

NEW JERSEY COMMON INTEREST COMMUNITIES: PREDICTORS OF DISTRESS AND AN AGENDA FOR REFORM

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Prof. John Payne was the quintessential gentleman and scholar. I had the privilege of collaborating with him on several initiatives that aimed to make real the promise of the Mount Laurel mandate, so that decent and affordable housing might one day be available to all. John was a pragmatic idealist. He dared to believe in the nobility of our craft, while finding practical solutions to complex social problems. On several occasions, he taught for us at Seton Hall Law School, and our students adored him. We all did. John taught that wisdom and compassion are indivisible. We are better because of him.

I. INTRODUCTION

Common interest communities (CIC), a somewhat generic characterization that includes within its grasp planned and single-family home developments, condominiums, housing cooperatives and gated and walled communities all under the umbrella of a homeowner association, are the mainstay of residential development. It has been estimated that one in five Americans now live in some form of homeowner-association (HOA) controlled dwelling.¹ In some states, upwards of fifty percent of homeowners find themselves living in a CIC.²

Much has been written about the proliferation of common interest communities, and the phenomenon of privatization that

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1. Survey, *Industry Data - National Statistics*, CMTY. ASS'N INST. <http://www.caionline.org/info/research/Pages/default.aspx>; U.S. CENSUS BUREAU: HOUSING VACANCIES AND HOMEOWNERSHIP, <http://www.census.gov/hhes/www/housing/hvs/qtr208/q208tab4.html>.

2. See Casey Perkins, Note, *Privatopia in Distress*, 10 NEV. L. J. 561, 561-62 (2010) ("In areas such as Las Vegas, Nevada, that have experienced rapid growth in the last couple of decades, this number may be as high as fifty percent.").

their prominence reflects.³ Relying on an exhaustive declaration of covenants, conditions and restrictions (CC&Rs) to privately control land use,⁴ the traditional CIC template for organization and resident governance has been both blessing and curse. In some instances, homeowner associations and their governing boards facilitate peaceful and predictable habitation, providing convenience, stability and order.⁵ By contrast, in many venues homeowner association governance has led to inefficiency, misunderstanding and heightened acrimony, as excessive reliance on rule-based models shifts the relevant inquiry of resident relations from “how is my neighbor doing?” to “what is my neighbor doing?”⁶

In a prior article with Steven Siegel,⁷ I explored the fundamental structural and conceptual deficiencies underlying the CIC⁸ as a form of property ownership, service delivery and self-governance. I proposed that the rule-bound boilerplate that governs the traditional CIC be replaced by a legal paradigm that places far greater reliance on the power of social trust and community and far less emphasis on the traditional command-and-control rule regime.⁹ Still, my research

3. See generally Paula Franzese & Steven Siegel, *Trust and Community: The Common Interest Community as Metaphor and Paradox*, 72 Mo. L. REV. 1111 (2007); see also Steven Siegel, *The Constitution and Private Government: Toward the Recognition of Constitutional Rights in Private Residential Communities Fifty Years after Marsh v. Alabama*, 6 WM. & MARY BILL OF RTS. J. 461 (1998).

4. The Restatement defines “common interest community” as a “development or neighborhood in which individually owned lots or units are burdened by a servitude . . . that cannot be avoided by nonuse or withdrawal.” RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 6.2 (2000).

5. See COMMUNITY ASSOCIATIONS INSTITUTE, WHAT DO AMERICANS SAY ABOUT THEIR OWN COMMUNITY ASSOCIATIONS? (2009), available at http://www.caionline.org/info/research/Documents/national_research_2009.pdf.

6. Paula Franzese, *Does It Take a Village?: Privatization, Patterns of Restrictiveness and the Demise of Community*, 47 VILL. L. REV. 553, 559 (2002).

7. See Franzese & Siegel, *supra* note 3 at 1111.

8. A “common-interest community” is: [A] real-estate development or neighborhood in which individually owned lots or units are burdened by a servitude that imposes an obligation that cannot be avoided by nonuse or withdrawal (1) to pay for the use of, or contribute to the maintenance of, property held or enjoyed in common by the individual owners, or (2) to pay dues or assessments to an association that provides services or facilities to the common property or to the individually owned property, or that enforces other servitudes burdening the property in the development or neighborhood. RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 1. 8 (2000).

9. More particularly, we proposed that a new CIC regime be based on far fewer *intrinsic* rules but, at the same time, circumscribed by new a new set of *extrinsic* baseline rules—in the form of a new CIC statutory foundation. We set forth a new legal foundation for CICs consisting of the following essential elements: (1) a new set of governance choices to be afforded to CIC homeowners based on a sunseting of the developer-imposed servitude regime after the developer relinquishes control of the CIC; (2) a series of clear statutory rights to be accorded to CIC residents; (3) a fair, equitable and affordable alternative dispute resolution regime; (4) an ombudsman

left me with the indelible impression that surprisingly little is known about the actual experience of CIC living.

This time, Steven Siegel and I engaged in empirical research to better understand the dynamics of common interest communities that have reported instances of discord and dysfunction. In the process, we came to identify particular shortcomings and structural deficiencies in the standard CIC template. Our research includes initial development of a series of case studies of CICs in which deficient and unresponsive CIC governance and poor interpersonal relations among CIC members combined to produce atmospheres of social distrust and management dysfunction.

Throughout the course of our inquiry, it became plain that several questions must form the basis for further review: Are the problems that plague troubled CICs primarily a problem of “bad” law, in the form of originating and governing documents and structure, or instead a problem of poor interpersonal relations and inadequate training of leaders? Are the existing CIC rules—and their enforcement—part of the problem or part of the solution to troubled and distressed CICs? What structural and non-structural reforms can be taken by a CIC board or by CIC members to help to build social trust and improve management accountability and responsiveness?

Based on our analysis of the commonalities or markers of CIC distress, we can begin to propose a series of legal and management recommendations to form the foundation for improved information-sharing, management accountability and resident participation in CICs. While our prior scholarship has stressed the promise of statutory reform as a means to remediate CIC ills,¹⁰ this Article is premised on an alternative *private-law* foundation aimed at facilitating transparency and accountability while enhancing opportunities for more participatory governance. Our approach amounts to a tacit and practical recognition that, in most states, comprehensive CIC statutory reform is unlikely to occur any time soon.¹¹ Hence, private-law solutions may well represent the best

with a mandate to resolve homeowner issues before such issues metastasize into full-blown wars; and (5) the imposition of systems of transparent management and accountability.

10. See Franzese & Siegel, *supra* note 3.

11. See Donnie Vanitzian, *Opposition to AARP's Proposed Homeowner Bill of Rights*, AM. HOMEOWNERS RES. CTR. (Oct. 3, 2006), <http://www.ahrc.se/new/index.php/src/news/sub/qa/action/ShowMedia/id/3186> (discussing how the UCOIA is opposed by homeowners); see also Janet Huet, *A Recurring Nightmare: Please Help Bury the New Jersey Doria-Caraballo Homeowner Association Bill*, AM. HOMEOWNERS RES. CTR. (July 11, 2007) <http://www.ahrc.se/new/index.php/src/govt/sub/legis/action/ShowMedia/id/3665> (discussing the stalled New Jersey Statutory reform process and HOA tactics to oppose the Turner-Rice bill).

chance to achieve meaningful reform of the standard CIC template.¹²

THE CASE STUDY: METHODOLOGY AND GOALS

This project has identified three communities ripe for case study. Further, utilizing the findings gleaned from an extensive questionnaire sent to residents within those communities as well as others, it has begun to identify common predictors of CIC distress. The case study method seems particularly apt in this setting. While it does not yield systematic, generalized conclusions, it does provide a means to better understand the complex interplay of social, cultural, and political dynamics at work within CICs themselves.

Indeed, the social science literature suggests that, although not a means to more generalized ends, the case study is useful as a way to assess in detail a real-life situation, and to gauge the interaction of many factors within the context of that real-life situation.¹³ Hence, the case study method is utilized throughout various disciplines to examine processes in their appropriate “real world” context by more fastidiously exploring the experiences of its subjects.¹⁴ Whereas the sampling method is more macroscopic in approach, typically polling a larger sample to seek out patterns that emerge from the surface of the data, the case study method is more microscopic in scope and focus, examining the given case with great regard for nuance and subtle discernment.¹⁵ Thus, while not the basis for sweeping characterizations, the case study can form the foundation for future research and help to yield tentative hypotheses for further testing.

Robert K. Yin, a leading case study methodologist, defines the case study research method as an empirical inquiry that examines a “contemporary phenomenon [for our purposes, the discord reported by CIC residents] within its real-life context,” using multiple sources of evidence.¹⁶ Still, one frequent criticism of case study methodology is that its necessary dependence on a small group of cases or a single

12. See Vanitzian, *supra* note 11; see also Huet, *supra* note 11.

13. See ROBERT K. YIN, CASE STUDY RESEARCH: DESIGN AND METHODS 13-14 (rev. ed. 1989).

14. *Id.*

15. Winston Tellis, *Introduction to Case Study*, 3 THE QUALITATIVE REPORT No. 2 (July 1997), <http://www.nova.edu/ssss/QR/QR3-2/tellis1.html>.

The quintessential characteristic of case studies is that they strive towards a holistic understanding of cultural systems of action. Cultural systems of action refer to sets of interrelated activities engaged in by the actors in a social situation. The case studies must always have boundaries. Case study research is not sampling research, which is a fact asserted by all the major researchers in the field, including Yin, Stake, Feagin and others.

Id.

16. YIN, *supra* note 13, at 13-14.

case limits the ability to reach general conclusions.¹⁷ With that as an important qualifier, the case study method has come to the forefront as a leading method of comparative inquiry. Its capacity for deep analysis of particular cases has informed critical thinking of various complex societal issues.¹⁸ Leading case study researchers suggest that such studies can establish helpful parameters to better inform broader study and inquiry.¹⁹

Here, we aimed for an explanatory research model based on Yin's multiple source approach.²⁰ The communities selected were chosen because they showed signs of the very sort of pathology that various scholars have long deemed markers of CIC dysfunction.²¹ We intend to more closely study the dynamics underlying this distress, to better understand its root causes. To help set the parameters for meaningful further inquiry, we interviewed residents for their opinions on private-law considerations based on their observations and experiences during the life of their occupancy in their particular community. Our informed group included residents who actually served on their HOA's board of directors as well as residents who never served as board members.

To arrive at the study group, questionnaires²² were mailed to several communities in northern and central New Jersey. Sixty-two respondents returned completed questionnaires, providing detailed answers to a total of fifty-five questions²³ that covered a range of topic areas that are discussed below. Once those questionnaires were processed and analyzed, residents were contacted and interviewed in both individual and group settings. Pattern-matching²⁴ was used to

17. Margaret Myers, *Qualitative Research and the Generalizability Question: Standing Firm with Proteus*, 4 THE QUALITATIVE REPORT No. 3/4 (Mar. 2000), <http://www.nova.edu/ssss/QR/QR4-3/myers.html>; Tellis, *supra* note 15.

18. Case studies have been used to revolutionize teaching methods in business and law schools, statistics modeling and in the social sciences through varied sociological experiments and in the raw sciences. See Tellis, *supra* note 15. See generally ROBERT E. STAKE, THE ART OF CASE STUDY RESEARCH (1995).

19. "Explanatory cases are suitable for doing causal studies. In very complex and multivariate cases, the analysis can make use of pattern-matching techniques [to facilitate conclusions]." See Tellis, *supra* note 15.

20. YIN, *supra* note 13, at 95-98.

21. EVAN MCKENZIE, PRIVATOPIA: HOMEOWNER ASSOCIATIONS AND THE RISE OF RESIDENTIAL PRIVATE GOVERNMENT 108 (1994).

22. Paula Franzese, Questionnaire Distributed Regarding Research Study for Seton Hall University School of Law. In the footnotes that follow, each response to the questionnaire referenced will be "[last name of respondent] questionnaire" or "Name withheld-Questionnaire number_" "at" page number. The full and complete questionnaire utilized for this case study is attached as Appendix A, and the completed questionnaires are on file with author.

23. See *infra* Appendix A.

24. See generally William M.K. Trochim, *Outcome Pattern Matching and Program*

identify and more closely study those issues deemed most contentious and those deficiencies that became common threads in the fabric of friction.

The three CICs that form the basis for this study provide a diverse sampling of residents across the spectrum of income, housing type, and governance structure. Yet, each presents an opportunity to examine the circumstances that can adversely affect CIC living. Specifically, when examined closely, each revealed cultures of discord, lack of participatory governance structures, inadequate dispute resolution methods, and insufficient communication channels between HOA boards and residents. Each provides fertile ground for discovery and adds meaningful context to the quest for reform.

Significantly, we learned from our research and interviews that the residents themselves demonstrated a savvy appreciation for the best interests of their respective domains. Their insights and reflections were honest, self-aware, and carefully crafted. Those who are engaged in the task of CIC reconstruction would do well to listen. Indeed, many of the problems complained of could have been averted had the given HOA governing board simply listened to, rather than suppressed, any form of dissent.

The three communities selected for analysis and further review are Radburn,²⁵ A Country Place,²⁶ and Greenbriar.²⁷ Radburn was chosen because in many respects it is the archetypical CIC, organized pursuant to the standardized template of originating documents and governing rules.²⁸ It has been embroiled in protracted litigation between its residents and its HOA board over the sale of a park known as Daly Field.²⁹ The second community, A Country Place, was selected because its residents' responses were focused on two issues

Theory, 12 EVALUATION AND PROGRAM PLANNING 355 (1989), available at <http://www.socialresearchmethods.net/research/Outcome%20Pattern%20Matching%20and%20Program%20Theory.pdf>.

25. A Fair Lawn, NJ community currently comprised of 3100 residents mostly in single family homes. *Radburn – A Planned Community*, RADBURN.ORG, <http://www.radburn.org> (last visited Apr. 1, 2011).

26. A Lakewood, NJ age-restricted community comprised of 76 condominium units. Barbara Reiman & Arthur Reiman, *A Country Place*, 55 PLUS IN OCEAN: A GUIDE TO ACTIVE ADULT COMMUNITIES IN OCEAN COUNTY, <http://55plusinocean.com/55plusinocean/A%20Country%20Place%20LKW.htm> (last visited Apr. 1, 2011).

27. A two-phase Brick, New Jersey age-restricted community comprised of over 600 mostly single family units. *Welcome to Greenbriar*, GREENBRIAR ASS'N, <http://greenbriarbrick.net> (last visited Apr. 1, 2011).

28. See *Radburn—A Planned Community*, *supra* note 25.

29. See Jacob Kamaras, *Radburn Trustees Overwhelmingly Pass Daly Field Development Contract*, FAIR LAWN PATCH (Nov. 8, 2010), <http://fairlawn.patch.com/articles/radburn-trustees-overwhelmingly-pass-daly-field-development--contract> (describing plans for Daly Field).

ripe for remediation: election irregularity and inadequate dispute resolution mechanisms.³⁰ The principal lament of the residents of the third community selected, Greenbriar, concerned the lack of communication between board and residents.³¹

The residents' responses allowed us to explore the interactions across community types, to better examine the failures and frustrations that have developed under the prototypical CIC structural framework. That framework allows CICs to derive their essential authority over constituent residents from covenants, conditions, and restrictions attached to the homeowners' deeds.³² Residents, in most cases, automatically become members of the homeowner association, and must obey the HOA's rules and pay its fees and assessments.³³ Originating documents prescribe that a governing board of directors, elected by and from the community's membership, enforces applicable restrictions and regulations, sets policy and oversees the effectuation of that policy.³⁴

The fourteen-page questionnaire focused on five areas:³⁵

1. Dispute resolution
2. Election practices
3. Adoption and enforcement of board policies and rules
4. Access to association records and financial statements
5. Motivating factors in the decision to purchase a CIC home

Residents were asked to describe in depth the range of their experiences with respect to each of those target areas, and to chronicle their expectations and motivations throughout the course of those experiences.

As we analyzed the data, clear patterns emerged. Most fundamentally, the rules of the game must be simplified. The CIC template, as it now exists, is too cumbersome. Its web of rules, regulations, and restrictions leads to substantive irregularities and procedural abuse. Residents who seek to participate in their community's governance are often stymied by the capacity of those in power to use the rules to keep newcomers out. Aggressive regulation allows those rules to function as both shield, insulating the status quo, and sword, giving those in power broad license to proceed against perceived rule-breakers.

30. See, e.g., *Richman questionnaire* at 5, 8.

31. See, e.g., *Coll questionnaire*.

32. See generally DONALD R. STABILE, *COMMUNITY ASSOCIATIONS: THE EMERGENCE AND ACCEPTANCE OF A QUIET INNOVATION IN HOUSING* 163 (2000).

33. See Siegel, *supra* note 3.

34. See JONATHAN B. ALTER, *THE LAW OF CONDOMINIA AND PROPERTY OWNERS' ASSOCIATIONS* 21-38 (1992).

35. See *infra* Appendix A.

Hence, our recommendations for reform are rooted first in the call to streamline, clarify and trim down governing rules. Thereafter, various low-cost strategies are proposed, aimed at facilitating the twin goals of transparency and accountability. Sunlight is indeed the best disinfectant.³⁶ Effective homeowner association governance, like all forms of governance, depends on the capacity of those in power to earn, and keep, their constituents' trust.³⁷ It is the erosion of trust that is the greatest predictor of CIC discord.

We have deliberately limited the scope of our reform agenda to private-law strategies, choosing to focus on what these communities and groups of residents can do to help themselves. As attempts at meaningful statutory reform remain mired in patterns of studied inaction,³⁸ it may be that the greatest promise for change is reform from within. Using the resources and personnel already in place, with limited interference from extrinsic forces, residents can be empowered to thoughtfully reconfigure their own articles and methods of governance. It is this potential for CIC self-determination that, once harnessed, might succeed where courts and legislatures have failed.

II. THE COMMUNITIES: RADBURN, A COUNTRY PLACE, GREENBRIAR

A. *Radburn*

The Radburn community was founded in 1929 in Fair Lawn, a suburb of northern New Jersey.³⁹ Comprised primarily of single-family homes, it boasts parks, sports fields and swimming pools, as well as a community center and elementary school.⁴⁰ The design of the community is meant to be pedestrian friendly, with many walkways connecting different areas without the need for a vehicle.⁴¹ Indeed, Radburn's eco-friendly design made it a model for emulation. As its webpage recounts:

The primary innovation of Radburn was the separation of pedestrian and vehicular traffic. This was accomplished by doing away with the traditional grid-iron street pattern and replacing it with an innovation called the superblock. The superblock is a large

36. "Sunlight is said to be the best of disinfectants." LOUIS BRANDEIS, *OTHER PEOPLE'S MONEY* 62 (1933).

37. Paula A. Franzese & Daniel J. O'Hern, *Restoring the Public Trust: An Agenda For Ethics Reform of State Government and a Proposed Model for New Jersey*, 57 *RUTGERS L. REV.* 1175, 1178 (2005).

38. Vanitzian *supra* note 11; Huet *supra* note 11.

39. See *Radburn—A Planned Community*, *supra* note 25.

40. *Id.*

41. *Id.*

block of land surrounded by main roads. The houses are grouped around small cul-de-sacs, each of which has an access road coming from the main roads. The remaining land inside the superblock is park area, the backbone of the neighborhood. The living and sleeping sections of the houses face toward the garden and park areas, while the service rooms face the access road. . . . The system was so devised that a pedestrian could start at any given point and proceed on foot to school, stores or church without crossing a street used by automobiles. Another innovation of Radburn was that the parks were secured without additional cost to the residents. The savings in expenditures for roads and public utilities at Radburn, as contrasted with the normal subdivision, paid for the parks. The Radburn type of plan requires less area of street to secure the same amount of frontage. In addition, for direct access to most houses, it used narrower roads of less expensive construction, as well as smaller utility lines. In fact, the area in streets and length of utilities is 25% less than in the typical American street. The savings in cost not only paid for 12 – 14% of the total area that went into internal parks, but also covered the cost of grading and landscaping the play spaces and green links connecting the central block commons. . . . The cost of living in such a community was therefore set at a minimum for the homeowner, and the cost to the builder was small enough to make the venture profitable.⁴²

The Radburn design model has been replicated in numerous states including California, Arizona, Florida, Nevada, and as far away as Sweden and the United Kingdom.⁴³

Radburn's organizational and governance structure is fairly typical, with its homeowner association organized as a "non-profit corporation charged with fixing, collecting and disbursing charges; maintaining services, parks and facilities; and interpreting and applying the Declaration of Restrictions."⁴⁴ The originating documents indicate that "the affairs of the [HOA] are handled much like the council-manager form of government."⁴⁵ A nine-member governing board "sets policies and approves the budget."⁴⁶ A full-time, paid manager is responsible for the day-to-day administration of the facilities.⁴⁷

Radburn has been beset by its share of disenchanting and

42. Ronald F. Gatti, *Radburn: A Town for the Motor Age*, RADBURN.ORG, <http://www.radburn.org/geninfo/history.html> (last visited Feb. 16, 2011).

43. See generally JULIA LAVE JOHNSTON & KIMBERLY JOHNSTON-DODDS, CAL. RESEARCH BUREAU COMMON INTEREST DEVELOPMENTS: HOUSING AT RISK? (2002), available at <http://www.library.ca.gov/crb/02/12/02-012.pdf>; GERALD HODGE & IRA ROBINSON, PLANNING CANADIAN REGIONS 52 (2001).

44. Gatti, *supra* note 42.

45. *Id.*

46. *Id.*

47. *Id.*

dissatisfied residents. Homeowners report that the governance system is perceived as secretive, closed, and unfair.⁴⁸ Cultures of litigiousness have followed. Most recently, Radburn has been embroiled in litigation over its board's allegedly secret sale of one of the community's fields, known as Daly Field, to a high-density developer, Landmark.⁴⁹ The board went ahead with the sale without providing the requisite notification to homeowners, and without receiving homeowners' ratification.⁵⁰ According to Ron Coll, a homeowner in Radburn, "The interpretation of the trustees was that since they are the only members, the park belonged to them and not to all of the homeowners."⁵¹

The New Jersey Law Division ruled in favor of the board, citing longstanding precedent that awards the benefit of a contracted-for bargain to the purchaser, an innocent third party.⁵²

Undaunted, dissatisfied residents appealed, with the hopes of changing the structure of their association's governance protocol. Specifically, residents sought democratic elections to the board, resident access to financial documents, and open board meetings.⁵³ The New Jersey Appellate Division ruled that residents are entitled to access to board meetings and financial documents, but are not assured a right to democratic elections.⁵⁴ Certification to the New Jersey Supreme Court was denied.⁵⁵

B. *A Country Place*

A Country Place is an age-restricted seventy-six-unit condominium community built in the early 1970s.⁵⁶ Located in Lakewood, a suburb of central New Jersey, the community offers various amenities, including a swimming pool, meeting room, private streets, and recreational center.⁵⁷ The developer no longer controls nor owns units.⁵⁸

Respondents from this community voiced two primary concerns.

48. *Moriarty Questionnaire* at 3, 5.

49. *See* *Boylan v. Radburn Ass'n.*, No. BER-C-438-06 (N.J. Super. Ct. Ch. Div. Feb. 19, 2008).

50. *Id.* at 1-2.

51. Transcript of Interview with selected questionnaire respondents in Newark, New Jersey (Oct. 16, 2009) [hereinafter Transcript of Interviews].

52. *Boylan*, No. BER-C-438-06 at 3, 5.

53. *Moore v. Radburn Ass'n.*, 2010 N.J. Super. Unpub. LEXIS 561, at *12-*14 (N.J. Super. Ct. App. Div. Mar. 18, 2010).

54. *Id.* at *12-15.

55. *Moore v. Radburn Ass'n.*, 997 A.2d 231 (N.J. 2010).

56. *Richman questionnaire* at 3-4.

57. *Id.*

58. *Id.* at 4; *Sachs questionnaire* at 4.

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First, procedures for election to the board are less than transparent and perceived as susceptible to improper influence.⁵⁹ Second, residents report significant dissatisfaction with dispute resolution mechanisms employed to address homeowner disagreements and resolve pre-litigation concerns.⁶⁰ More generally, residents stressed the need for greater civility and, indeed, old-fashioned neighborliness, between residents and the board, and among residents themselves.⁶¹

Board election procedure and protocol is described as flawed, rife with formal and informal impediments to open and fair access.⁶² Close friends of firmly entrenched incumbents are described as counting ballots.⁶³ The counting of votes is perceived as shrouded in mystery. One resident did “[s]ucceed in having the counting of votes in the annual condominium election observed by an impartial panel, though it was expensive and required the efforts of various powerful people.”⁶⁴ The resident hastened to add that “no permanent structure was put in place for future elections and the attempt at open counting, while successful, was not carried out by future boards.”⁶⁵

Alternative dispute resolution (“ADR”) mechanisms, while in place, have never been resorted to. One resident reported that when he sought a copy of the procedures, he was refused.⁶⁶ Another indicated that “[m]ost members don’t know they have the right to an alternative dispute resolution process.”⁶⁷ Those homeowners who are aware of the protocol describe it as infected with various corrosive influences. For example, “friends” of the board are enlisted to resolve resident disputes with the board.⁶⁸ The perception of conflicts of interest abounds. That perception, coupled with residents’ basic lack of awareness of the protocol itself, may well explain why internal dispute resolution mechanisms have yet to be activated.

Residents reported frustration with the channels of communication (or lack thereof) between the board and homeowners. For example, maintenance and assessment fees reportedly rise without notice or explanation.⁶⁹ The board is described as making significant expenditures without resident approval, contrary to the

59. *See, e. g., Richman questionnaire* at 5, 8.

60. *See, e. g., id.* at 9-10, 12.

61. *See, e.g., id.*

62. *Id.* at 8.

63. *Id.*

64. *Sachs questionnaire* at 5.

65. *Id.* at 6.

66. *Id.* at 6.

67. *Richman questionnaire* at 5.

68. *Id.*

69. *Id.* at 12.

requirements set forth in governing by-laws.⁷⁰ The breakdown of the costs of various services is considered a mystery.⁷¹ Record-keeping is perceived as “non-existent.”⁷² In the words of one respondent, “Record keeping is so poor that a determination of the facts is impossible.”⁷³ In response to our queries as to whether financial matters were managed effectively, one resident exclaimed that he was “definitely not satisfied!”⁷⁴ Some residents lamented the breakdown in basic civility, characterizing the culture as rife with “hostility and mismanagement, causing bad relations.”⁷⁵

The perception that their board rules by fiat has led to some modicum of resignation on the part of residents. When asked if he was satisfied with board rules and policy, one respondent asked; “What difference does it make?”⁷⁶ Residents expressed the belief that their views and opinions simply do not matter, and certainly would not be heeded. One commented that “there must be laws with teeth, to rein in abusive boards.”⁷⁷ The experiences of those polled make real the specter of resident disaffection in the presence of autocratic leadership systems. Whether worn down or disenfranchised, homeowners report suffering the consequences of unchecked management.

C. Greenbriar

Greenbriar is an age-restricted community of 600 units located in Brick Township, a suburb in central New Jersey. The recreation facilities provided by the developer “include a one-story recreational building . . . of approximately 10,000 square feet . . . a game room, ceramic room, a sewing room, a woodworking shop, men’s and ladies restrooms, each with a sauna and whirlpool bath Marion security patrols the Community from 3PM to 7AM normal workdays and 24 hours Saturday, Sunday and holidays Lawn care and snow removal is provided.”⁷⁸

Respondents described their governance system as cloaked in secrecy, particularly with respect to election procedures and fiscal

70. See Transcript of Interviews, *supra* note 51.

71. *Richman questionnaire* at 10.

72. *Sachs questionnaire* at 10.

73. *Id.*

74. *Richman questionnaire* at 10.

75. *Sachs questionnaire* at 4.

76. *Richman questionnaire* at 9.

77. *Id.* at 13.

78. *A. Coll questionnaire* at Section I. As noted in her quotes throughout, Ms. Coll maintains that these facilities are mostly kept in sub-par condition or have been converted to other uses and that the services are for the most part, not provided or unsatisfactory. See *id.*

spending.⁷⁹ Residents reported that they were met with hostility when they tried to ask questions or elicit details from their board with regard to its decision-making processes.⁸⁰ If knowledge is power, homeowners in Greenbriar are essentially powerless. Residents know little, if anything, of the rules, restrictions, and procedures to accompany membership in their homeowner association. Many respondents indicated that they were never provided with a copy of governing CC&Rs when they bought into the development. Copies could be obtained thereafter, but only upon request.⁸¹

The few residents who doggedly persisted in seeking transparency came to learn of glaring inconsistencies in board management.⁸² For example, one homeowner recounted an incident whereby the board exceeded its authority by expending \$50,000 more than was approved by residents, without providing any notification of the overage.⁸³ The committed few who seek inclusionary leadership yearn for enhanced disclosure requirements, mandatory training for board members on matters of fiscal management and professional responsibility, and creation of an association website to facilitate channels of communication.⁸⁴

III. COMMON CHARACTERISTICS OF DISTRESSED CICs

As articulated by the residents themselves, the problems associated with common interest community living fall into several readily identifiable categories. Moreover, the perceived deficiencies in HOA governance systems existed across the spectrum of communities ripe for study. The most frequently voiced frustration found itself rooted in the two-part question, "Why don't the rules and restrictions reflect the consensus of the governed, and why aren't those who lead accountable to their constituents?" The lesson is plain. Good and sustainable governance, whether in the public or private realms, depends on the perception of legitimacy and the presence of a mandate. By contrast, the following list of deficiencies, derived from the entirety of the questionnaire responses, serves as a powerful predictor of CIC dysfunction.

A. *The absence of transparency*

Failures or breakdowns in communication between homeowners

79. *Id.* at Section III.

80. *Id.*

81. *Id.* at Section VI.

82. *Id.* at Section VII.

83. *Id.* at Section V.

84. *Id.* at Section VII.

and their HOA boards represented the most frequently invoked criticism of CIC models of governance. Residents routinely cited the absence of effective communication pathways.⁸⁵ In the words of one respondent, “The board simply does not answer questions or does not do so in a straightforward way.”⁸⁶

Homeowners report that lapses in communication tend to be accompanied by a more systemic lack of transparency. For example, many residents were chagrined by board refusal to provide access to salient financial records.⁸⁷ One respondent recounted that her HOA had not provided residents with any accounting documentation since June of 2007.⁸⁸ Another requested documentation twenty times, only to receive responses in three instances.⁸⁹ When asked to characterize board response to requests for information, she replied, emphatically, “You are ignored!”⁹⁰

Some residents reported having to file suit to gain access to financial records.⁹¹ In the face of board stonewalling, judicial recourse is perceived as the only resort because the board and its arm, the HOA’s management company, fully control the disclosure process. Hence, absent judicial intervention, the board itself is the sole and final arbiter on requests for documents.

Homeowners who sought access to financial records often found that they were hitting a nerve; numerous instances were recounted of board hostility to such requests.⁹² Allegations of suspicious, if not patently illegal, accounting practices were reported. One resident maintained that more than \$25,000 in HOA fees were unaccounted for in the documentation finally provided to him, and that many line items were left out of the “vague budget” provided.⁹³ When asked if his questions about the board’s accounting mechanisms were answered satisfactorily, he replied, “Not even close.”⁹⁴

In a similar vein, residents expressed frustration at the difficulties encountered when they endeavored to gain access to board meetings and/or, after the fact, the minutes of those meetings. Other residents decried deficiencies in the election process, where the hope for open and honest elections was compromised by secrecy and favoritism. The widely shared perception is that the methods used to

85. *See, e.g., Jahnig questionnaire* at 10.

86. *Id.*

87. *See, e.g., id.*

88. *Id.*

89. *Name withheld-Questionnaire 54* at 10.

90. *Id.*

91. *Custode questionnaire* at 6.

92. *Name withheld-Questionnaire 7* at 10.

93. *Serafini questionnaire* at 10.

94. *Id.*

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distribute election information and nominate, as well as promote, candidates are skewed to favor certain “insider” candidates. In the words of one homeowner:

The [President] of the [management company]/association has always controlled who sat on the [board]. If a candidate not to his liking ran, he sent letters to the owners discrediting the person (I have written proof) The votes were sent to him at his office—No independent person recorded what units returned ballots to him. No independent person recorded what votes were turned over for counting. For many years he counted them in his office and reported the results. We have not had an election since 2007.⁹⁵

The problems of obstinate or unresponsive board leadership are compounded by the absence of effective oversight mechanisms. Residents determined to right perceived wrongs find themselves on a litigation track whose costs, real and emotional, prove insurmountable. Indeed, those controversies that are adjudicated by the courts demonstrate that CIC governing boards are often poor or inexperienced financial stewards.⁹⁶ As will be discussed, there are ways to remediate deficiencies in board accounting, record-keeping, and accountability short of the litigious response.

B. Breakdowns in resident-board communications

Respondents expressed greatest frustration at the gaps, or, in some instances, whole breakdown in communications between residents and HOA boards. Residents repeatedly pointed to “a lack of responsiveness” on the part of their boards, which were routinely characterized as “evasive,” “roundabout” or simply “nonresponsive.”⁹⁷ Significantly, the attention to detail demonstrated by this study’s respondents portrays a pool of well-informed homeowners, who have taken considerable care to learn the rules and regulations that govern their respective communities. Their knowledge is well-chronicled in the copies of letters to the board that many shared with us. Much to residents’ disappointment, that correspondence often fell on deaf ears.⁹⁸

Homeowners pointed to numerous instances in which their

95. *Jahnig questionnaire* at 8.

96. *See, e.g.,* *Cherry Hill Manor Assocs. v. Faugno*, 861 A.2d 123 (N.J. 2004); *Levandusky v. One Fifth Ave. Apartment Corp.*, 553 N.E.2d 1317 (N.Y. App. 2001). *See generally* JONI GREENWALT, *HOMEOWNERS ASSOCIATIONS: A NIGHTMARE OR A DREAM COME TRUE?* (2d ed. 2001).

97. *See generally* *Manhire questionnaire* at 10.

98. One consideration that must be accounted for is volume. There are often hundreds of residents, each with their own particular desires, often several desires, that simply cannot be individually addressed by a part-time board whose responsibilities range from maintenance and funding, to organizational and legislative matters. *See, e.g.,* *Name-withheld questionnaire 1* at Appendix.

inquiries, requests for clarification, or complaints were either ignored or met with protracted inaction.⁹⁹ Residents showed considerable range with respect to the types of channels of communication that they have resorted to when endeavoring to get their given board's attention.¹⁰⁰ That repertoire has included phone calls, letters, memoranda, e-mails, open letters in the HOA newsletter, and leaflets.¹⁰¹ Matters inquired about, or complained of, ran the gamut, from a somewhat modest request for repairs to concerns over the propriety of board expenditures.¹⁰² In the preponderance of instances reported, board response was considerably wanting.¹⁰³

Those interviewed took pains to recount that their inquiries to their respective boards were made in good faith and represented matters of genuine concern, often deemed integral to their daily lives. Whether asking about maintenance and repairs, timelines for renovations and new projects, or the procedures for upcoming elections, residents reported that their boards failed to respond meaningfully, if at all.¹⁰⁴ In one particularly egregious case, a resident spent five years attempting to garner a response to his queries about board decision making.¹⁰⁵ When none was forthcoming, he wrote numerous letters to New Jersey's Department of Community Affairs, ("DCA"), a state agency charged with providing oversight and administrative guidance to CIC boards as part of its duties.¹⁰⁶ The DCA noted in letter after letter that the board was either "unresponsive to the requests" or "failed to comply" with DCA requests for the documentation. To date, the board has failed to respond.

A number of respondents expressed the perception that their boards simply choose to *ignore* certain individuals or issues. One described a packed board meeting where residents were eager to discuss a proposed resolution. Instead, the board president, ignoring procedural rules, ended the meeting without allowing a single

99. *See id.*; *see also Jahnig questionnaire* at 13.

100. *Name-withheld questionnaire 54* at Appendix (hired attorney to request documents); *Name-withheld questionnaire 1* at Appendix.

101. *See supra* text accompanying footnote 100.

102. *Name-withheld questionnaire 54* at Appendix (hired attorney to request documents); *Name-withheld questionnaire 1* at Appendix.

103. *Id.*

104. *Id.*

105. *McCloskey questionnaire* at Appendix.

106. *Id.* "The New Jersey Department of Community Affairs is a State agency created to provide administrative guidance, financial support and technical assistance to local governments, community development organizations, businesses and individuals to improve the quality of life in New Jersey." *About DCA*, N.J. DEPT OF COMMUNITY AFFAIRS, <http://www.state.nj.us/dca/about/index.html> (last visited Oct. 10, 2010).

resident to be heard.¹⁰⁷ Another respondent noted that her continued pleas to the board for remediation of an asbestos and mold problem in the basement below her unit were ignored for more than three years.¹⁰⁸

C. The absence of fiscal and ethics-based training for board members

Residents' concerns about the effectiveness of their HOA boards makes plain that board members are often unaware of their fiduciary responsibilities or are poorly equipped to meet the challenges of fiscal leadership. Respondents who had served on their boards noted that they had never received financial or any other form of training. Moreover, several residents noted that once the board has rendered a decision, there is simply no adequate appeals process. Audits do not occur, and accounting errors can go unchecked.

D. Covenants, conditions and restrictions that do not reflect a consensus of the residents

Residents reported in several instances that they were not aware of the governing rules of their homeowner association until after they had moved in, and only then, once they had requested a copy of the CC&Rs and by-laws. Those rules are perceived as imposed by fiat, rather than by resident consensus. Moreover, the restrictions are widely viewed as fixed or immutable.

One resident claimed that "[our] boards and the association lawyer prevent changes to the By-laws."¹⁰⁹ Another resident summarized the problem as follows:

My community has "vague and ambiguous" not to mention disorganized By-laws. There is no distinction between elections and By-law amendments. Both are done by secret ballot. Both require an affirmative vote of a majority of only 41% of homes . . . Our Declaration of Incorporation has been amended only once, when the federal government changed the minimum age to 55 years of age. Ours had been 48 years of age. This document is extremely outdated and needs revision. I suspect that the reason it is not addressed is that some of the board of dictators [k]now what would be required and do not want the owners to find out the truth that Title 15A which governs non-profit corporations requires a 2/3 affirmative vote for By-laws.¹¹⁰

Respondents described closed-door board meetings where

107. *Huet questionnaire* at 9-9a.

108. *Jahnig questionnaire* at 13.

109. *Richman questionnaire* at 9.

110. *A. Coll questionnaire* at Section VII.

proposed changes to the governing rules were apparently discussed, with no opportunity for review. It was noted that in one instance, when the possibility of rule changes was presented at a public meeting, the presentation was one-sided, and opposing or alternative viewpoints were not afforded the opportunity to be heard.¹¹¹ When changes are promulgated, they are perceived to be the product of unilateral board fiat. Another resident, who is currently chairing a committee charged with reviewing governing CC&Rs and by-laws as a consequence of the previous board's mismanagement, noted that the now ousted board had created, voted, and adopted a series of ill-conceived rule changes without any vetting and without any notice.¹¹² The changes only came to be known after a resident challenged the subsequent enforcement of one of the new rules.¹¹³

E. Arbitrary and selective enforcement of CC&Rs

Residents reported that the governing rules are enforced selectively, and often wielded by boards as a sword against those deemed a threat to the existing hierarchy. Questionnaire after questionnaire pointed out that "policies and rules differ for certain owners-depend[ing] on who is friends with the board." One resident likened the matter to "the haves vs. the have-nots," citing "discriminatory practices . . . depending on which board members are friendly with which unit owners."

Selective enforcement was cited as a principal reason for the erosion of resident trust in their boards. The practice of boards favoring some residents over others reportedly has caused rifts among neighbors of different standing with the board. Perceptions of unfairness abound. One respondent described a situation where the community's "no dogs" rule was enforced against a resident who owned a larger dog, but not enforced against several dog-owning board members. In her eyes, "they seem to pick and choose who they want to take to court."¹¹⁴

F. Lack of resident involvement in the life of the community

Resident disaffection was widely reported. Some respondents perceived the problem as one attributable to sheer resignation, when attempts to become involved are resisted by entrenched governing boards or solicitations simply ignored. Some attributed the lack of resident involvement in the life of the community to a more fundamental absence of any desire to become engaged. Still others

111. *Vergano questionnaire* at 9.

112. *DeCandia questionnaire* at 9.

113. *Id.*

114. *Manhire questionnaire* at 6.

chronicled patterns of resident isolation and alienation. One resident described many of the more senior members of her community as “alone, afraid of complaining, and willing to accept whatever is dictated to them.”¹¹⁵ Another, disappointed by the experience of HOA living, recounted that she tries to “close [her] eyes and forget about the fact that [her] entire life savings is tied up in” the apartment she owns.¹¹⁶ She continued, “So much for the American Dream.”¹¹⁷

G. Inadequate dispute resolution mechanisms

Residents repeatedly lamented the absence of internal dispute resolution mechanisms, citing judicial recourse as the only option when dissatisfied with board action. The litigious course is perceived as immensely time-consuming and prohibitively expensive for residents. In the words of one respondent:

There is no resolution, until & unless unit owners are forced into a position to sue the association. In our association, the Board President is all powerful. Since the deck is stacked against any new blood: (1) issues are mostly ignored, [or] (2) [met by] stalled action or hostile actions (carried on by the management company), [or] (3) the board votes in procedures to protect itself—many times at the expense of the very unit owners (association members) in general, who pay the bills.¹¹⁸

Some residents who had been involved in disputes with their boards had to pursue legal action to seek redress.¹¹⁹ Others were simply unable to afford counsel, and hence had no recourse. One noted that most residents call the manager with little expectation of resolution and fail to pursue any further resolution, seeing it as pointless.¹²⁰ Still others expressed hesitation at the prospect of taking on their boards, for fear of reprisals or, at a minimum, the prospect of their annual fees and assessments rising as a consequence of a litigious course. HOAs are authorized to tax residents to finance lawsuits.¹²¹

115. *Vergano questionnaire* at 6.

116. *Name withheld-Questionnaire 54* at 13.

117. *Id.*

118. *Custode questionnaire* at 5.

119. A number of respondents had personal disputes with their boards of directors. For example, Terry-Lynn Bautista took legal action against her association to address issues about the lack of open meetings, the lack of distribution of any of the minutes from those meeting with the residents, and selective maintenance repairs. Ms. Bautista, whose case was sent to mediation by the court, was eventually successful in her dispute. *Bautista questionnaire* at 5.

120. *Name withheld-Questionnaire 9* at 10.

121. Matthew Benjamin, *Hi, Neighbor, Want to Get Together? Let's Meet in Court!*, U.S. NEWS & WORLD REP., Oct. 30, 2000, at 56 (defining right to self-help foreclosure as meaning that the “association doesn’t need a hearing or a judge to sell a resident’s

A number of respondents sought assistance from the DCA,¹²² the state agency charged with oversight of HOAs, to no avail. Many stated that the DCA was simply powerless to act. One noted that “although [DCA’s] intentions are sterling, they are a lion without teeth.”¹²³

H. Irregularities in the board election process

Residents recounted numerous instances of board election irregularities. For example, several noted that election ballots were not numbered, providing the opportunity for fraud by discarding or replacing ballots. Others indicated that elections were not by secret ballot. Another indicated that no ballots were used at all, with residents having to vote by show of hands at a meeting.¹²⁴

In one instance, on election night a former board member was allowed to read a page and a half statement discrediting a particular candidate and advising residents not to vote for him.¹²⁵ The targeted candidate was denied the opportunity to refute the charges, and did not win a position on the board.¹²⁶ Residents reported incidents of gaming of the election system.¹²⁷ Dubious victories attributed to the “write-in vote” allowed candidates to avoid appearing in person.¹²⁸ Even more shocking, one homeowner stated that the president of the management company (and former board president) and his daughter called elderly residents to influence their vote, made threats to shut off their heat if they voted a certain way, and mandated that completed ballots be mailed directly to his office for counting, without any independent monitor to ensure fairness.¹²⁹

Once in office, it becomes exceedingly difficult to remove a board member. Respondents noted that the electoral system favors incumbents, and that those in power are exceedingly reluctant to cede it. As a consequence, the board becomes so entrenched that it is virtually impossible to have new board members enter the fray because the board controls the voting and governance to such a level that it acts as a de-facto dictatorship.¹³⁰ Attempts to impose term

house to collect fines and legal fees,” and noting that homeowner associations can “tax residents to finance lawsuits”).

122. *Custode questionnaire* at 6.

123. *Huet questionnaire* at 6.

124. *Moreno questionnaire* at 8 (vote by raising their hands for their chosen candidate).

125. *DeCandia questionnaire* at 8.

126. *Id.*

127. *Capuano questionnaire* at 8.

128. *Id.*

129. *Jahnig questionnaire* at 8.

130. *Capawan questionnaire* at 8 (noting in his community, the same board has

limits were thwarted in several reported instances, although one group of residents was successful in gaining passage of an amendment to existing bylaws that now imposes a two-term limit on board membership.¹³¹

IV. REFORM FROM WITHIN: REMEDIATING EXISTING CIC MODELS

A. *Training and review of CIC board members*

Certainly, CIC boards, as privatized mini-governments of sorts, are just as susceptible to mismanagement and corruption as their public equivalents.¹³² Efforts at CIC reform from within must focus on curbing the potential for abuse at the hands of petty or autocratic governing boards. Various internal mechanisms could well succeed at promoting transparency by creating independent watchdogs, strengthening conflict of interest laws and imposing more vigorous auditing and compliance protocol.¹³³

Respondents reported that board lapses were attributable either to basic ignorance of existing strictures and appropriate accounting methods or the product of bad faith abuse of power.¹³⁴ The antidote to the former lies in mandatory fiscal training for all board members, and the promulgation of plain language guides to describe, simply and clearly, all governing rules, standards and procedures. To enhance the potential for more participatory governance, those guides should be made available to all, including (and particularly) the residents themselves. Training for board members should include annual briefings and routine refresher courses on appropriate standards of conduct, as well as financial-integrity training. Every board member should be required to certify that he or she has read the plain language guide, understands it, and promises to abide by its terms.¹³⁵

The twin aims of disclosure and transparency are facilitated when CIC residents are aware of the rules of the game, and how best to change them. A streamlined, plain language guide to governing restrictions, covenants and conditions would provide a comprehensible rendering of the otherwise largely inaccessible CC&Rs and by-laws, which many residents profess never to have

been in place since 1994).

131. *Halifko questionnaire* at 8.

132. Paula Franzese, *Privatization and Its Discontents: Common Interest Communities and the Rise of Government for "the Nice"*, 37 URB. LAW. 335, 350 (2005).

133. *Id.* In this regard, models for government reform prove particularly helpful.

134. See text accompanying notes 92-94.

135. This prototype was promulgated to reform state government in New Jersey. See Franzese & O'Hern, *supra* note 37.

read. Indeed, on the front end of CIC living, and as a precondition to closing, buyers should be required to certify that they have read and understand the guide.

CIC by-laws should require that board members engage in annual financial-integrity training as a pre-condition to membership on the board. Training protocols should set forth the scope of relevant responsibilities, fiduciary duties, and prohibitions against abuse of power. There are a multitude of financial-integrity training models available to advance this end, both in the public and private realms. For example, the Sarbanes-Oxley financial oversight certifications required of all publicly traded companies¹³⁶ have ushered in a veritable cottage industry of training service providers, including on-line programs, available to provide fiscal and ethics instruction and establish auditing mechanisms.¹³⁷ While some costs will have to be incurred to implement training protocols, efficiency will be enhanced and the potential for lawsuits reduced. Experience shows that adjudicated controversies in the CIC realm are often the product of board mismanagement.¹³⁸

To weed out instances of board bad faith and abuse of power, CIC by-laws should be amended to provide for routine auditing of boards, penalties for abuse of authority and the vesting of some independent watchdog or watchdog panel with significant oversight functions. Independent watchdog agencies would help to relieve courts of some of the burden that CIC litigation has wrought. For that matter, as the residents themselves readily concede, the judicial process is often ill-equipped to serve as arbiter of the very context-specific concerns raised by displeased homeowners.

B. Remediate election irregularities and promote the aims of participatory governance

CIC governing boards are the entrusted fiduciaries of the community's collective good. Service on the board, then, is best viewed as a public trust. That ethos recognizes implicitly that every system of governance degenerates when entrusted to the rulers alone. As Thomas Jefferson observed, "The people themselves are its

136. Section 302 of the Sarbanes-Oxley Act requires the CEO and CFO of each publicly traded company to certify the "appropriateness of the financial statements and disclosures contained in the periodic report, and that those financial statements and disclosures fairly present in all material respects the operation and financial conditions of the issuer." JILL GILBERT WELYTOK, *SARBANES-OXLEY FOR DUMMIES* 146 (2008).

137. See e.g., INTEGRITY INTERACTIVE, <http://www.saiglobal.com/compliance/about/history/bios/> (last visited February 10, 2011) (containing an extensive list of available consultants to assist with financial-integrity training).

138. See generally GREENWALT, *supra* note 96.

only safe depositories.”¹³⁹ Hence, in the CIC setting, it is the residents themselves who can serve as the most effective check.

Resident engagement is facilitated, and trust enhanced, when board election procedures are perceived as fair and open. Relevant election protocol, already set forth in standard originating documents, must be made known to all, and must be followed. Election monitors, from within the ranks of the community, should be appointed to monitor and oversee elections. Board term limits should become the norm, to provide opportunities for fresh leadership and minimize the potential for stagnation.

C. Cultivate enhanced and multiple means for resident engagement

Many of the residents polled expressed the desire to become more involved in the life of their respective communities.¹⁴⁰ Several have been residents for extensive periods of time and are well-versed in relevant history, traditions and governing by-laws.¹⁴¹ Those who sought to become more engaged expressed frustration at the absence of alternative paths to involvement, particularly when they found themselves turned away or ignored by less than responsive (if not obstinate) boards.¹⁴²

Respondents suggested several creative ways to enhance resident participation. For example, boards should be in the practice of regularly calling for volunteers to serve on ad hoc committees, charged with responsibility for gauging resident sentiment on issues of collective interest. These volunteer groups would make periodic recommendations on matters deemed relevant, from budgeting to aesthetics to social networking. They would also build bridges to the community while serving as sounding boards, informal mediators and liaisons.

D. Devise web-based strategies to promote information-sharing

Residents' lives are busy. Respondents yearned for more efficient and more effective communication mechanisms, so that they might keep apprised of community developments, board action, upcoming meeting dates, elections and resident news. Many suggested that the establishment of an HOA website for their given community, with

139. THOMAS JEFFERSON, *Notes On The State Of Virginia*, in WRITINGS 123, 274 (Merill D. Peterson ed. 1984).

140. See *Name withheld-Questionnaire 5* at 9; *Custode questionnaire* at 4-14; *Name withheld-Questionnaire 1* at 4-14.

141. See *A. Coll questionnaire* at Section 1, *Name withheld-Questionnaire 11* at 9, *Jahnig questionnaire* at 8-14; *Name withheld-Questionnaire 1* at 4-14.

142. *Name withheld-Questionnaire 11* at 6-9; *Name withheld-Questionnaire 9* at 8-14.

regularized web postings, would go a long way toward enhancing resident engagement.

For that matter, web-based strategies enhance the goals of transparency and access to power. Budgets and expenditures can be posted. Plain guides to the governing rules and by-laws would be online. Board meeting could be web-cast. Minutes of board meetings would be made available to all. Election nominations could be submitted online. Voting could be conducted online, with appropriate security mechanisms imposed to help to assure the integrity of the process.

The internet offers speed and convenience, and leaves a digital trail to allay at least some of the potential for corrosive influence. Companies like Balloteer.com¹⁴³ now specialize in providing software applications designed specifically for governance, and are available to actually administer and monitor elections.

Web-based strategies for CIC governance can be designed to facilitate interactive dialogue and debate. Open access can help to alleviate the concern, shared by a number of respondents, that entrenched ruling cultures prevent many from being heard. For that matter, the internet can simply bring people together, whether to redress a particular deficiency or to plan a neighborhood barbeque.

E. Community room access and use

In myriad studies on community well-being, ranging from college campuses¹⁴⁴ to military installations¹⁴⁵ to prisons,¹⁴⁶ common areas are cited as essential conduits to effective community building and sense of place. Centrally located and aesthetically pleasing community rooms are utilized in residential and workplace venues to spur healthy interactions and invite conversation on hosts of issues.¹⁴⁷ Corporations like Google, which consistently earns top rankings in Fortune Magazine's annual survey of the "100 Best Companies to Work For,"¹⁴⁸ quite deliberately maintain inviting

143. See BALLOTEER, <http://www.balloteer.com> (last visited Apr. 1, 2011).

144. *Campus Design*, BOWDOIN UNIVERSITY, <http://www.bowdoin.edu/campus-life/community/campus-design.shtml> (last visited Apr. 1, 2011).

145. Jason Ellis, *Military Housing Privatization and the Promise of Design Innovation* (May 29, 2009) (unpublished M.S. thesis, Massachusetts Institute of Technology), available at <http://hdl.handle.net/1721.1/54848>.

146. G. LARRY MAYS & THOMAS WINFREE, *ESSENTIALS OF CORRECTIONS* 157-159 (4th ed. 2009).

147. Igor Ovsyannykov, *5 Astounding Workspaces of Successful Internet Companies*, INSPIRATIONFEED (Sep. 22, 2010), <http://inspirationfeed.com/2010/09/5-astounding-workspaces-of-successful-internet-companies/>.

148. Adam Lashinsky, *Google is No. 1: Search and Enjoy*, CNNMONEY.COM (Jan. 10, 2007), http://money.cnn.com/2007/01/05/magazines/fortune/Search_and_enjoy.fortune/.

common areas throughout their corporate headquarters to drive intellectual exchange and discussion of complex problems.¹⁴⁹ The idea of using collaborative space to foster cooperation and idea-sharing has become prevalent in many industries, including healthcare, manufacturing and communications.¹⁵⁰

In the CIC setting, community rooms must be used more effectively to provide freely accessible and attractive “neutral ground,” readily available to all residents as a safe harbor for discussion, exchange, deliberation and celebration. This recommendation, while at first blush seemingly obvious, is actually quite salient as a potential antidote to some CIC dysfunction. Disgruntled residents reported that the community rooms and meeting rooms in their developments had become board-controlled and monopolized, to such an extent as to deny most residents meaningful access.¹⁵¹ Another respondent pointed to the fact that “there is no longer a meeting room. It is now the Conference Room, kept locked and used exclusively by the board for closed and executive session meetings despite being built for homeowners.”¹⁵²

F. Alternative Dispute Resolution

As previously noted, all three communities selected for initial study were characterized by ongoing disputes that culminated in contentious litigation. The litigation was burdensome and costly. Just as significant, the litigation—when finally resolved—only compounded the feelings of mistrust and alienation among the residents. The litigation may have nominally “settled” the dispute. But the currents of resentment and hostility fueled by adversarial litigation were aggravated, not settled.

This paradoxical outcome is not surprising. Litigation is a peculiarly inappropriate system of dispute resolution as applied to most CIC-homeowner disputes. Many CICs employ experienced counsel, and have virtually unlimited resources (i.e., the homeowners’ funds) in which to fund aggressive and protracted litigation. Furthermore, because of one-sided fee-shifting clauses in CIC governing documents, the CIC association, if it is the prevailing party, often may collect its fees and costs from the homeowner, but,

149. *Id.*

150. Linda L. Lindeke & Ann M. Sieckert, *Nurse-Physician Workplace Collaboration*, 10 *ONLINE J. ISSUES NURSING* 1 (2005), http://www.nursingworld.org/MainMenuCategories/ANAMarketplace/ANAPeriodicals/OJIN/TableofContents/Volume102005/No1Jan05/tpc26_416011.aspx (last visited Apr. 1, 2011); Laura Boutelle, *Abercrombie and Fitch Headquarters*, PLACES 12-13, available at http://www.designobserver.com/media/pdf/Abercrombie_an_637.pdf.

151. *DeCandia questionnaire* at 13, 14.

152. *A. Coll questionnaire* at Section I.

conversely, the homeowner, if the prevailing party, may be barred from receiving the same benefit. By contrast, homeowners often cannot afford counsel, have little experience with litigation, and stand to lose everything—including their house—if they lose. In this context, the theoretical promise of “equal justice” has, in effect, been contracted away.

CICs are characterized by small-scale disputes among neighbors. The resolution of such disputes most often can be accomplished informally, expeditiously, and at low cost. In stark contrast, litigation—whatever its merits—is formal, slow, and extremely expensive. Alternate dispute resolution offers the promise of a dispute resolution mechanism tailored to the unique needs of a common interest community.

The statutory ADR procedure adopted by California provides an excellent example of a fair and balanced procedure that is tailored to the needs of CIC homeowners and associations. Notably, California does not require *any particular* ADR mechanism, but rather mandates that any such mechanism must satisfy the following baseline requirements:

- (a) The procedure may be invoked by either party to the dispute. A request invoking the procedure shall be in writing.
- (b) The procedure shall provide for prompt deadlines. The procedure shall state the maximum time for the association to act on a request invoking the procedure.
- (c) If the procedure is invoked by a member, the association shall participate in the procedure.
- (d) If the procedure is invoked by the association, the member may elect not to participate in the procedure. If the member participates but the dispute is resolved other than by agreement of the member, the member shall have a right of appeal to the association’s board of directors.
- (e) A resolution of a dispute pursuant to the procedure, that is not in conflict with the law or the governing documents, binds the association and is judicially enforceable. An agreement reached pursuant to the procedure, that is not in conflict with the law or the governing documents, binds the parties and is judicially enforceable.
- (f) The procedure shall provide a means by which the member and the association may explain their positions.
- (g) A member of the association shall not be charged a fee to participate in the process.¹⁵³

The foregoing ADR baseline requirements provide an excellent

153. CAL. CIV. CODE § 1363.830 (West 2007).

template for a system of alternate dispute resolution tailored to the unique needs of CICs.

In addition to these baseline requirements, the California statute also offers an optional model ADR procedure for CICs. The model procedure is as follows:

- (1) The party may request the other party to meet and confer in an effort to resolve the dispute. The request shall be in writing.
- (2) A member of an association may refuse a request to meet and confer. The association may not refuse a request to meet and confer.
- (3) The association's board of directors shall designate a member of the board to meet and confer.
- (4) The parties shall meet promptly at a mutually convenient time and place, explain their positions to each other, and confer in good faith in an effort to resolve the dispute.
- (5) A resolution of the dispute agreed to by the parties shall be memorialized in writing and signed by the parties, including the board designee on behalf of the association.¹⁵⁴

California's recommended ADR procedure ensures a fair and expeditious procedure without undue complexity and without cost to the homeowner. It places a premium on "meeting and conferring"¹⁵⁵—an approach uniquely suited to a community of neighbors.

The implementation of a fair and effective ADR mechanism may be the single most important component of the reform of CICs. Some states mandate ADR in CICs. But, whether mandated or not, ADR procedures (such as the one outlined above) should be made part of all CIC governing documents, whether by the developer at the inception of the CIC or by the residents through amendment of the governing documents.

G. Resident access to association meetings and documents

In virtually all of the communities studied, residents sought access to association documents and decisions of the board concerning key governance issues. Unfortunately, in each case, residents encountered resistance from the board at every step of the way.

For example, residents of Radburn sought basic information concerning property, which was part of the Radburn community, that the board sought to sell without the knowledge of the residents.¹⁵⁶

154. CAL. CIV. CODE § 1363.840 (West 2007).

155. *See id.*

156. *Moriarty questionnaire* at 14.

Access was denied. In Greenbriar, residents never received a copy of the association governing documents at the time of home purchase.¹⁵⁷

In general, government is required to conduct its business in public, to publicize its expenditures, to bid its contracts, and to open its files. Without these basic principles of transparency, government cannot be held to account, and the electoral process itself may lose all meaning. These principles apply no less to CICs, which, after all, have assumed many of the functions traditionally provided by local government.

The communities present astonishing instances of governing bodies that are secretive, defensive, and nonresponsive to the needs of the governed. To some extent, this may be attributed to the vagueness and generality of applicable law, including CIC governing documents, with respect to the scope of the obligation of boards to disclose association documents and to permit resident access to board meetings.

This must change, either by statutory enactment or—failing that—voluntary amendment to governing documents. Access to records should be the rule; non-disclosure, the exception. Timetables for a response to a document request must be made a part of the disclosure rule. Furthermore, resident access to board meetings must be broad and unfettered; the grounds permitting closed sessions of the board must be narrow and well defined.

However, reform and tightening of disclosure and access rules cannot alone cure the unacceptable conduct of boards that is described by these case studies. Rule reform is necessary but not sufficient. The egregious conduct of the boards that are described above also suggests a compelling need for mandatory training as a condition of service on the boards of CICs.

CONCLUSION

In a talk to first year law students, a wise and seasoned public interest attorney shared this observation: “Listen, really listen, to your client. I promise you this. If you let your client talk long enough, he will always reveal to you the best solution to the problem that he presents.”¹⁵⁸

Our initial study made plain to us that, while dysfunction persists behind the walls and gates of the CIC living experience, meaningful solutions can be found in the reflections and observations of the residents themselves. Uniquely equipped to know and

157. A. Coll questionnaire at Section VI.

158. David Popiel, Esq., Senior Counsel, Community Health Law Project, Address at Seton Hall Law School (Feb. 13, 2009).

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understand their given domains, the responding residents were astute, well-informed, and measured in their recommendations. Those respondents who expressed discontent more often than not attributed their malaise to unresponsive or autocratic leadership, a lack of transparency in fiscal management, selective enforcement of governing rules, and a more general absence of effective communication and participation pathways.

Recommendations for solutions from within abound. Training and review of board members, coupled with routine fiscal and ethics audits, can and should become a staple of the reform effort. The aims of participatory governance can be advanced by remediating election irregularities, cultivating web-based strategies to promote information sharing, and working to create literal communities of shared space, in the form of common areas and truly accessible community rooms. Devising more creative means for resident engagement could take the form of chartering ad hoc advisory committees comprised of interested homeowners.

Certainly, common interest communities are destined to endure. To render their existence more palatable, it may well be that the answer lies not in yet to be attained legislative enactment or case by case judicial rendering, but rather in the experiential repertoire of the residents themselves. It is best that we continue to listen.

APPENDIX A

New Jersey Common Interest Community Questionnaire

SETON HALL UNIVERSITY SCHOOL OF LAW
Research Project on New Jersey Common Interest Communities

Professor Paula A. Franzese
Steven Siegel, Esq.
Maggie Czykier (Seton Hall law student)

(973) 642-8817
franzepa@shu.edu

This questionnaire has been prepared as part of an academic research project concerning New Jersey common interest communities. The purpose of this questionnaire is to gain additional perspectives on New Jersey common interest communities from the people who know them best -- the residents. Your participation is greatly appreciated.

Any information you can provide will be helpful in our research. You need not answer every question -- answer as many questions as you can. If your answers do not fit in the space provided, we strongly encourage you to attach additional sheets as necessary.

We would prefer if you give us permission to use your name in reporting our research in published articles and elsewhere. However, if you wish you to keep your answers confidential, we will, of course, honor your request. We will not use your name in reporting our research without your permission. You may give your permission for us to use your name by checking the appropriate box at the beginning of this questionnaire.

Please let us know if it would be OK for us to contact you by either e-mail or telephone if we have follow-up questions.

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You may return the completed questionnaire in one of three ways:

1. By mail:

Professor Paula A. Franzese
Seton Hall School of Law
One Newark Center
Newark, NJ 07102

2. By fax:

(973) _____
(to the attention of Professor Franzese)

3. By e-mail:

franzepa@shu.edu

Please note: Some persons who are receiving this questionnaire are receiving it by reason of their membership in the Common-Interest Homeowners Association (C-IHC). As to these persons: C-IHC has a strict policy of keeping confidential its membership list. For this reason, C-IHC itself has mailed this questionnaire to its own members, and has not disclosed the names of its members to the authors of this questionnaire. If you are a C-IHC member and have received a copy of this questionnaire, it is entirely up to you as to whether you elect to disclose the fact of your C-IHC membership in your responses to this questionnaire.

Thank you very much for your time and assistance in completing this survey.

Permission to use name in reporting the results of this questionnaire (yes/no)

I give permission to use my name (in connection with my responses to this questionnaire) in published articles and elsewhere.

Yes___ No___.

(Note: A "no" answer means that we will keep your name confidential but will use your responses on an anonymous basis in publications and elsewhere).

Signature

Print name

Date

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RUTGERS LAW REVIEW

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I. Basic information about you and your community

Name: _____

Address: _____

Telephone: _____

E-mail address: _____

If we have follow-up questions, may we contact you? Yes___ No___.

If yes, would you prefer to be contacted by: phone___ e-mail___.

If by phone, what are the best times to call: _____
_____Name of common interest community/homeowners association:

Number of housing units in the community: ____

Which describes most closely the type of community in which you live? (check one)

Single-family home community___ Condominium attached-home community___

Mixture of single-family home community and condominium attached-home community___

Medium-rise or high-rise condominium community___

Other (please describe)_____

Approximate date that the community was built: _____

Does the original developer of the community still control the community?

Yes___ No___.

Does the original developer of the community still own housing units in the community?

Yes___ No___.

Is the community age-restricted (i.e., 55 and over)?

Yes___ No___.

Check the amenities/services provided in your community.

Community meeting room___ Recreational center___ Swimming pool___

Private streets___ Private security___ Private curbside trash pick-up___

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Gated___ Other (please specify)_____

Date that you moved-in:_____

Your age:___ Number of persons living in your household (include yourself):___

Do you have a child/children living with you? Yes___ No___ If yes, please give the number of your children living with you and their ages:

Do you presently serve on the Board of Directors? Yes___ No___

Have you ever served on the Board of Directors? Yes___ No___

If yes, identify board position (*i.e.*, President, V.P., Secretary, etc.) and identify your dates of service:_____

If you are not presently serving on the board of directors, would you be interested in serving on the board at some point in the future? Yes___ No___ Explain your reasons for this answer.

II. Dispute resolution in your community

1. How does your community resolve disputes between the association and individual residents? Please describe the process.

2. Have you been personally involved in any dispute with the association? Yes ____ No ____.

If yes, please describe the dispute and its resolution in detail. Were you satisfied with the result? If so, why? If not, why not? Feel free to provide as much detail as you like.

3. Are you aware of any homeowner in your community (including yourself) who has sought the assistance of the New Jersey Department of Community Affairs in resolving a dispute between the association and the homeowner? Yes ____ No ____.

If yes, describe the issue, DCA's involvement in the dispute, and the outcome of the dispute.

III. Election of officers and directors in your association

1. When does the election of officers and directors take place each year: _____

2. When do you receive notice of the election? _____

3. Did you vote in the most election of officers and directors?
Yes___ No___.

4. Did you personally attend the most recent annual meeting in which the elections were held?
Yes___ No___.

5. Describe the means by which the names of residents are placed in nomination for board positions.

6. Describe the method of balloting that is used:

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7. Is the elected conducted by means of a "secret ballot"? ("Secret ballot" means that the voter's choice of candidate is known only to the voter)

Yes___ No___.

8. If you know, who is responsible for counting the ballots and recording the results? Is this person: (1) a board member; (2) an employee of the association; (2) an employee of the managing agent; (3) an attorney retained by the association; (4) a person or company specifically retained by the association for the purpose of counting ballots and recording the results; or (5) none of the above?

9. Please give us your opinion about whether the present elections process is open and fair. If you believe the process could be improved, how would you improve it?

IV. Adoption and enforcement of Board policies and rules

1. Are you satisfied with the way the Board adopts its policies and rules?

Yes___ No___.

If you are dissatisfied, do you have any suggestions as to how the adoption of policies and rules could be improved?

2. Are you satisfied with the way the Board enforces its policies and rules?

Yes ___ No ___.

If you are dissatisfied, do you have any suggestions as to how the enforcement of policies and rules could be improved?

V. Access to Association records and financial statements

1. Do you receive financial statements from the association?

Yes ___ No ___.

If yes, do you review the statements?

Yes ___ No ___.

If you review the financial statements, have you ever raised questions about the financial information reported on the statements?

Yes ___ No ___.

If yes, please describe the experience, whether your question(s) were answered to your satisfaction and whether you were satisfied with the procedures by which your request was handled.

2. Have you ever requested access to Association records and/or financial statements?
Yes ___ No ___.

If yes, please describe the experience, whether you obtained the information that you were seeking, and whether you were satisfied with the procedures by which your request was handled.

VI. Your decision to purchase your home in a common interest community.

1. Prior to your present home, had you ever lived in a common interest community?
Yes ___ No ___.

If yes, were you satisfied with your experience in living in that community?
Yes ___ No ___.

If you were not satisfied with the experience, what was the basis for your dissatisfaction? _____

2. Were you specifically looking to purchase a home in a common interest community when you purchased your home in this community?

Yes___ No___

If yes, explain your reasons for preferring to live in a common interest community:

3. If you were not specifically looking to purchase a home in a common interest community (when you purchased your home in this community), what made you decide to go forward your home purchase?

4. Prior to your purchase of your home in this community, were you given a copy of your community's "Offering Statement"?

Yes___ No___

If yes, did you have any questions about the community based on your reading of the Offering Statement?

Yes__ No__ .

If you had questions, were those questions answered prior to your purchase? Yes ___ No ___.

If the questions were not answered to your satisfaction prior to your purchase, give details:

5. Did you understand your responsibilities and rights as a homeowner in a common interest community prior to purchasing a home in this community? Yes ___ No ___.

If no, please describe what responsibilities and rights that you did not understand prior to purchasing a home in this community.

6. If you had to do it all over again, would you purchase a home in this community? Yes ___ No ___.

If you had to do it all over again, would you purchase a home in any common interest community?

Yes ___ No ___.

Please explain your answers.

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We much very appreciate your time and attention in completing this questionnaire.