owner and condominium association was given in *Raymond v. Aquarius Condominium Owners Association, Inc.*<sup>12</sup> There, the court held that condominium unit owners constitute a democratic subsociety, necessarily more restrictive in the use of condominium property than might be acceptable in more traditional forms of property ownership. The court explained that "each constituent must relinquish some degree of freedom of choice and agree to subordinate some of his traditional ownership rights when he elects this type of ownership experience."<sup>13</sup>

Without considering the "rule of reasonableness", the propriety of association action in running the condominium can be examined by using either contract law or constitutional law. The test is whether the association is operating as a business (for contract law to apply) or as a government (for constitutional law to be applied). One legal commentator calls the condominium association "the obvious private alternative to the city."<sup>14</sup> While recognizing that municipalities are considered "public" and condominium associations "private", "[o]nly one important difference between the two forms of organization [is discernible] — the sometimes involuntary nature of membership in a

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9. *Siller v. Hartz Mountain Assoc.*, 184 N.J. Super. 450, 446 A.2d 551 (1981), *aff'd*, 184 N.J. Super. 442, 446 A.2d 547 (N.J. Super. Ct. App. Div. 1982), *rev'd in part*, 93 N.J. 370, 461 A.2d 568, *cert. denied*, 104 S. Ct. 395 (1983).

10. 223 Va. 752, 292 S.E.2d 378 (1982).

11. *Id.* at 766, 292 S.E.2d at 385.

12. 662 S.W.2d 82 (Tex. Civ. App. 1983).

13. *Id.* at 89 (citations omitted).

14. Ellickson, *Cities and Homeowners Associations*, 130 U. PA. L. REV. 1519, 1519 (1982).

city versus the perfectly voluntary nature of membership in a homeowners association."<sup>15</sup>

As a result of this voluntariness, or the contractual nature of the association-unit owner relationship, courts have treated the condominium association as a business entity rather than a municipal corporation. Indeed, the association in some jurisdictions may incorporate, adopt corporate bylaws and conduct business meetings in the manner of any business corporation.<sup>16</sup> In recent cases, the association is viewed merely as a business entity and is held to those rights and duties toward its residents that a commercial enterprise has to its customers or, more specifically, that a landlord has to its tenants.

The litigation-plagued Village Green condominium project in Los Angeles, California, perhaps illustrates this business relationship attitude best. Village Green Condominiums contains 629 units over a 64-acre tract in the Baldwin Hills area of Los Angeles. The project consists of approximately ninety-two buildings, each containing several condominium units. The buildings are situated around grassy, park-like areas known as "courts." Village Green was operated as an apartment complex until 1973 when it was converted into condominium units. Village Green has been sued on two occasions by unit owners, and both cases turned on whether the project was considered a "business."

The first case, *O'Connor v. Village Green Owners Association*,<sup>17</sup> considered whether the project could limit residency in the development to persons over the age of 18 years. The case arose when John and Denise O'Connor bought a two-bedroom unit in 1975 and four years later had their first child, Gavin. Shortly after the child's birth, the association gave the O'Connors written notice that the presence of Gavin in the unit violated the covenants, conditions and restrictions of the development and directed them to live elsewhere. The O'Connors filed suit against the association to have the age restriction declared invalid under the Unruh Civil Rights Act of California.<sup>18</sup> For the restriction to be declared invalid, the court first had to find that the condominium was a "business establishment" under the act. Noting that the term had a broad definition under the act, the court said:

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15. *Id.* at 1520.

16. 1 A. FERRER, LAW OF CONDOMINIUM § 474 (1967).

17. 33 Cal. 3d 790, 662 P.2d 427, 191 Cal. Rptr. 320 (1983).

18. *Id.* at 793, 662 P.2d at 428, 191 Cal. Rptr. at 321 (citing CAL. CIV. CODE § 51 (West 1982)).

The Village Green Owners Association has sufficient businesslike attributes to fall within the scope of the act's reference to "business establishments of every kind whatsoever." Contrary to the association's attempt to characterize itself as but an organization that "mows lawns" for owners, the association in reality has a far broader and more businesslike purpose. . . . In brief, the association performs all the customary business functions which in the traditional landlord-tenant relationship, rest on the landlord's shoulders.<sup>19</sup>

The court also held that a "business establishment" does not have to make a profit to be governed by the Unruh Act. It was sufficient that the association's overall function was to protect and enhance the project's economic value.<sup>20</sup>

The landlord-tenant model of *O'Connor* returned to haunt the Village Green association in the second case, *Troy v. Village Green Condominium Project*.<sup>21</sup> In that case, a unit owner sued the association for injuries sustained in a criminal assault that, she alleged, resulted from the association's failure to provide adequate exterior lighting.<sup>22</sup> During April 1980, a unit owned by Frances Troy was burglarized. She asked the project manager to install more exterior lighting as soon as possible. The association did not act on the request, and in August 1980, Ms. Troy, frustrated by the inaction, installed additional exterior lighting for her own unit. Shortly thereafter, she was informed that the exterior lighting violated the project's covenants, conditions and restrictions and was installed without the association's permission. She was told that the lighting must be removed by October sixth. Ms. Troy did not remove the lighting, and the association

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19. *Id.* at 796, 662 P.2d at 431, 191 Cal. Rptr. at 324.

20. *Id.*

21. 149 Cal. App. 3d 135, 196 Cal. Rptr. 680 (1983).

22. *Id.* at 139, 196 Cal. Rptr. at 682. Ironically, since the theme of this paper centers around the condominium and its similarities to a municipal corporation, it should be noted that cities have historically had difficulties in providing street lighting. According to J. DILLON, COMMENTARIES ON THE LAW OF MUNICIPAL CORPORATIONS § 4 (5th ed. 1911) (quoting LANCIANI, ANCIENT ROME IN THE LIGHT OF RECENT DISCOVERIES, Ch. 8 (1889)), the great cities of civilization were stymied by lack of public illumination.

In ancient Rome, public places were not lighted. The principal cause of disorder was that the metropolis was kept in perfect darkness at night. Why the idea of a system of public illumination was not conceived and adopted is a mystery hard to solve. Excavations fully confirm the fact. Not a trace of a bracket fixed to the front of a house, or of a rope or small chain drawn across the street to support lamps or lanterns, has as yet been found, and probably none ever will be.

J. DILLON, *supra* § 4. London in 1685 had a similar problem:

When the evening closed in, the difficulty and danger in walking about London became serious indeed. The garret windows were opened, and pails were emptied, with little regard to those passing below. Falls, bruises and broken bones were of constant occurrence. For till the last year of the reign of Charles II, most of the streets were left in profound darkness. Thieves and robbers plied their trade with impunity; yet they were hardly so terrible as another class of ruffians. It was a favorite amusement of dissolute young gentlemen to swagger by night about the town, breaking windows, upsetting sedans, beating quiet men, and offering rude caresses to pretty women.

*Id.* § 4 n.1 (citing 1 T. MACAULAY, HISTORY OF ENGLAND, Ch. 2).

board told her on October eighth that she would have to turn off the circuit that fed the prohibited lighting. She complied with the request on October eighth, turned off the circuit and was left with no exterior lighting whatsoever. That night, an intruder entered her unit and raped and robbed her.

The court found that the association board was negligent in not having sufficient exterior lighting once it learned of criminal activity in the project. The association's duty to exercise reasonable care for the safety of unit owners was deemed to be the duty required of landlords for their tenants. As the court said,

[The board members] contend that it would be unfair to impose upon them a duty to provide "expensive security measures" when they are not landlords in the traditional sense but members of a homeowners' association which has limited funds and cannot significantly increase its budget without the approval of a majority of the Association members. However, respondents are, for all practical purposes, the Project's "landlords."<sup>23</sup>

In reaching this conclusion, the court considered the landlord-tenant attributes of the Village Green association. The association was the only entity in a position to maintain and secure the common areas of the project. The association acted like a landlord when it so swiftly rejected the exterior lighting installed by Ms. Troy. Also, the association was responsible for the common areas and it was a management body over which the individual owner had no effective control.<sup>24</sup>

This landlord-like treatment also was apparent in *Admiral's Port Condominium Association, Inc. v. Feldman*,<sup>25</sup> In this case, a unit owner sued the association for not taking reasonable steps to guard against crime after the owner's wife had been mugged in the condominium parking lot. The court found no breach of duty because there was no prior mugging in the parking lot which would have made the crime foreseeable.<sup>26</sup>

On the other hand, a court may not view the condominium ar-

23. *Village Green Condominium Project*, 149 Cal. 3d at 144, 196 Cal. Rptr. at 685.

24. In *Ryan v. Baptiste*, 565 S.W.2d 196 (Mo. Ct. App. 1978), an association was sued for providing more security for its residents. There, a unit owner sought an injunction to remove locks from exterior doors providing entry to the common passageways of the condominium building, claiming they created an inconvenience and were a nuisance. The court held that the installation was a reasonable exercise of the association board of managers' authority where there were reports of vandalism and theft. *Id.* at 198.

25. 426 So. 2d 1054 (Fla. Dist. Ct. App. 1983).

26. *Id.* at 1055. Additional cases treating the association-unit owner relationship as similar to the landlord-tenant relationship are: *Pratt v. Maryland Farms Condominium Phase 1, Inc.*, 42 Md. App. 632, 402 A.2d 105 (1979); *Baum v. Coronado Condominium Ass'n, Inc.*, 376 So. 2d 914 (Fla. Dist. Ct. App. 1979).



rangement as a landlord-tenant relationship<sup>27</sup> but rather as a government-citizen relationship. However, a pure government approach is difficult, due in part to the difficulty of defining municipal government.

McQuillan's treatise on municipal corporations defines a public corporation as "one that is created for political purposes only, with political powers to be exercised for purposes connected with the public good in the administration of civil government, as distinguished from a private corporation which is one created for purposes other than those of government. . . ." <sup>28</sup> Generally, McQuillan writes, "municipal corporations" is a term that applies only to incorporated cities, towns or villages invested with the power of local legislation.<sup>29</sup> In defining the traits of a municipal corporation, however, the treatise could well be describing the condominium association:

1. Incorporation as such pursuant to the constitution of the state or to a statute.
2. A charter.
3. A population and prescribed area within which the local civil government and corporate functions are exercised. . . .
4. Consent of the inhabitants of the territory to the creation of the corporation, with certain exceptions.
5. A corporate name.
6. The right of local self-government. . . . [A] test as to whether an organization is a municipal corporation, using that term in its strict sense, is whether it has the power of local government as distinguished from merely possessing powers which are merely executive and administrative in their character. . . . The power to sue or be sued.<sup>30</sup>

Unlike their treatment of condominium associations, courts generally have treated municipal corporations as subordinate branches of state government.<sup>31</sup> For this reason, a municipal corporation has been variously described as an arm of the state, a miniature state, an instrumentality of the state, a mere creature of the state, and an agency of the state and the like.<sup>32</sup>

The United States Supreme Court has defined a municipal corporation as a political subdivision of the state, created by the state legislature for the exercise of such governmental powers of the state as may be entrusted to it as a unit of local government.<sup>33</sup> This definition contains three elements, all of which can be satisfied by the condominium association arrangement. First, the condominium form of

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27. See, e.g., *People v. Board of Managers, New City Condominium*, 123 Misc. 2d 188, 474 N.Y.S.2d 376 (1984).

28. E. MCQUILLAN, *THE LAW OF MUNICIPAL CORPORATIONS* § 2.03 (3d ed. 1971) (citations omitted).

29. *Id.* § 2.07.

30. *Id.* § 2.07(b).

31. See, e.g., *Knauer v. Commonwealth*, 17 Pa. Commw. 360, 332 A.2d 589 (1975) (municipal corporations are "creatures of the state").

32. E. MCQUILLAN, *supra* note 28, § 2.08.

33. *Trenton v. New Jersey*, 262 U.S. 182, 189 (1923).

ownership is created by state statute. Second, the governing body of the condominium, the association board, is popularly elected by unit owners. And, third, the state entrusts to the board many powers of self-government, including the power to levy assessments, the power to regulate land use and the power to provide such municipal services as water and sewer service, security and recreation.

Courts and scholars also point to the dual role of the municipal corporation as: (1) to assist the government of the state as an agent or arm of the state, and (2) to regulate and administer the local affairs of the area incorporated for the benefit of the local community.<sup>34</sup> The Supreme Court has acknowledged this dual role:

[Municipal corporations] exercise powers which are governmental and powers which are of a private or business character. In the one character a municipal corporation is a governmental subdivision, and for that purpose exercises by delegation a part of the sovereignty of the State. In the other character it is a mere legal entity or juristic person. In the latter character it stands for the community in the administration of local affairs wholly beyond the sphere of the public purposes for which its governmental powers are conferred.<sup>35</sup>

It is difficult to enumerate exactly what governmental powers the Court is addressing. In determining whether a particular organization has the attributes of a government requiring the one person-one vote standard of the equal protection clause,<sup>36</sup> for example, the Court looks to see if that body exercises "traditional" government powers and provides "traditional" government services.<sup>37</sup>

One reason the condominium development probably should not be viewed as a political subdivision or municipal corporation is the geographical overlap of a condominium situated within an already incorporated municipality. The legislature of the state may provide for the organization of municipal corporations which embrace territory situated wholly within the boundaries of another municipal corporation. However, the legislature cannot create two municipalities possessed of the same or similar powers, privileges and jurisdiction

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34. C. RHYNE, *MUNICIPAL LAW*, §§ 1-2 (1957).

35. *Vilas v. Manila*, 220 U.S. 345, 356 (1911).

36. *Hadley v. Junior College Dist. of Metropolitan Kansas City*, 397 U.S. 50 (1970); *Salyer Land Co. v. Tulare Lake Basin Water Storage Dist.*, 410 U.S. 719 (1973).

37. The prototype of today's collection of municipal services can be found in the history of ancient Rome. The city provided itself with a magnificent water supply, consisting of 14 aqueducts whose aggregate length was 359 1/3 miles of which 304 miles were underground. The city also constructed drains to carry off the sewage. Rome had fire and police departments. Public baths could accommodate up to 62,800 citizens. And the city had 18 public squares, 30 parks or gardens and eight large public recreation areas for foot races and gymnastics exercises. See J. DILLON, *supra* note 22, § 4.

covering the same territory at the same time.<sup>38</sup> In other words, a condominium cannot be considered as a general purpose government if it is situated within an incorporated municipality having general government powers. That is not to say that a condominium in such a municipality could not be considered a special government, having specialized powers and duties — a quasi-municipal corporation.

The public or quasi-municipal corporation is an arm of the state, created for purposes of convenience of administering state-related services.<sup>39</sup> Entities such as school districts, sewer authorities and transit authorities are quasi-municipal corporations and are not general purpose governments. Nonetheless, these entities are created under state law and serve important governmental interests. The acts of these entities are considered “state action” for the purposes of the fourteenth amendment.<sup>40</sup>

While the condominium does not exercise express powers carved out of the local government’s general grant of powers, the condominium acts as a special government to those residents within its “jurisdiction.”<sup>41</sup> Several legal commentators prefer to label the

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38. *Town of Hornellsville v. City of Hornell*, 38 A.D.2d 312, 328 N.Y.S.2d 941 (1972).

39. O. REYNOLDS, *LOCAL GOVERNMENT LAW* § 6 (1982).

40. *Craft v. Memphis Light, Gas and Water Div.*, 436 U.S. 1 (1977); *Brown v. D.C. Transit Sys., Inc.*, 523 F.2d 725 (D.C. Cir.), *cert. denied*, 423 U.S. 862 (1975).

41. The condominium association is but one of several entities that have indicia of municipal corporations. Consider the following three examples:

A. The community council. This model organization has been proposed by government planners as a political action arm of local government. The community council, a group of self-selected citizens at the neighborhood level, can assume a watchdog function over local government agencies, influence public opinion, claim the neighborhood’s share of services from the local city government and actually provide some services, e.g., a housing relocation service, a homework-helper program and recreation programs, such as Little League baseball. The community council also can effect political change by acting as spokesman for its neighborhood before city council. See H. WEISSMAN, *COMMUNITY COUNCIL AND COMMUNITY CONTROL* 145-47 (1970).

B. The community development organization. The federal Model Cities Grant Program spawned many neighborhood groups which participated in the planning, funding and execution of urban redevelopment programs. This program has since been displaced by the Community Development and Block Grant Program in which the federal Department of Housing and Urban Development makes grants directly to units of local government for funding local community development programs. See U.S. DEPT. OF HOUSING AND URBAN DEVELOPMENT, *APPRAISING HUD STRATEGIES FOR ECONOMIC AND COMMUNITY DEVELOPMENT* (1980).

C. The community development corporation. This corporation is a locally controlled tax-exempt corporation that receives money from government grants and from the private sector. These corporations seek to increase jobs and income, and to improve housing and to secure better services from local government, business and utilities — envisioned as run by “strongly individualistic executives who have demonstrated ability to devise programs, attract funds, inspire co-workers, earn the respect of people in the community and harmonize conflicting forces.” FORD FOUNDATION POLICY PAPER, *COMMUNITY DEVELOPMENT CORPORATIONS* 5-6 (May 1973).

A few such community development corporations have evolved to the point where they could reasonably become local delivery mechanisms in a national program with

condominium as a "quasi-government entity" not having specialized powers, but rather general governmental powers on a miniature scale. According to two commentators,

Upon analysis of the association's functions, one clearly sees the association as a quasi-government entity paralleling in almost every case the powers, duties, and responsibilities of a municipal government. As a "mini-government," the association provides to its members, in almost every case, utility services, road maintenance, street and common area lighting, and refuse removal. In many cases, it also provides security services and various forms of communication with the community. There is, moreover, a clear analogy to the municipal police and public safety functions. All of these functions are financed through assessments or taxes levied upon the members of the community, with powers vested in the board of directors, council of co-owners, board of managers, or other similar body clearly analogous to the governing body of a municipality.<sup>42</sup>

This governmental role, the commentators continued, creates a special need to observe strictly the dictates of due process of law, a need made more acute by two powers: the rule-making authority and the assessment authority.<sup>43</sup>

Some courts have adopted this rationale and viewed the condominium association as a government entity. A leading case is *Cohen v. Kite Hill Community Association*.<sup>44</sup> Kite Hill is located in the rolling hills of Southern Orange County in California. It is a planned residential community development fronting the Pacific Ocean, consisting of about 900 homes, each costing \$200,000 or more. The price of a home depends in part on its view of the ocean. To preserve these views, the homeowner association enforced various covenants and restrictions on the types of fences and the allowable height of fences owners could construct. The association organized a five-member architectural committee, composed of homeowners having no special training in architecture, water runoff or geology. This committee received plans for any landscape improvement projects and had the power to approve plans before any construction could begin.

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systematic aid from governmental sources. In fact, they are increasingly sought after by government at all levels to act as its instrumentality. For example, the Bedford-Stuyvesant Restoration Corp., with program activities totalling more than \$25 million annually, has a contract with New York City's Criminal Justice Coordinating Council to implement its ex-offender program. This corporation is the prime mover for city and state financed day-care activities in the Bedford-Stuyvesant area and has agreed to manage a substantial part of the government's inventory of abandoned buildings in Bedford-Stuyvesant, N.Y. *Id.* at 6.

42. Hyatt and Rhoads, *Concepts of Liability in the Development and Administration of Condominium and Home Owners Associations*, 12 WAKE FOREST L. REV. 915, 918 (1976) (citations omitted).

43. *Id.*

44. 142 Cal. App. 3d 642, 191 Cal. Rptr. 209 (1983).

Shortly after the Cohens purchased their home, they submitted to the architecture committee landscaping plans for their front and rear yards. One part of the plan approved by the committee was a stone and wrought iron fence (a two-foot stone base topped by a three-foot iron fence). The Declaration of Kite Hill designated this style of fence for use in a lot such as the Cohens'. Shortly thereafter, the Cohens' neighbors, the Ehles, received committee approval to build a nonconforming solid stone fence, which partially obstructed the Cohens' view. The Cohens sued the association for allowing this breach of covenant and for breaching its fiduciary duty to them.

After noting the great powers the Kite Hill association was given by its Declaration, the court said the committee's action in approving the Ehles' plan must be reviewed by the same standard used to review municipal zoning variances.

The Kite Hill Community Association's approval of a fence not in conformity with the Declaration is analogous to the administrative award of a zoning variance. In the zoning context as well as here, a departure from the master plan in the Declaration stands to affect most adversely those who hold rights in neighboring property. Hence, what the California Supreme Court has stated with regard to judicial review of grants of variances applies equally well to the Association's actions herein: "Courts must meaningfully review grants of variances in order to protect the interests of those who hold rights in property nearby the parcel for which a variance is sought."<sup>45</sup>

The court then defined its role as a guardian of neighboring property interests from arbitrary actions by homeowner associations. Further, the court described as "nonsense" the association's argument that committee approval of landscape improvement plans could be arbitrary as to an individual homeowner, as long as the action was reasonable in light of the overriding interests of the homeowner community.<sup>46</sup> The court said: "Like any community, Kite Hill consists of individual members who form in the aggregate an organic whole. Thus, *like any government*, the Association must balance individual interests against the general welfare."<sup>47</sup> These governmental traits of the association give rise to a high standard of responsibility, according to the court:

The business and governmental aspects of the association and the association's relationship to its members clearly give rise to a special sense of responsibility upon the officers and directors . . . . This special responsibility is manifested in the requirements of fiduciary duties and the requirements of due process, equal protection, and fair dealing.<sup>48</sup>

At least in reviewing land use controls by associations,<sup>49</sup> the *Kite Hill*

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45. *Id.* at 652-53, 191 Cal. Rptr. at 214-15 (quoting *Topanga Ass'n for a Scenic Community v. County of Los Angeles*, 11 Cal. 3d 506, 517-18, 522 P.2d 12, 19, 113 Cal. Rptr. 836, 843 (1974)).

46. 142 Cal. App. 3d at 653, 191 Cal. Rptr. at 215.

47. *Id.* at 652-653, 191 Cal. Rptr. at 215 (emphasis added).

48. *Id.* at 651, 191 Cal. Rptr. at 214 (quoting Hyatt and Rhoads, *supra* note 42, at 921).

49. For a collection of cases dealing with adequacy and application of guidelines

court does not distinguish associations from municipal corporations.

Other courts also have seen no distinction between the two in the area of rule enforcement. In *Chateau Village North Condominium v. Jordan*,<sup>50</sup> the association promulgated a rule that "[n]o cats, dogs, or other animal . . . shall be kept . . . in the development unless the same in each instance is expressly permitted in writing by the [management]."<sup>51</sup> The plaintiff, wishing to keep two cats in her unit, sought and was denied permission. She filed suit, charging that the association had an unstated policy not to permit any pets in the development. After finding the rule's language to be discretionary and not mandatory, the court treated the association as a government entity and found that it abused its discretion in having a blanket prohibition of pets. "[T]he Association had the duty to consider her application and apply its discretion in a reasonable and good faith manner."<sup>52</sup>

In *Michaels v. Galaxy Towers*,<sup>53</sup> the court reviewed the reasonableness of a fine imposed on a unit owner who had violated a condominium rule. The owner had refused to give to the association board a duplicate key to his unit as per the rule. For this refusal, the unit owner incurred a daily fine, which totalled \$1,100 when the case was heard. The court held that this fine was unreasonable because it exceeded any amount necessary to ensure compliance. In other words, the punishment did not fit the crime, and the fine exceeded the police power authority of local government.

Again, whether purposefully or accidentally, courts sense a parallel between the government-citizen relationship and the association-unit owner relationship.<sup>54</sup> Because of this parallel, courts are applying lo-

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relating to condominium associations' requisite approval of an individual unit owner's improvements or decorations, see Annot., 25 A.L.R. 4th 1059 (1983).

50. 643 P.2d 791 (Colo. Ct. App. 1982).

51. *Id.*

52. *Id.* at 792.

53. Superior Court of New Jersey, Chancery Division, Hudson County, Docket No. C19283 (1983).

54. Once again, this result may stem from the difficulty in defining a governmental entity. Consider the definition offered by Professor Frank Michelman, a recognized scholar on community governance:

We know perfectly well, granting that there are intermediate hard cases, how to distinguish governmental from non-governmental *powers* and *forms of organization*: governments are distinguished by their acknowledged, lawful authority — not dependent on property ownership — to coerce a territorially defined and imperfectly voluntary membership by acts of regulation, taxation, and condemnation, the exercise of which authority is determined by majoritarian and representative procedures.

cal government law to the field of condominium law. The next section will illustrate how the application of government law to the condominium context implicates fourteenth amendment rights and obligations for the association and the unit owner.

### III. CONSTITUTIONAL RIGHTS AND THE ASSOCIATION

The rights guaranteed to the citizens of the states have their basis in the fourteenth amendment. Under this amendment, a citizen's fundamental rights, such as those listed in the Bill of Rights, cannot be abridged by state action.<sup>55</sup> The amendment's due process clause is today probably the greatest single limitation upon the states and municipal government.<sup>56</sup> It limits the actions taken by a state's legislative, judicial and executive branches.<sup>57</sup> Specifically what actions are proscribed by the clause have not been listed. The fact that the due process clause has always evaded definition is perhaps the strongest evidence that the protections secured are general rather than specific.<sup>58</sup> In condominium association cases, the courts have applied general due process limitations on association actions and, to some extent, have considered the protection of another clause of the fourteenth amendment — the equal protection clause.

#### A. *Substantive Due Process*

While the due process clause incorporates such rights as freedom of speech, freedom of religion, freedom against unreasonable searches and seizures and the right against self-incrimination, the application of due process constraints in the condominium association context deals with the reasonableness of association action. It is here that the "rule of reasonableness" employed by the courts takes on its constitutional clothing. Courts review the association action to determine if the action deprives the individual unit owner of liberty of property unreasonably, arbitrarily, capriciously or by an abuse of lawful discretion, *i.e.*, without substantive due process of law. The action can be reviewed through a three-part test, which is pervasive in constitutional law:

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Michelman, *States' Rights and States' Roles: Permutations of "Sovereignty" in National League of Cities v. Usery*, 86 YALE L.J. 1165, 1167 (1977) (emphasis in original).

This thoughtful, well-crafted definition can apply to the condominium association. The condominium is territorially defined, its membership is imperfectly voluntary, and a body elected by the majority exercises acts of regulation. However, membership is "dependent on property ownership."

55. *Procunier v. Martinez*, 416 U.S. 396 (1974).

56. M. FORKOSCH, CONSTITUTIONAL LAW § 385 (2d ed. 1969).

57. *Brinkerhoff-Faris Trust and Savings Co. v. Hill*, 281 U.S. 673, 680 (1930).

58. R. MOTT, DUE PROCESS OF LAW § 237 (1973).

1. Does the unit owner have a fundamental property or liberty interest that is being infringed by the association's action?
2. Is the association's action reasonably related to a legitimate goal of the condominium development, e.g., providing for the security of residents, preserving property values by maintaining the common areas, etc.?
3. Are the means taken by the association in furthering that legitimate end the least restrictive of the unit owner's property and liberty interests?

As the court held in *Kite Hill*,<sup>59</sup> the test is a balancing one, weighing the interests of the individual unit owner against the interests of the community of unit owners.<sup>60</sup>

A good example of this balancing can be found in *Makeever v. Lyle*.<sup>61</sup> Dr. Lyle purchased a unit in a 16-unit condominium located adjacent to the Yuma Golf and Country Club in Yuma, Ariz. All units were built on ground level in blocks of four. Dr. Lyle wanted to construct a second story consisting of two bedrooms, a bath and a den, and also to add a basement workshop directly underneath his carport. After receiving approval from ten of the sixteen unit owners, he began the construction. Two other unit owners sued to enjoin the construction, arguing that the doctor was appropriating to himself the exclusive use and control of cubic airspace belonging in common to all owners. The court agreed. Noting that the condominium declaration permitted alterations upon approval of a majority of unit owners, the court held that a majority cannot deprive an individual of his property interest in the common area. In this case, the council of unit owners' approval of the second floor addition constituted a "taking" of the plaintiffs' property interest in the common area. As the court said,

It is recognized that the council of co-owners must have broad powers in determining and managing the common uses of the general common elements, and such determinations will be upheld if they are not arbitrary and capricious, bearing no reasonable relationship to the fundamental condominium concept. . . . However, in our opinion the power of the council of co-owners to actually convert the common general elements to the exclusive and private use and control of one of the individual owners constitutes a *taking* of the other remaining individual owners' property.<sup>62</sup>

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59. 142 Cal. App. 3d 642, 191 Cal. Rptr. 209 (1983).

60. *Cf. Lawton v. Steele*, 152 U.S. 133, 137 (1894) (general public interest must require interference and the state must use means reasonably necessary for the accomplishment of the purpose).

61. 125 Ariz. 384, 609 P.2d 1084 (1980). *See also* Annot., 13 A.L.R. 4th 591 (1980).

62. 125 Ariz. at 388-389, 609 P.2d at 1088-89 (emphasis added) (citations omitted).



Clearly, this passage is fraught with due process language. The court recognized that even though a public (or community) purpose may be served in enhancing the value of the condominium project, such action by the council of co-owners does not outweigh the fundamental property rights of the individual unit owners.

In *Juno By The Sea North Condominium Association, Inc. v. Manfredonia*,<sup>63</sup> twenty of seventy unit owners each paid \$2,000 for the exclusive right to use twenty covered parking spaces in the common area of the condominium. When all of the units were sold, there were an insufficient number of uncovered parking spaces. The association board passed a rule assigning one parking space to each unit owner who did not already own one of the twenty covered spaces. The twenty unit owners filed suit to enjoin the rule, arguing that all seventy owners must have equal access to the common parking lot area. The court, however, found the rule to be reasonable and logical:

We believe the regulation challenged herein is not only fair but makes good sense. Upon construction by Juno by the Sea, there were 70 parking spaces provided to unit owners in the immediate area of the condominium building. For an extra \$2,000 each, 20 unit owners were able to secure the best of these 70 spaces; i.e., 20 covered spaces in the basement of the condominium building. . . . In addition, the expense of maintenance of the covered spaces as well as the open spaces is borne by the association. Under all these circumstances we believe this plan not only makes good sense, but appears to be the only reasonable alternative, short of total chaos, open to the association.<sup>64</sup>

In applying the three-part constitutional test to the parking regulation, the court held that the the rule was legitimate even though there was an infringement of a property interest in the common area. The court explained that the rule was reasonably related to the association's interest in providing a workable parking scheme and the regulation's minimal restriction on the individual owners' property rights. Noting that the twenty unit owners already had parking spaces secured, their interest in parking in the open lot did not outweigh the association's interest in making do with what parking was available.<sup>65</sup> Since the association's interest outweighed the interests of the twenty unit owners, the rule was reasonable.

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63. 397 So. 2d 297 (Fla. Dist. Ct. App. 1981).

64. *Id.* at 304-05.

65. See also *Jarvis v. Stage Neck Owners Ass'n*, 464 A.2d 952 (Me. 1983), where the court held valid an agreement between an association and a resort hotel in which the hotel held a long-term lease for the use of the condominium's swimming pool, tennis courts and parking lots. Because the agreement did not increase or diminish the common areas or relegate any portion of the common areas to the exclusive use of any condominium owners or of the resort hotel, the agreement in no way affected the percentage of undivided interest of each unit owner in the common areas.

See also *Raymond*, 662 S.W.2d at 89, dealing with the standard to be applied by the court in reviewing an association's determination of a unit owner's pro rata share of the "common expenses."

Beyond rules governing the use of common areas, the due process reasonableness test has been applied to rules governing the use of the units themselves. In *Wilshire Condominium Association, Inc. v. Kohlbrand*,<sup>66</sup> the association asked the court to enforce a rule that dwelling unit owners who have dogs may not replace the dog with another after its death. The appellate court found the regulation to be reasonable after engaging in a balancing test:

Certainly, the 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.<sup>67</sup>

Again, the restriction, on balance, had a greater benefit in promoting "the health, happiness and peace of mind of unit owners living in close proximity" than the detriment to the unit owner who lost her ability to purchase a replacement dog.

The reasonableness of an association's action has not been reviewed by applying the equitable principle of "balancing the conveniences." In *Monell v. Golfview Road Association*,<sup>68</sup> a homeowners' association constructed speed bumps in a private road over which the plaintiff homeowner held an easement. The trial court used the doctrine of "balancing conveniences," which is applicable where a technical encroachment of another's rights is slight and the cost of removing the encroachment would produce great harm and only small benefit. Applying the doctrine, the trial court denied injunctive relief. On appeal, the doctrine was held to be inapplicable because the association was found to have violated the plaintiff's fundamental property right. "It is also important to note that the Association even representing a majority of the easement holders had no right to substantially diminish the convenience of the roadway."<sup>69</sup> In this case, the balance swung in favor of the individual homeowner.<sup>70</sup>

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66. 368 So. 2d 629 (Fla. Dist. Ct. App. 1979).

67. *Id.* at 630 (quoting *Hidden Harbour Estates, Inc. v. Norman*, 309 So. 2d 182 (Fla. Dist. Ct. App. 1975)).

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

69. *Id.* at 4.

70. Other cases in which courts have considered the "reasonableness" of association action are: *Seagate Condominium Ass'n, Inc. v. Duffy*, 330 So. 2d 484 (Fla. Dist. Ct. App. 1976); *Holleman v. Mission Trace Homeowners Ass'n*, 556 S.W.2d 632 (Tex. Ct. App. 1977); *Papalexou v. Tower West Condominium*, 167 N.J. Super. 516, 401 A.2d

## B. Procedural Due Process

Procedural due process consists of basically three rights: that the individual has adequate notice that a hearing will be held affecting his interest in property; that a fair and impartial hearing will be conducted; and that the individual has an opportunity to be heard at such a hearing.<sup>71</sup> The Supreme Court has found that the procedural requirements vary with the nature of the case and that competing policy interests must be balanced to determine what process is due.<sup>72</sup> Although the Court has stressed a flexible approach in assessing the required procedures, it has consistently held that some kind of hearing is required at some time before a person is finally deprived of his property.<sup>73</sup> As the Court held in *Logan v. Zimmerman Brush Co.*: “the Due Process Clause grants the aggrieved party the opportunity to present his case and have its merits fairly judged. Thus it has become a truism that ‘some form of hearing’ is required before the owner is finally deprived of a protected property interest.”<sup>74</sup>

The issue in the condominium context then is whether the association can adopt a regulation that infringes upon a unit owner’s property rights without affording that individual a due process hearing to challenge the regulation. Some courts have held that such a hearing is not required before the regulation is enacted.

In *Majestic View Condominium Association, Inc. v. Bolotin*,<sup>75</sup> the condominium declaration prohibited all pets of any kind, except one dog or cat weighing less than 25 pounds. The Bolotins acquired a dog which then grew heavier than 25 pounds. They later bought another large dog. The Bolotins “permitted these dogs to run at will through the condominium, frightening residents and creating a nuisance.”<sup>76</sup> The dog owners refused to comply with an association request that the dogs be removed. Pursuant to the declaration, the association sought an injunction. The trial court ruled that the asso-

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280 (1979); *Dulaney Towers Maintenance Corp. v. O’Brey*, 46 Md. App. 464, 418 A.2d 1233 (Md. Ct. Spec. App. 1980).

See also *Wolinsky v. Kadison*, 114 Ill. App. 3d 527, 449 N.E.2d 151 (1983), where a condominium unit owner wanted to purchase from another unit owner his large unit. The association, however, held the right of first refusal on every unit. The association exercised its right allegedly because it did not want the prospective purchaser to buy it and move her children into the unit. The court found that the exercise of the first refusal right must be rationally related to the protection, preservation or proper operation of the property and exercised in a fair and nondiscriminatory manner.

71. M. FORKOSCH, *supra* note 56, §§ 181, 183, 186.

72. *Matthews v. Eldridge*, 424 U.S. 319, 334-35 (1976).

73. *Wolff v. McDonnell*, 418 U.S. 539, 557-58 (1974).

74. 455 U.S. 422, 433 (1982) (emphasis in original) (quoting *Board of Regents v. Roth*, 408 U.S. 564, 570-71 (1972)).

75. 429 So. 2d 438 (Fla. Dist. Ct. App. 1983).

76. *Id.* at 439.

ciation acted arbitrarily and had failed to give the owner pre-litigation due process.

The court of appeals reversed stating that the association had met the three requirements for procedural due process in condominium rule enforcement situations. Those requirements are: (1) constructive or actual notice of the existence of the restriction to the owner prior to enforcement; (2) a reasonable demand for compliance with the restriction after the breach has occurred; and (3) compliance with the applicable procedural due process considerations which require notice of the commencement of the litigation and an opportunity to be heard.<sup>77</sup> The appellate court found no support for the trial court's conclusion that a condominium association must provide the unit owner with an adversary proceeding before seeking judicial enforcement of restrictive covenants.

While a pre-litigation hearing may not be required by due process, courts have demanded that another element of procedural due process—the element of notice—be satisfied before the association can enforce a rule or regulation. In *Streams Sports Club, Ltd. v. Richmond*,<sup>78</sup> the sports club brought an action to foreclose on a lien placed on a unit owner's property for failure to pay annual membership fees.<sup>79</sup> The court rejected the unit owner's contention that the covenant to pay fees was an unlawful restriction on alienation of property. "The imposition of a lien for unpaid fees is a reasonable method of enforcing the terms of the covenant. The description of the sports club and the relevant fees were set out in the articles of the condominium declaration giving prospective purchasers *adequate*

77. *Id.*

78. 99 Ill. 2d 182, 457 N.E.2d 1226 (1983).

79. Article 15 of the Streams Sports Club Declaration states:

15.2 *Membership in Club.* Each Owner of any Unit in the entire Condominium Development shall, upon acquisition of title, by such Owner, become a member of the Club, without any membership or initiation fee therefor. Each such Owner may exercise and enjoy any and all facilities of such Club as may exist from time to time, expressly subject and contingent upon the continuous compliance by each such Owner with all By-Laws, rules and regulations as the Owner of said Club may adopt from time to time, and the payment of any annual membership fees and such other fees occasioned solely by the use of the facilities of the Club by such Unit member, as may be imposed. . . .

15.3 *Termination of Membership or Privileges.* . . . All unpaid charges shall be a lien against said Unit, subject, however, to rights of any mortgages on said Unit. The Club shall have the right, in addition to any other remedy, to enforce its lien by foreclosure. . . .

99 Ill. 2d at 186, 457 N.E.2d at 1229.

notice of their contractual obligations.”<sup>80</sup>

In *Snug Harbor Property Owners Association v. Curran*,<sup>81</sup> the court held that restrictive covenants can be enforced only if they were not so vague that the unit owner would not have sufficient notice of conduct violative of the covenant. In that case, the association brought an action to recover arrearages of annual maintenance fees. The bylaws were written with “invalidating indefiniteness,” the court held.<sup>82</sup> “Although [b]ylaws are, in a sense, a contract among the shareholders, . . . these fee provisions contain no clear standard by which a court could determine which . . . facilities were to be maintained, or to what degree, and for this reason they are unenforceable.”<sup>83</sup>

Procedural due process also has been held to require that the association’s board of managers conduct open meetings<sup>84</sup> so that the unit owners are apprised of any efforts to adopt rules and regulations that would affect property interests.<sup>85</sup>

### C. Equal Protection

The equal protection clause of the fourteenth amendment applies to the condominium association in two major respects. First, it may limit the association’s ability to discriminate among prospective unit purchasers, as by exercising its rights of first refusal to prevent a unit owner from selling to a minority purchaser,<sup>86</sup> or by discriminating in the services it offers to its residents. Second, it may affect how the association elects its board of managers. This second aspect has not been tested through litigation.

The first aspect, the association’s ability to discriminate among prospective residents, was confronted squarely in *White Egret Condominiums, Inc. v. Franklin*.<sup>87</sup> A unit owner conveyed a half interest to his brother. The association sought to set aside the transfer on the ground that the brother had minor children, violating the express covenant which prohibited children under the age of twelve from residing on the premises. The brother argued that the restriction violated his rights to marriage, procreation, association, and to equal protection of the laws. The court, however, chose not to treat the re-

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80. *Id.* at 191, 457 N.E.2d at 1231 (emphasis added).

81. 55 N.C. App. 199, 284 S.E.2d 752 (1981).

82. *Id.* at 206, 284 S.E.2d at 756.

83. *Id.* (citations omitted).

84. See, e.g., *Davis v. Deerfield Lake Condominium Management Ass’n, Inc.*, 348 So. 2d 1213 (Fla. Dist. Ct. App. 1977); UNIF. CONDOMINIUM ACT § 3-308 (1985).

85. For a discussion of the due process limitations on condominium conversions, see Note, *Fifth Amendment Takings and Condominium Conversion Regulations that Restrict Owner Occupancy Rights*, 62 B.U.L. REV. 467 (1982).

86. *Wolinsky*, 114 Ill. App. 3d at 527, 449 N.E.2d at 151.

87. 379 So. 2d 346 (Fla. 1979).

striction as it would a municipal ordinance. It thereby was able to find no state action and no right to equal protection. The court held:

In the instant case, the restriction is not a zoning ordinance adopted under the police power but rather a mutual agreement entered into by all condominium apartment owners of the complex. With this type of land use restriction, an individual can choose at the time of purchase whether to sign an agreement with these restrictions or limitations. Reasonable restrictions concerning use, occupancy, and transfer of condominium units are necessary for the operation and protection of the owners in the condominium concept.<sup>88</sup>

Noting further that restriction on individual rights based on age need not pass the "strict scrutiny" test of the equal protection clause, the court said in this case that age restrictions are permissible where housing complexes are specifically designed for certain age groups.<sup>89</sup> While the court found the age restriction constitutional, it found the association's manner of enforcement arbitrary and selective, because at the time the brother purchased his interest in the unit six other children under the age of twelve were living in the complex. Given the arbitrary enforcement of the rule, the court did not have to decide the equal protection issue. Unfortunately, it did address equal protection but failed to indicate whether the clause should be applied to an association unit owner dispute.<sup>90</sup>

The constitutionality of association under the equal protection clause also was challenged in *Franklin v. Spadafora*.<sup>91</sup> In that case, a condominium bylaw amendment limited to two the number of units that could be owned by any one person or entity. The amendment, presumably, was passed to prevent any investor from buying several units and then leasing them to others for occupancy. On the date of the amendment, the plaintiff owned six units in the complex and was negotiating to buy a seventh. The trustees of the complex notified the sellers that the sale was in violation of the bylaw amendment. Franklin, the buyer, and the sellers filed suit to have the amendment declared unconstitutional as a violation of the equal protection clause. They claimed that the amendment was "unequal" because it discriminated against those who owned more than one unit.<sup>92</sup> After holding that the trustees had authority to pass the amendment and

88. *Id.* at 350.

89. *Id.* at 351 (citing *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307 (1976)).

90. For other age restriction cases, see *Star Lake North Commodore Ass'n, Inc. v. Parker*, 423 So. 2d 509 (Fla. Dist. Ct. App. 1982); *De Slatopolsky v. Balmoral Condominium Ass'n, Inc.*, 427 So. 2d 781 (Fla. Dist. Ct. App. 1983); *O'Connor v. Village Green Owners Ass'n*, 33 Cal. 3d 790, 662 P.2d 427, 191 Cal. Rptr. 320 (1983).

91. 388 Mass. 764, 447 N.E.2d 1244 (1983).

92. *Id.* at 772 n.15, 447 N.E.2d at 1249 n.15.

that the amendment was rationally related to the trustees' purpose of encouraging a stable population in the complex, the court disposed of the equal protection claim as follows:

With this type of land use restriction, an individual can choose at the time of purchase whether to sign an agreement with these restrictions or limitations. . . . In these circumstances, we do not view the amendment as impinging on fundamental rights of the plaintiffs. . . . Therefore, the amendment's limitation to two of the number of units a person may own does not set up a classification scheme requiring "strict scrutiny." . . . There is no question here of "inherently suspect distinctions such as race, religion, or alienage."<sup>93</sup>

Whether the court would apply strict scrutiny if the bylaw amendment discriminated against any of the suspect classes was left unanswered.<sup>94</sup>

The second application of the equal protection clause to the condominium association — the one person-one vote concept for association board elections — has not been addressed by the courts. The basic argument is this: if the condominium is a municipal entity and the association board is the government of that municipal entity, then all of those affected by board action should participate equally in electing board members. All those affected include each person who lives in the condominium community, whether a unit owner or not.

However, most if not all condominium associations provide for voting only by unit owners.<sup>95</sup> Usually units receive a number of votes in proportion to their ownership interest in the condominium and to their burden of the common expense. Other voting schemes are based on the size of the unit owned, *i.e.*, a vote for a certain number of square feet of floor area.

While these voting arrangements may be based on the premise that unit owners' investments are the only matters affected by board actions and, therefore, only unit owners should vote for board members, it is clear that rules and regulations promulgated by the board affect non-unit owning residents as well. A rule preventing the playing of stereos after 11 p.m. or a rule prohibiting children from playing in the common areas affects all in the condominium as much as any nuisance ordinance or municipal curfew. Does equal protection,

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93. *Id.* at 773-774 n.16, 447 N.E.2d at 1250 n.16 (quoting *New Orleans v. Duke*, 427 U.S. 297 (1976)).

94. Those discriminated against in housing can bring a claim under the Fair Housing Act, 42 U.S.C. § 3604 (1982). See *Halet v. Wend Inv. Co.*, 672 F.2d 1305 (9th Cir. 1982), where a white tenant who charged that an apartment complex's adults only rental policy was racially discriminatory had standing to raise its racial discrimination claim only under the Fair Housing Act, not under the fourteenth amendment.

Where a condominium association adopts racially discriminatory policies, the association board of directors may be individually liable. In *Tillman v. Weaton-Haven Recreation Ass'n, Inc.*, 517 F.2d 1141 (4th Cir. 1975), directors of a non-profit corporation which operated a community swimming pool could be personally liable for the corporation's refusal to admit blacks to the corporation's pool.

95. UNIF. CONDOMINIUM ACT §§ 3-103, 3-110 (1985).

then, require that all those affected by the board action have an equal vote in electing board members?

In *Ball v. James*,<sup>96</sup> the Supreme Court sent a warning to community associations that they may fall under the one person-one vote equal protection requirement of the fourteenth amendment. In *Ball*, the Court considered whether voting may be limited to landowners in electing directors of a large water reclamation district in Arizona. The issue phrased by the Court was "whether the purpose of the District is sufficiently specialized and narrow and whether its activities bear on landowners so disproportionately as to distinguish the District from those public entities whose more general governmental functions demand application of the [one person-one vote] principle."<sup>97</sup> The Court then found that the district did not exercise general governmental powers and, therefore, was not bound by the principle. The Court then listed those powers it would consider as evidence of a general government: "The District cannot impose ad valorem property taxes or sales taxes. It cannot enact any laws governing the conduct of citizens, nor does it administer such normal functions of government as the maintenance of streets, the operation of schools, or sanitation, health, or welfare services."<sup>98</sup>

Where the body exercises these general government powers and "performs important governmental functions" that have a significant impact on all citizens residing within the district, then the one person-one vote principle is applied.<sup>99</sup> If the condominium board of directors is vested with and exercises traditional and important governmental powers, should board elections allow participation by all of those condominium residents affected, regardless of whether they own property in the complex?<sup>100</sup> It can be argued that the consensual relationship of the unit owner and association controls and

96. 451 U.S. 355 (1981).

97. *Id.* at 362.

98. *Id.* at 366 (footnote omitted).

99. *Hadley v. Junior College Dist.*, 397 U.S. 50, 53-55 (1970).

100. See *Washington ex rel Seattle Trust Co. v. Roberge*, 278 U.S. 116 (1928). See also SANDS & LIBONATI, *LOCAL GOVERNMENT LAW* § 9.02 (1981): "The determination of when an issue statutorily committed to the electoral process in some form is of sufficient 'general interest' to warrant strict equal protection analysis must, under the current state of the law, fluctuate according to the circumstances of the particular case."

In *Phoenix v. Kolodziejcki*, 399 U.S. 204, 209 (1970), the Court said: "Presumptively, when all citizens are affected in important ways by a governmental decision . . . , [the fourteenth amendment] does not permit . . . the exclusion of otherwise qualified citizens from the franchise."

In *Kramer v. Union School Dist.*, 395 U.S. 621, 627 (1969), the Court said that any state statute granting the franchise to residents on a selective basis poses the "danger



that those who choose to live in a condominium impliedly consent to live under an aristocracy or, in some cases, an oligarchy.

#### IV. STATE ACTION DOCTRINE AND THE ASSOCIATION

The fourteenth amendment only limits actions taken by a state government or those acting under color of state law. There can be no violation of the fourteenth amendment without a finding that state action is present.<sup>101</sup> Private conduct which abridges "individual rights does no violence to the [fourteenth amendment] unless to some significant extent the State in any of its manifestations has been found to have become involved in it."<sup>102</sup>

The state acts by three means: its legislature, its administration and its courts. It can act in no other way.<sup>103</sup> This is not to say that an individual who holds no public office or employment cannot engage in conduct under the color of state law for the purposes of "state action." The Supreme Court has said: "When private individuals . . . are endowed by the State with powers or functions governmental in nature, they become agencies or instrumentalities of the State and subject to its constitutional limitations."<sup>104</sup>

For a condominium association to be limited by the fourteenth amendment, it must engage in state action. Unless the condominium project is itself owned and operated by the state, state action will be found only if (a) the condominium association has taken on governmental powers and is providing traditional governmental services to its residents, with the approval and acquiescence of the state through an enabling statute, or (b) the state, through legislation or through administrative or judicial action, acquiesces or enforces association action.

##### A. *The Association's Governmental Powers*

A private entity which engages in a function that serves the public does not transform its acts into "state action."<sup>105</sup> However, where there is private performance of a governmental function, the Court may find state action. In *Terry v. Adams*,<sup>106</sup> a private political party's candidate selection process was struck down as a violation of the fifteenth amendment. Underlying the Court's holding was the fact that

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of denying some citizens any effective voice in the governmental affairs which substantially affect their lives." *Id.* (footnote omitted).

101. C. ANTIEAU, *MODERN CONSTITUTIONAL LAW* § 8:1 (1969).

102. *Burton v. Wilmington Parking Auth.*, 365 U.S. 715, 722 (1961).

103. *Ex Parte Virginia*, 100 U.S. 339, 347 (1879).

104. *Evans v. Newton*, 382 U.S. 296, 299 (1966).

105. *Rendell-Baker v. Kohn*, 457 U.S. 830, 839-43 (1982).

106. 345 U.S. 461 (1953).

the party's primary was the only effective part of the electoral process determining who would govern the county.

Where a private corporation owns property and operates a "company town," providing traditional governmental services, state action is present and the corporation's actions are limited by the fourteenth amendment. In *Marsh v. Alabama*,<sup>107</sup> the town of Chicasaw, Alabama, was owned by the Gulf Shipbuilding Corporation. A company rule prohibited the distribution of religious literature on the sidewalks. A Jehovah's Witness was arrested for trespassing when she refused to leave the town after handing out religious pamphlets on a sidewalk. The Supreme Court held that the woman's first amendment rights had been violated. For the majority, Justice Black wrote: "Ownership does not always mean absolute dominion. The more an owner, for his advantage, opens up his property for use by the public in general, the more do his rights become circumscribed by the statutory and constitutional rights of those who use it."<sup>108</sup>

Whether state action exists in the condominium setting does not turn on the fact that the title to the condominium rests in private hands. The inquiry by the court considers the degree to which the private property owner has opened up his property for use by the general public. As Justice Black wrote,

In our view the circumstance that the property rights to the premises where the deprivation of liberty, here involved, took place, were held by others than the public, is not sufficient to justify the State's permitting a corporation to govern a community of citizens so as to restrict their fundamental liberties and the enforcement of such restraint by the application of a state statute.<sup>109</sup>

The town was performing with state action traditional government functions because public ownership of the sites of the violation is not necessary in finding state action and because Chicasaw had all the characteristics of a town except public ownership. So when the company town prevented free speech, the Court could find constructive state action present.

A series of cases dealing with shopping centers may be illustrative of how the Court would address the state action doctrine in the condominium context. In *Amalgamated Food Employees Union v. Logan Valley Plaza, Inc.*,<sup>110</sup> the Supreme Court held that a privately owned shopping center fell under the state action concept of the fourteenth amendment. The Court then held that the shopping

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107. 326 U.S. 501 (1946).

108. *Id.* at 506. *Cf. Republican Aviation Corp. v. Labor Bd.*, 324 U.S. 793 (1943).

109. 326 U.S. at 509.

110. 391 U.S. 308 (1968).

center violated the freedom of expression rights of picketers by banning them from the area. Eight years later, in *Hudgens v. N.L.R.B.*,<sup>111</sup> the Court overruled *Logan Valley* and held that the owner of a private shopping center is not bound by the first amendment. The owner was permitted to remove picketers from his sixty-store shopping center. The Court disagreed with *Logan Valley's* conclusion that the "shopping center here is clearly the . . . equivalent of the business district of Chicasaw involved in *Marsh [v. Alabama.]*"<sup>112</sup> The Court then cited with approval an earlier holding in *Lloyd Corp. v. Tanner*:

The argument is that such a [shopping] center has sidewalks, streets, and parking areas which are functionally similar to facilities customarily provided by municipalities. It is then asserted that all members of the public, whether invited as customers or not, have the same right of free speech as they would have on the similar public facilities in the streets of a city or town. The argument reaches too far. The Constitution by no means requires such an attenuated doctrine of dedication of private property to public use [Contrary to *Marsh*] . . . [i]n the instant case there is no comparable assumption or exercise of municipal functions or power.<sup>113</sup>

If state action does not adhere to purely business entities, should the Court find state action present in purely residential entities? An argument certainly can be made that the condominium development is operated more like a municipality (at least a residential suburb) than a shopping center or mall. The condominium association makes decisions that directly affect use of property, conduct of residents and visitors and assessments paid by property owners. The shopping center has fewer indicia of a democratic form of government. The center is usually owned by a single entity and the stores are rented by individual businessmen. A condominium is governed by a board popularly elected by unit owners; the shopping center is usually operated by an individual, although shop owners may form a shopping center association. Perhaps the most significant distinction between the shopping center and the condominium is that people visit the former and live in the latter. When decisions are made affecting people where they live, the decisions take on more of a governmental appearance. With government comes state action and the fourteenth amendment.

### *B. State Involvement with Condominiums*

The second avenue by which the court could find state action in the condominium context is through state involvement in the condo-

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111. 424 U.S. 507 (1976).

112. *Logan Valley*, 391 U.S. at 318.

113. 407 U.S. 551, 569 (1972). See also *Pruneyard Shopping Center v. Robins*, 447 U.S. 74 (1980), where the Court held that nothing in the United States Constitution prevents a state from requiring in its constitution that persons be given rights of free speech in privately owned shopping centers.

minium operation. Where the state significantly involves itself with a private party, the acts of that private party may be viewed as state action. Three major Supreme Court cases are frequently cited for that proposition—*Burton v. Wilmington Parking Authority*,<sup>114</sup> *Moose Lodge No. 107 v. Irvis*,<sup>115</sup> and *Jackson v. Metropolitan Edison Co.*<sup>116</sup>

In *Burton*, a privately operated restaurant rented space in a publicly owned parking garage. The restaurant refused to serve a black man. The Court found that state action was present; the restaurant's refusal to serve the man was a violation of the fourteenth amendment's equal protection clause. In so holding, the Court pointed out that the restaurant was physically and financially an integral part of a public building, built and maintained with public funds. Because of these factors, the state was viewed as a joint participant in the operation of the restaurant.

In *Irvis*, the Moose Lodge refused to serve the guest of a member because he was black. The guest filed suit, claiming that the refusal of service was state action because the Pennsylvania Liquor Control Board had issued the Moose Lodge a private club license that authorized the sale of alcoholic beverages on the premises. Writing for the majority, Justice Rehnquist said that the state's regulatory scheme did not sufficiently implicate the state in the discriminatory guest policies of the club. Consequently, the club's refusal to serve liquor to the guest solely because of his race presented no fourteenth amendment violation.

In *Jackson*, an electric company customer whose electric service had been terminated without a hearing or notice claimed a violation of due process. Although the Court found that the defendant utility company was heavily regulated by state law and that it operated a partial monopoly thanks to state law, no state action was present.

These cases indicate that the state must have some substantial, direct involvement with the privately owned entity for state action to be present. The mere fact that condominiums exist by virtue of state law is not enough for state action. As the Court said in *Irvis*:

The Court has never held, of course, that discrimination by an otherwise private entity would be violative of the Equal Protection Clause if the private entity receives any sort of benefit or service at all from the State, or if it is subject to state regulation in any degree whatever. . . . Our holdings indicate

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114. 365 U.S. 715 (1961).

115. 407 U.S. 163 (1972).

116. 419 U.S. 345 (1974).

that where the impetus for the discrimination is private, the State must have "significantly involved itself with invidious discriminations" . . . in order for the discriminatory action to fall within the ambit of the constitutional prohibition.<sup>117</sup>

Private conduct, in other words, will be viewed as state action where the state and the private entity enter into a "symbiotic relationship" in which the state has "so far insinuated itself into a position of interdependence with [the defendant] that it must be recognized as a joint participant in the challenged activity."<sup>118</sup> Unless the state is providing special services or funding to the condominium, it would be difficult to find any symbiotic relationship with the state.<sup>119</sup>

Also, state involvement with the condominium, sufficient for state action purposes, can be found where the condominium association seeks judicial enforcement of a discriminatory rule or regulation. *Shelley v. Kraemer*,<sup>120</sup> where the Court held that judicial enforcement of a racially discriminatory restrictive covenant in a deed was state action, may serve as a limitation on the powers of condominium associations. If an association must rely on court action to prevent minorities from purchasing condominium units, to discriminate against unmarried mothers or aliens, or even to place unreasonable restrictions upon the use and alienation of individual units, the court's involvement may trigger state action and subject the association to liability.

Whether the doctrine of *Shelley v. Kraemer* would find state action whenever a court upholds a condominium regulation, so that another court can then pass upon the regulation's constitutionality, has been addressed by one court. In *Franklin v. White Egret Condominium*,

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117. *Irvis*, 407 U.S. at 173 (quoting *Reitman v. Mulkey*, 387 U.S. 369, 380 (1967)).

118. *Burton*, 365 U.S. at 725.

119. See Note, *Judicial Control of Actions of Private Associations*, 76 HARV. L. REV. 983, 1068 (1963):

Since states impose some regulation on almost every business and occupation, and since it is difficult to articulate what makes the relationship "close," the theory might be stretched to cover all activities which the state has power to regulate. And the unsatisfactory experience with the "business affected with public interest" test of legislative power to regulate, suggests it would be difficult to formulate a rationally defined narrowed limit of the proposed theory.

*Id.* (footnote omitted).

In *Blum v. Yaretsky*, 457 U.S. 991 (1982), the Court held that the mere fact that a business is subject to state regulation does not, by itself, convert action into that of the state for the purposes of the fourteenth amendment but, rather, the complaining party must also show that there is a sufficiently close nexus between the state and the challenged action so that the action of the regulating party may be fairly treated as that of the state itself. Constitutional standards are invoked, the Court said, only when it can be said that the state is responsible for the misconduct involved. *Id.* at 1002-12.

For a broader definition of state action on the part of private associations, see *Cooper v. Aaron*, 358 U.S. 1 (1958), the Little Rock, Ark., school desegregation case, where the Court held that state action exists where the state participates through "any arrangement, management, funds, or property." *Id.* at 19.

120. 334 U.S. 1 (1948).

*Inc.*,<sup>121</sup> the Florida Court of Appeals said that private enforcement of a condominium covenant did not constitute state action. However, when the condominium association relied on judicial enforcement of the covenant, "it invoked the sovereign powers of the state to legitimize the restrictive covenant at issue. This court therefore owed a duty to carefully scrutinize that covenant with a view toward forbidding its enforcement should it fail to pass constitutional muster."<sup>122</sup> The case was appealed to the Florida Supreme Court, which found the restrictive covenant reasonable and constitutional without addressing the issue of state action.<sup>123</sup>

### C. Applying State Action Doctrine to the Condominium

In addition to the *White Egret* case, a few state courts have addressed the issue of whether state action exists where the condominium association takes action. These courts have reached different conclusions.

In *Franklin v. Spadafora*,<sup>124</sup> the Massachusetts court upheld a condominium bylaw amendment against due process and equal protection challenges. To pass on the constitutionality of the bylaw amendment, the court first "assumed" that the adoption of the amendment constituted state action. This assumption permitted the court to reach the merits of the case. The court said: "Because we conclude that the amendment did not deprive the plaintiffs of any constitutional rights, we may assume, without deciding, that the amendment represents State action."<sup>125</sup> Once the assumption was made, the court then applied the due process rationality test, to hold "that, [i]f a [bylaw amendment] serves a legitimate purpose, and if the means the [condominium association] adopted are rationally related to the achievement of that purpose, the [amendment] will withstand constitutional challenge."<sup>126</sup> Whether the court would have found state action had the bylaw amendment not survived the rationality test is uncertain. The court, however, did point out that condominium bylaws are similar to municipal laws and that "the test employed in determining the constitutional validity of municipal by-

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121. 358 So. 2d 1084 (Fla. Dist. Ct. App. 1978), *aff'd*, 379 So. 2d 346 (Fla. 1979).

122. *Id.* at 1089.

123. 379 So. 2d 346 (Fla. 1979). See *supra* note 87 and accompanying text for the facts of the case.

124. 388 Mass. 764, 447 N.E.2d 1244 (1983).

125. *Id.* at 773, 447 N.E.2d at 1249.

126. *Id.* at 774, 447 N.E.2d at 1250 (quoting *Shell Oil Co. v. Revere*, 383 Mass. 682, 421 N.E.2d 1181 (1981)).

laws affecting economic relations is appropriate to the present inquiry.”<sup>127</sup>Such language indicates that the court viewed the condominium as exercising governmental functions, such as the “company town” in *Marsh v. Alabama*.<sup>128</sup>

While state action is usually considered a threshold requirement in a fourteenth amendment claim, courts facing constitutional challenges to condominium regulations have bypassed the state action question to reach the merits of the claim. In *Laguna Royale Owners Association v. Darger*,<sup>129</sup> a California court was asked to decide whether a condominium deed restriction prohibiting assignment or transfer of a unit without approval by the condominium association was a violation of the unit owner’s freedom of association. “Preliminarily, there is considerable doubt of whether the actions of the Association constitute state action so as to bring into play the constitutional guarantees,” the court said.<sup>130</sup> It then proceeded to find that the restriction did not abridge the owner’s right to freedom of association and to due process.

However, in *Owens v. Tiber Island Condominium Association*<sup>131</sup> a District of Columbia court refused to consider the constitutionality of an assessment scheme because no state action was present.

The Owens argue that their due process rights were violated by the assessment schedule basing each co-owner’s share on his percentage of ownership. We fail to see any state action in the establishment of the assessment schedule by the condominium and since the Owens voluntarily agreed to the schedule when they bought a unit, any attempt to change it now should be by an attempt to alter the declaration and bylaws by the processes provided for in the bylaws.<sup>132</sup>

Perhaps underlying the *Owens* court’s holding is an estoppel or waiver argument. The Owens possibly have constitutional rights to due process as against the condominium association but, by voluntarily agreeing to the assessment schedule, they waived their rights to challenge its constitutionality. In any event, where the court finds no state action present, there is no constitutional inquiry into the regulations.<sup>133</sup>

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127. 388 Mass. at 774, 447 N.E. 2d at 1250.

128. 326 U.S. 501 (1946); see *supra* notes 103-105 and accompanying text.

129. 119 Cal. App. 3d 670, 174 Cal. Rptr. 136 (1981).

130. *Id.* at 683, 174 Cal. Rptr. at 144.

131. 373 A.2d 890 (D.C. 1977).

132. *Id.* at 895.

133. The Constitution also comes into play in condominium cases where unit owners are challenged on grounds of standing. This topic is beyond the scope of this paper. See, e.g., *Rouse v. Glascam Builders, Inc.*, 11 HOUS. & DEV. REP. 912 (BNA) (Wash. 1984), where the Washington Supreme Court held that a condominium owner may bring an action for negligence and breach of warranty in the construction of a common area without joining the other unit owners as plaintiffs. The unit owner’s interest in the common area is “exclusive in nature,” the court said, explaining that the interest

V. THE APPROPRIATE ROLE OF THE CONSTITUTION IN REFERENCE  
TO THE CONDOMINIUM

Before taking any action, a condominium association should consider the unit owner's two interests. First, the unit owner has an interest in his investment-backed expectations. The owner has risked a substantial amount of capital and incurred a long-term mortgage debt with the expectation of at least a reasonable return on his investment. Secondly, the unit owner has an interest in the fundamental freedoms guaranteed by the Constitution through the due process clause of the fourteenth amendment. Every association action either enlarges or restricts an individual owner's freedom of action and either enhances or diminishes an owner's return on investment.

It is not necessarily ideal for the association to only take action that strikes a balance between the two often competing interests. Sometimes the situation may call for the association to steer hard to the side of investment expectations at the expense of personal liberty, e.g., enacting a "no pets" rule when the condominium is being overrun by pet dogs. Sometimes personal liberty should triumph, e.g., deleting a "no children" rule despite an adverse effect on property values. What course the association decides to take is a matter of personal preference and the condominium's collective policy. However, action that steers the condominium too far toward either interest and too far from the other subjects the action to judicial overruling. If the action severely restricts personal freedom, the court may deem the action unreasonable (under the rule of reasonableness) or violative of due process or equal protection (if state action is present). If the action severely harms investment expectations, it may be deemed contrary to the association's statutory authority or violative of the condominium documents.<sup>134</sup>

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of the other co-tenants will also be served by successful prosecution of the suit, resulting in the common area being repaired.

Other condominium standing cases include: *Equitable Life Assurance Soc'y of the United States v. Tinsley Mill Village*, 249 Ga. 768, 294 S.E.2d 495 (1982); *Siller v. Hartz Mountain Assoc.*, 93 N.J. 370, 461 A.2d 568 (1983); *Brickell Club Condominium Ass'n v. Forte*, 410 So. 2d 522 (Fla. Dist. Ct. App. 1982).

134. Association action that severely limits the use or impedes possession of an individual owner's property could be considered a "taking" without due process if state action is present. It is interesting to note that even if the action were to serve collective condominium interests, e.g., a prohibition on leasing units in order to preserve the owner-occupied character of the condominium, such action might be considered a "taking" because it impedes the potential owner-lessor's individual investment-backed expectations. See, e.g., *Penn Central Transp. Co. v. New York City*, 438 U.S. 104 (1978); *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 581 F. Supp. 511 (W.D. Pa. 1984).



Generally, the association has a wide latitude in making decisions for the condominium. Enabling statutes usually grant broad powers to the association to take whatever action is necessary for the smooth and effective operation of the condominium. The better drafted condominium declarations and bylaws do not narrow this grant of power and nearly any action by the association or its executive board can be justified as promoting the general welfare of the condominium as a whole and the unit owners' individual investments. However, despite generous state law deference to association actions, it is clear that federal constitutional concerns always take precedence. The question then is when does the federal Constitution become involved in the review of association actions.

This article has analyzed the similarities of the municipal corporation and the condominium development. Even though a condominium has defined geographical boundaries, has traditional government facilities and services such as streets and security, and has an independent collective identity, it is not a municipality and is not an arm of the state. The reason is that condominium residents have consented to live in their development. It is this consensual relationship that distinguishes the association from true municipal government. The citizen has no choice but to live under the dictates of his government, so he must have constitutional protections from the abuses of government. The condominium unit owner, however, made a voluntary choice to purchase in his development. The unit owner voluntarily agreed to be bound by the covenants, rules and regulations found in the declaration and promulgated by the association. The unit owner impliedly agreed to abide by decisions of the association which are designed to maintain and enhance the value of the condominium project as a whole. In so doing, he indicated that he is primarily concerned with protecting and enhancing his investment.

This consensual aspect of the condominium unit owner relationship does not render the Constitution meaningless in the condominium context. The Constitution's basic purpose in terms of individual freedoms is to protect the individual from the tyranny of the majority. When the majority acts in a tyrannical fashion, the Constitution is employed as a shield for the individual. The unit owner consents to live in the development, but does not consent to tyrannical or unreasonable restraints on his property or activities. When the association acts beyond the powers granted by statute and its documents, no longer can the association claim that its actions are justified by the consent of the individual unit owner. In such a situation, the association is acting like a government, imposing its laws on an unconsenting public. When the association takes actions that cannot be based on the protection or enhancement of the condominium unit owner's investment interests, then the actions should be subject to constitu-

tional scrutiny.<sup>135</sup>

The unit owner's investment interests encompass all of the aspects that affect the value of his property. Those interests include: structural improvements, architectural standards, freedom from nuisances, security and safety, upkeep of the common areas and the financial well-being of the condominium association. The unit owner's investment interests do not include: regulation of conduct within units that has no external effects, unreasonable restraints on the alienation of units and rules or restrictions that are applied to some units arbitrarily.

These association actions that concern the unit owner's investment interests should not be subject to constitutional scrutiny, unless state action is present. These actions should be evaluated through the rule of reasonableness. The rule of reasonableness measures the appropriateness of the association action by considering the plight of the individual unit owner in the context of the entire condominium situation. There are no "fundamental rights" of the unit owner under the rule of reasonableness; there is only an examination of whether the association has unfairly dealt the unit owner a lousy hand.

Those association actions that do not concern the unit owner's investment interests should be subject to constitutional scrutiny because the association is taking on a governmental role beyond the consent of the individual unit owner. The powers of the condominiums are granted by state law, but these powers are defined through the consent of the unit owners. If the association exerts the maximum powers granted under state law, it is pushing itself as close to a government as possible. In so doing, the association is risking a constitutional review of its actions.

Court decisions have made it clear that by acting like a government, the association will be treated like a government. To avoid an upheaval by the constitution of the carefully drawn relationship of the condominium parties, the association should exercise only those powers necessary to protect and enhance the investments of the unit

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135. One problem with applying the Constitution to association actions is the potential inappropriateness of some constitutional law remedies. For example, the unit owner and association are initially bound by contract, but under a constitutional claim the unit owner may be awarded attorney's fees and punitive damages — relief not normally available in contract actions. Also, constitutional adjudication of the reasonableness of assessments may result in an injunction, possibly throwing the operation of the condominium into chaos. See Rosenberry, *supra* note 2, at 29.

owners and avoid taking action whose only purpose is to govern conduct of condominium residents.

Courts should not presume that the Constitution will be applied to measure the validity of all associations' actions. Each condominium set-up is different; there is a wide variety of condominium declarations, bylaws and rules and regulations. Each association acts differently towards its unit owners. Some associations may be extremely productive, meeting once a week and promulgating a steady stream of regulations. Others may meet once a year and simply adopt a budget and an assessment rate schedule. Obviously, both types of associations do not "govern" to the same degree and state action should not be applied automatically to both. The state action requirement must be found only through a case-by-case inquiry.

To determine whether state action is present in the condominium context, the court should ask the following questions: (1) Has the state, through direct aid or active participation, substantially involved itself with the operation of the condominium? (2) Has the condominium association exceeded the powers granted to it under state law in such a way as to usurp traditional governmental functions? (3) Has the condominium association, acting within the powers granted by state law, taken on a governmental role which is not primarily directed to, and justified by, the protection or enhancement of the unit owner's investment interests? If any question is answered in the affirmative, then state action under the fourteenth amendment is present.

If state action is not found and the Constitution does not apply, the court should resolve challenges to association action through the rule of reasonableness. In such a situation, the court should consider the following factors: the social good within the condominium served by the association action, the impact of the action upon the unit owner's investment expectations and whether the action was within the contemplation of reasonable condominium unit purchasers at the time of sale. This inquiry is a peculiar blend of constitutional law and contract law. The test basically asks whether the utility served by the association outweighs the harm caused to the unit owner, so long as that harm was foreseeable at the time of the purchase of the unit. The test cannot be one of merely gauging the intentions of the contracting parties, because there are too many parties to the condominium "contract."

## VI. CONCLUSION

While today's condominium development provides a wide variety of government-like services to its residents, the condominium association is not a government so long as it acts within the powers con-

ferred by state statute and it acts to protect the investment expectations of unit owners. Should the association assume a governmental role beyond the expectations of the unit owner, it should suffer the constitutional consequences. When the association acts like a government, it should be treated like a government. In such a situation, the court should find the "state action" requirement of the fourteenth amendment to be satisfied, and association action should be tested under constitutional law analysis.

Otherwise, where the association acts within powers granted by the state and acts for the protection of the unit owners' investments, the constitutional protections against governmental actions should not be applied. In that situation, the court should use the rule of reasonableness and determine whether the association has acted reasonably in promoting the good of the condominium society as a whole without severely damaging an individual unit owner's property interest.

