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**Homeowner Associations:
Problems and Solutions**



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HOMEOWNER ASSOCIATION PROBLEMS AND SOLUTIONS

Edward R. Hannaman, Esq.¹

Agreement on a goal is a prerequisite to classifying situations or conditions as problems. Mere identification of problems, however, is insufficient. One cannot propose solutions without adequately understanding the problems. If society's intention in setting up associations is to encourage the formation of undemocratic Gulags ruled by unaccountable boards and for the enrichment of those who profit from owner ignorance or impotency- we have succeeded completely. Alternatively, if the intention is that associations be formed as microcosms of democracy in which informed owners collectively wield power, maintain their freedoms and are honestly served by their neighbors and trades people- we have failed miserably. This conference itself, although thirty years overdue, is evidence that enlightened people are focused on true public interest and are aiming for democratic models.

For those in agreement with the democratic model, the solutions are often apparent from problems themselves. And the problems are not what the critics claim them to be; namely owners who wish to avoid following rules they agreed to. In dealing directly with thousands of homeowners over twelve years, I have found the opposite to be true. It is the board members, uneducated and untrained for their roles, often

¹ The author was unable to participate at the conference but provided this submission at the request of the sponsors. For the past 12 years he has worked with homeowners who have had complaints about the operation of their associations. He previously wrote a paper for a Rutgers Symposium on Homeowner Association problems that was cited by the Appellate Division in Twin Rivers and cited by respondents to the Supreme Court.

misguided by attorneys and property managers, who refuse to follow not only the rules but any semblance of responsible corporate stewardship. That current laws are inadequate in protecting owners is now obvious. The curious thing is that on the surface they appear adequate to the task. Boards are required to act in public, comply with their fiduciary obligations, allow owners access to financial records and provide a means to resolve disputes.²

The existence of many individual problems statewide and even institutional ones does not mean that every association is necessarily poorly managed and oppressive. There are many associations among the thousands that are well governed, honestly served by professionals and operate in the best interests of the owners, despite the absence of effective laws, governing documents and oversight conducive to that end. Just as there are many dedicated board members throughout the State who are laudable examples of adherence to the highest fiduciary standards, there are attorneys and property managers who strive to represent the best interests of the owners collectively. Unfortunately there are also many who, either deliberately or from a misunderstanding of their roles, comprise the opposite end of the spectrum. The crucial point unfortunately lost on many owners happily residing in well-run association is the fragility of their situation. The election of the wrong type of person as the board president, the hiring of the wrong attorney or property manager, or even a change in the attitude of a previously good board president and a previously trouble-free association becomes the nightmare all too familiar to many owners throughout the State.

In the case of boards failing to comply with governing documents, effective dispute resolution (meaning a process that is fair, inexpensive and administered by knowledgeable dispute resolvers) offers a potential remedy.³ Although the law does not compel a board to comply with the result, one would expect that

² See, e.g., N.J. STAT. ANN. §§ 45:22A-44 to -45, 46:8B-13, -14 (West 2007).

³ Unfortunately the Appellate Court in *Committee for a Better Twin Rivers v. Twin Rivers Homeowners' Ass'n*, 890 A.2d 947 (N.J. Super. Ct. App. Div. 2006), determined that owners in homeowners' associations faced with renegade boards must bring derivative suits. Unless counsel fees are awarded to such owners, this is only a hypothetical solution.

it would since it set up the system. Boards, however, not only feel free to ignore compliance with an outcome, there is an amazing lack of compliance with the very provision of the dispute resolution procedure. This type of situation highlights the need to train board members and provide a system of oversight to encourage compliance. There are other deeper problems to remedy if the system is to adequately protect owners faced with what amounts to a layer of essentially unaccountable government.⁴ Problems in fact arise from the very nature of the manner in which planned developments are created, marketed and administered before the first owner even buys a unit. Thus, one must look initially at the current statutory construct and the Public Offering Statement (POS) mandated by The Planned Real Estate Development Full Disclosure Act.⁵

Relatively speaking, condominiums and homeowner associations are recent statutory creatures. The only, albeit crucial, difference from traditional homes is the factor of common ownership and the concomitant obligation to manage it. The overwhelming choice is through the formation of a homeowner's (or condominium or co-operative) association. There are reasons why developers feel compelled to impose restrictions on personal conduct that are completely unrelated to those necessary to address common ownership problems. After all, restrictions on parking, plantings, placement of lawn furniture, etc., may facilitate the sales of homes. This is no different than a realtor encouraging a seller to eliminate clutter

⁴ Although courts apply a business model, one is hard-pressed to find a business like the one one is compelled to participate in by buying a home; that acts through an elected body which passes and enforces rules governing everyday behavior, that is duty bound to maintain common property and which compels regular and special payments that are liens on one's home. The only way to avoid the board's jurisdiction is to sell one's home and move- exactly as if one desires to avoid State or local government jurisdiction. Arguably the court already acknowledged this by noting that candidates for association office were public figures. *Verna v. Links at Valleybrook Neighborhood Ass'n*, 852 A.2d 202, 213-14 (N.J. Super. Ct. App. Div. 2004). The court also recognized that the power to levy fines is a "governmental power." *Walker v. Briarwood Condo Ass'n*, 644 A.2d 634, 638 (N.J. Super. Ct. App. Div. 1994).

⁵ N.J. STAT. ANN. §§ 45:22A-21 to -56 (West 2007) [hereinafter the PREDFDA].

and clean their home to encourage a sale. But do realtors expect the buyers to maintain their house as it was when they purchased it-under penalty of fines? It is doubtful that the developer would care that the restrictions continue to apply once he has sold all his units and turned the project over to the owners. Frankly, if he did, the owners should resent it.

Unlike traditional homes, most planned developments have their documents registered by the State.⁶ The PREDFDA grants the State broad power in registering developments. As noted above, it is not a mystery why a developer may impose numerous personal restrictions while he is selling units in his development. What is a mystery is why the State would allow them to remain wholesale and require unorganized and usually unaware (see below) owners to remain subject to them. Logic and a desire to instill a democratic sense of self-governance would suggest that the owners be allowed to impose such restrictions as they determine are necessary. Every municipality has health, safety and welfare ordinances to protect owners so allowing owners to start anew would not place them in any jeopardy.⁷

As prospective purchasers into this association realm, individuals are faced initially with advertising that never mentions any association or rules as well as an offering statement that is a densely written compilation of hundreds of pages of turgid legalize about the project, ostensibly intended to assist them. The POS, although it contains bylaws, fails to directly inform owners that ultimately they will be responsible

⁶ In accordance with N.J. STAT. ANN. § 45:22A-25 (West 2007), and N.J. ADMIN. CODE § 5:26-2.2 (2008), certain developments, either due to size or make-up (e.g. all low or moderate income units or fewer than 10 condominium units) need not submit offering plans or governing documents to the State for review. Although not mentioned in the statute, the Regulation is clear that the State only accepts the documents- it does not approve them. State reviewers provide no special guidance to owners on general potential problems, e.g. consequences of the developer's failure to sell a majority of units or inclusion of a large rental building with many units, each with a vote, assuring one corporate owner of complete control over individual owners.

⁷ Naturally, exceptions could be made for any rules shown to be specifically necessary to protect the owner's well-being in a project. It is doubtful that many rules would fall into this category. The advantage is that they could easily be listed for owners to understand.

for governing the development. It contains little if anything about what to expect in association living, has no indexed list of rules or restrictions and varies widely from development to development. Perhaps the most glaring deficiencies are that it fails to inform owners of their rights, makes no mention of the standards expected from boards and neglects to inform owners where they may turn for help should they encounter problems. In evaluating the reality of the POS one must consider that section 28d of the PREDFDA states:

The public offering statement shall, to the extent possible, combine simplicity and accuracy of information, in order to facilitate purchaser understanding of the totality of rights, privileges, obligations and restrictions, comprehended under the proposed plan of development. In reviewing such public offering statement, the agency shall pay close attention to the requirements of this subsection, and shall use its discretion to require revision of a public offering statement which is unnecessarily complex, confusing, or is illegible by reason of type size or otherwise.⁸

That current POS' do not meet either this standard or the owners' needs is not simply the opinion of owners and attorneys who have tried to read a POS. A leading publication in the field written by attorneys representing developers states:

Because of its sheer volume, many purchasers fail to read the POS prior to signing a contract to purchase, or during their seven-day rescission period after signing. Accordingly, the real informational value of the POS to a purchaser is questionable.⁹

⁸ N.J. STAT. ANN. § 45:22A-28d (West 2007).

⁹ WENDELL A. SMITH & DENNIS A. ESTIS, NEW JERSEY CONDOMINIUM & COMMUNITY ASSOCIATION LAW 163 (2004). The authors note that the State requires complex plans to list "special risks." *Id.* The authors, however, encourage sponsors' attorneys to supplement the POS "with a booklet summarizing the most important and most often misunderstood facts about a particular offering." *Id.*

The statutory mandate for the POS' content is suspect on at least two counts. It requires such things as the inclusion of entire management contracts and recreational leases¹⁰- as if a purchaser will even read, no less understand them- which is irrelevant since the entire transaction is a contract of adhesion. It would seem preferable for the State to ensure that they were not unfair to the owners. Moreover, one wonders why there is no parallel provision to that in the Condominium Act which simply voids the management contract 90 days after the owners assume control.¹¹ Much of the general information that congests the POS is various general municipal community information mandated by the statute (and further amplified by the PREDFDA Regulations).¹² In this modern information age all of this is readily obtainable over the Internet or from any broker.

Notably, the POS stands in stark contrast to the short, effective, easy to read booklet published by the State to assist renters in understanding their legal rights. The POS is so intimidating that, faced with the inherent demands and distractions in buying and selling a home and moving, few owners even bother to read all, or sometimes any, of it.

Only two conclusions are possible; either the statutory standard for the POS cannot be met or, the State is not ensuring that it is met. Whichever is the case, it is instructive that even leading developer attorneys counsel others to provide purchasers with a separate informational booklet. Unfortunately, these are targeted to specific facts about the offering. It is clear that the effect, if not the purpose, of overwhelming disclosure is to protect the developer. Logically and practically, the greater the volume of material disclosed and the more legalistic the contents, the less chance there is of any purchaser bothering to wade through it.

As noted above, the POS includes a copy of the bylaws, which may recite multiple restrictions on owner conduct. Unfortunately, not only are they rarely ever indexed, there is not even a standard format for indexing them in useful categories

¹⁰ N.J. STAT. ANN. § 45:22A-28a(3) (West 2007).

¹¹ § 46:8B-12.2.

¹² N.J. ADMIN. CODE § 5:26-4.2 (2008).

such as: pets, lawn furniture, garage use, permitted vehicles, etc. Rules often differ for each developer and each development, as do association bylaws. Despite 30 years of State administration of the statute, no State official has publicly proposed a standard format for any governing documents. Inasmuch as most of the bylaws concern such things as elections, board procedures and board powers and other purely governance matters, they are largely unaffected by the nature of each development.¹³ Considering that the purpose of bylaws is to direct how the owners govern their own association, one can validly question why developers should write them. Moreover, there is no logical reason that bylaws should not be initially standardized with an option for owners themselves to vote to revise them.

As one may expect, if a potential buyer happens to notice and object to a restriction, it is not uncommon for sales agents to downplay it as nothing to be concerned about. Developers themselves have been known to waive restrictions to encourage a sale by eliminating a concern. This would not pose a problem for the benefited owner if it were not for the fact that owner-elected boards do not consider themselves bound by such waivers and will penalize the owner. Despite the industry claims to the contrary, it is not only highly doubtful that many people buy in such communities because of all the rules (how could they when no prominent mention is even made of them)- it is doubtful that many are even aware of them until after they move in and receive a violation notice. Anyone conversant with basic human nature realizes that people purchase homes in developments for a multitude of reasons- location, affordability, aesthetics, amenities, the unavailability of non-association homes, and desire to avoid property maintenance chores.¹⁴

¹³ While document authors should recognize the differences in administration between, for example, a two- unit condominium and a 200 unit one, that is frequently not the case. As a result there are many two- unit condominiums that have bylaws requiring them to operate with boards of five members. At least as troublesome are those with six units in which one owner is left out.

¹⁴ One need merely peruse real estate advertisements in a weekend newspaper to confirm this fact. Ironically, not only must owners pay for maintenance, they cede all control over it to the board. In other parts of the country where the adverse effects of association living are more well known, advertising for single family homes often carries the notation “No homeowner association” to better attract purchasers.

In addition to building the units, the developer (or in reality, his attorney) establishes both the method of governing the development and all the rules. They both will continue to apply to the owners after the developer sells all the units and departs, unless a majority (or at times even two-thirds) of owners can organize themselves to overturn them. The difficulty for owners is compounded by the fact that they can usually expect their own board to vehemently oppose them. Fewer rules not only mean less power and authority for the board, but listening to owners is contrary to the board's training. Under the current system, owners begin serving on the board while the developer is in control. They are, therefore, not exposed to a democratic manner of governing a development. The developer, after all, is running a business and not administering a democracy. If he wants to change some aspect of the development he does not survey the owners- he simply implements it. As noted above, developers are often flexible with rules. For reasons perhaps best left to psychologists, owner elected boards are demonstrably more dedicated to enforcing and preserving every small rule than developers ever are.¹⁵ Professor Evan McKenzie, an authority in the field, characterized such board members as enjoying the "perceived pleasure of wielding power over others" and he noted that those members with an authoritarian bent receive strong support from the trade group's attorney's and managers.¹⁶ In fact, Professor McKenzie observed that managers and lawyers routinely advise boards to be extremely aggressive and inflexible in enforcing rules.¹⁷

Although developers typically (and quite practically) only enforce the rules necessary for them to sell units, it is common for owner-run boards to seize on unnecessary, unwanted and

¹⁵ A request to see complaints filed with the State while the developer is in charge would reveal that construction matters dominate and rule enforcement is rarely an issue. Developers are focused on selling- not enforcing such things as bans on barbequing, pet ownership or flowerpots on steps.

¹⁶ EVAN MCKENZIE, PRIVATOPIA: HOMEOWNER ASSOCIATIONS AND THE RISE OF RESIDENTIAL PRIVATE GOVERNMENT 131-32 (1994).

¹⁷ *Id.* at 13. For a non academic but thorough view of the numerous pitfalls (the book is 519 pages) of associations, see DONIE VANITZIAN & STEPHEN GLASSMAN, VILLA APPALLING: DESTROYING THE MYTH OF AFFORDABLE COMMUNITY LIVING (2002).

often undesirable rules to dominate their neighbors- especially those who ask questions or otherwise annoy an untrained (and unrestrained) board's sense that it rules by divine right. While rules regarding common property are essential and in fact the reason for the formation of the association, all associations have numerous restrictions on owners' personal conduct on their own property (e.g., restricting drapes as they appear to the outside of a window or working in one's own garage). The numerous rules facilitate harsh boards in exercising an "enforcer mentality" and create an "us v. them" atmosphere.

Although the PRED supplement gives the State broad authority to act on the owners' behalf and the court has found it to have broad incidental and implied remedial powers, the State confines itself to three areas: open meetings, access to financial records and dispute resolution.¹⁸ Despite the legislative mandate to prepare and distribute "explanatory materials and guidelines" to assist associations, executive boards and administrators "in achieving proper and timely compliance with the requirements of P.L. 1993, c.30" (the legislative supplement which includes provisions for owner rights and elections),¹⁹ the responsible agency has not issued any guidelines to associations not already contained in the statute on anything other than open meetings²⁰ and the location of a suitable meeting room.²¹ Even when implored by owners in Radburn to exercise its authority to require fair elections under section 45a of the PREDFDA and pursuant to the decision of the Appellate Division in *Twin Rivers* (before the Supreme Court's decision and unaffected by it), the State refused to intervene to stop blatantly unfair

¹⁸ See N.J. STAT. ANN. § 45:22A-48 (West 2007); *Coastal Group v. Planned Real Estate Dev., Dep't of Cmty. Affairs*, 630 A.2d 814, 819 (N.J. Super. Ct. App. Div. 1993); *Enfield v. FWL, Inc.*, 607 A.2d 685, 689 (N.J. Super. Ct. Ch. Div. 1991), *aff'd* 607 A.2d 666 (N.J. Super. Ct. App. Div. 1991), *cert. denied*, 611A.2d 648 (N.J. 1992); Assemb. Local Gov't Comm. Statement to S. 217- L.1993, c.30 (1993).

¹⁹ § 45:22A-48. The provision states: "[s]uch guidelines may include the text of model bylaw provisions suggested or recommended for adoption." *Id.*

²⁰ N.J. ADMIN. CODE § 5:20-1.1 (2008).

²¹ § 5:26-8.2.

elections.²² Compounding this deficiency is the State's failure to provide practical information to owners or State-sanctioned training courses to educate board members as to their duties or the meaning of the "fiduciary obligation" applicable to their service. Uneducated board members are easy prey for unscrupulous attorneys, property managers and trades-people. They, in turn, find it easy to prey upon uninformed owners who have no idea of board fiduciary obligations. Just as bad, even if owners are aware of their rights, they have nowhere to turn for protection from board malfeasance, other than to unaffordable private lawsuits.

From the development's inception, the applicable statute provides that the developer exercises authority in the name of the association. This continues until 75% of units have been sold and the development's governing board is fully elected by the owners.²³ Until such time, anything the developer does, even in his own interest, is done in the name of the "association" and thus appears to be done by the owners. This can have and has had seriously detrimental consequences for owners. As one participant in the Homeowners Conference reported, the developer, acting as the association, can make agreements and represent both sides, such as making a loan from himself to the association. Although it appears that two parties are involved, there is really only one- the developer- engaged in self-dealing. Although, if discovered, such self-dealing can be undone, neither statutes nor state review should permit even its possibility.

The association environment, even as owners are added to the board after 25% and 40% of the units are sold, is not in line with a democratic model. The business model tolerates no

²² The Radburn Board only allows election of candidates it sanctions. It disregards owner petitions for candidacy and summarily rejects owners who get more write-in votes than the board's candidate. The court in *Twin Rivers* noted that while sections 44 and 45 of the PREDFDA did not address the conduct of elections the requirement for elections "must be taken to connote fair and open processes, in which opposition candidates are entitled to campaign." Comm. for a Better Twin Rivers v. Twin Rivers Homeowners' Ass'n, 890 A.2d 947, 964 (N.J. Super. Ct. App. Div. 2006). The court also noted that any suppression of opposition or skewing of elections "would be viewed as an improper exercise of legislatively established powers." *Id.*

²³ N.J. STAT. ANN. §§ 45:22A-47a, 46:8B-12.1a (West 2007).

effective opposition, nor does it incorporate a balance of powers or any effective checks and balances on board power. (For example, in the crucial financial area there are no state regulations and there is rarely any provision for a finance committee composed of non board members that the board must satisfy). Needless to say, even if there is a community newsletter, the board runs it and can edit it to effectively undermine owner opposition to board conduct.²⁴ For the initial owners, service on a developer-run board is the only “training” they receive in preparation to exercising essentially unbridled power. Subsequent owners are thus inured to this model of governance. Expecting democracy to flourish in such an environment is like expecting plant seeds to germinate in concrete. Like seeds, democracy needs the right conditions to take root and grow.

To complete the abysmal situation for owners, the dominant force in the association arena is comprised mostly of and ruled by the professionals and trades-people that profit off of associations. Although this trade group originated many years ago as an organization which included owners in positions of leadership and was intended to benefit associations, as Professor McKenzie documented in *Privatopia*, the trade group organization became dominated by attorneys, property managers and other trades people profiting off of associations.²⁵ He succinctly describes those who build and service developments as a “typical trade association petitioning for legislative beneficence for its members.”²⁶ Moreover, he states that it has “become a significant force in interest group politics

²⁴ In the *Twin Rivers* Supreme Court decision the court recognized it as sufficient if the community newsletter allowed owners access to it. It failed to note that it was paid for by the owners and was their free press right- not that of the board president. Thus, it allowed him to insert rebuttals to newly submitted letters on the first page with the letter being criticized relegated to an inner page. He also routinely used the newsletter to boldly personally name and criticize opposition owners. The owners’ rights are supposedly to publish and distribute their own newsletter— naturally at their own expense. If either political party in our democracy were permitted to operate under this standard we would have the same one party rule common to all associations.

²⁵ MCKENZIE, *supra* note 16, at 106-21.

²⁶ *Id.* at 119.

in many states. To a large extent, they have been able to shape legislation and judicial policy making, prevent meaningful regulation of CID [Common Interest Development] activity, and keep the discourse on such matters largely private.”²⁷

This group is currently lobbying for a statute written by its members (serving on national law commissions) that provides owner “rights” that are more apparent than real.²⁸ This group argued before the New Jersey Supreme Court in the *Twin Rivers* case that homeowners in associations should be denied the State Constitutional Rights afforded every other homeowner in the State.²⁹ (Sadly, since some board members favor this denial to further enhance their power over owners, the owners themselves were required to pay the trade attorneys fees to pay for litigation to deny them fundamental rights).³⁰ It also argued

²⁷ *Id.* at 26.

²⁸ For example, in its approximately 118 page Uniform Common Interest Ownership Act (UCIOA), which largely parallels issues and concerns covered by the existing PREDFDA (only approximately 20 pages of it deal with owner “rights”), financial record access for owners is allowed but only for two hours in any week, after which the association can charge any amount it desires. Assemb. Res. 798, 212th Leg. (N.J. 2006), available at http://njleg.state.nj.us/2006/Bills/A1000/798_I1.PDF; S. 805, 212th Leg. (N.J. 2006). This rewards inefficient boards and punishes owners. It provides less protection than the current statute, which does not allow a charge for access. Similarly, theirs makes no provision for educating board members or for such necessary protections as counsel fees for owners. Its concept of bidding requirements is swallowed up by a far lengthier list of exceptions. The trade group vehemently opposes the owners’ protection bill (17 pages long), which contains actual owner protections such as those and more. S. 1608, 212th Leg. (N.J. 2006). The trade group’s legislation parallels the POS in using bulk to deter effective review. Since the vast majority of its Bill concerns development issues, it is arguably unnecessary. Any such concerns would be better addressed through amendments to the State’s PREDFDA. Unlike the few states which have adopted the complete UCIOA, New Jersey has comprehensive legislation.

²⁹ They supported the association’s position that the New Jersey Constitution did not apply to its rules and regulations. Notably, the Appellate Division had remanded the matter to work out specific restrictions in accordance with the New Jersey Constitution. Since the owners were willing to accept limitations under standard “time, place and manner” considerations, there was no reason to bring the matter to the Supreme Court other than to solicit a denial of constitutional rights.

³⁰ One presumes that if the trade group succeeded, developers would not be prominently disclosing this fact in either their POS or advertisements. It is

that the PREDFDA supplement that provided owners with certain minimum statutory rights should not apply to any development in existence prior to its enactment. Fortunately both the Appellate Division and the Supreme Court disagreed with the trade group position that would have led unjustly to differing rights for owners depending on the date their development was established.

What is amazing is that in the past 30 years, until the Public Advocate intervened on behalf of the owners in the *Twin Rivers* Case, there is no record that any ranking State Executive Official or entity has ever publicly spoken out for owner rights. Even more disheartening for owners is the fact that the agency charged with protecting their rights has never shown any interest in intervening in any suit to help establish or protect owner rights in associations.³¹ When the trade group toured the State holding its “town meetings” to support its own proposed legislation and to attack owner protective legislation introduced by Senator Turner³² at the behest of owners, the State said nothing and did nothing to oppose that presentation.³³ It could have held public information meetings at various public places and at association community rooms to inform the owners the truth; namely that the proposed owner Bill³⁴ gave the State no power to interfere in authorized and properly made internal

doubtful that advertisements with banners such as: “Buy here and leave those pesky Constitutional Rights behind” would enhance marketability.

³¹ Equally disheartening, as well as mysterious, is the fact that the agency has never sought to participate in any Institute for Continuing Legal Education courses on the subject of its administration of the PREDFDA.

³² S. 1608, 212th Leg. (N.J. 2006).

³³ One immediate benefit of the Conference is that the agency’s representative stated for the record that the agency was not supporting any particular legislation on owner rights. This is notable in that the same representative, in commenting upon the pending introduction of S. 2016, 211th Leg. (N.J. 2004), by Senator Shirley Turner, stated publicly at a workshop on homeowner associations, whose attendees included owners at an Atlantic City conference in 2004, that this bill would not pass, and that the agency instead supported UCIOA, which he was helping to re-write in consultation with the Trade group.

³⁴ See *supra* note 33.

decisions. Nor would it be charging huge fees since the original bill only had a two-dollar annual fee (capable of being increased over years to an annual maximum of four).³⁵ Most importantly, it could have answered owners’ concerns and put to rest their completely unfounded fears- fanned by the trade group- that it would allow State take-over of their associations or even abolish their associations. (The bill contains a provision, in line with case law, that curtails unnecessarily over reaching umbrella associations so that the owners in their individual associations retain the powers granted them by statute).³⁶

The State’s failure to act in the owners’ interests places owners at a severe disadvantage and explains in large part why the current problems persist. In response the owners themselves were compelled to form The Common-Interest Homeowners Coalition (CIHC), which is currently the only statewide owners group advocating for owner rights.³⁷ When they have attempted to try to present their position before the legislative or executive branches one inevitably finds a few lay people- usually retired- confronted by the highly organized well funded nationally connected trade group packed with attorneys. Perhaps fearing that its powerful, well-financed organization of professionals was not enough to insure a sufficient imbalance against the owners, the trade group hired additional professional lobbyists to advocate for its preferred law. Owners alone cannot hope to match the resources that professional financial interests have arrayed against them.³⁸

³⁵ The trade group’s cries of alarm over a two dollar fee to help owners (the Bill was subsequently revised to eliminate any fee) stands in sharp contrast to it’s position when it is the cause and the likely beneficiary of additional and considerably larger funds owners will be forced to pay. *See infra* note 26.

³⁶ *See* Fox v. Kings Grant Maint. Ass’n., 770 A.2d 707, 719 (N.J. 2001). Fox is another in a seemingly endless stream of cases that the “responsible” agency refuses to follow, allowing boards to perpetuate an improper violation of owner rights.

³⁷ *See generally* Common-Interest Homeowners Coalition, <http://www.cihc.org> (last visited Apr. 11, 2008).

³⁸ Professor Wolff of Columbia precisely identified the problems of new interest groups (such as the CIHC) in a pluralistic society competing against established ones in an essay entitled “Beyond Tolerance.” Robert Paul Wolff, *Beyond Tolerance*, in A CRITIQUE OF PURE TOLERANCE (1965). His basic thesis is that it is extremely difficult for new interest groups to reach the plateau on

In identifying problems, the agency charged with the responsibility for protecting owners did not have to rely solely on its own experiences. In 1998 the Legislature published a report of the Task Force of the Assembly to Study Homeowner Associations which identified virtually all of the problems extant today.³⁹ Despite years of compelling and mounting evidence of the problems confronting owners, there have been no revised regulations, statutes, POS changes or form documents to assist and protect owners. In fact it is difficult for owners to find the agency providing governmental support since it receives absolutely no publicity.⁴⁰ Generally (and logically), owners with problems try either Consumer Affairs or the Attorney General (neither of which to date have opted to exercise any jurisdiction they may have in the area of homeowner rights).⁴¹

which groups can compete equally and get governmental recognition. Even worse for new groups was a government that saw its role as mediator; that position inevitably favored the more powerful. This is exactly the situation that occurred in considering proposed legislation to protect owners when the state agency charged with owner protection brought the owners together with the trade lobby. The trade lobby, as expected, took as its starting point not owner needs but its ponderous and largely irrelevant UCIOA. It dominated to the extent that the owners wisely withdrew to preserve their ability to independently seek and, with S. 1608, 212th Leg. (N.J. 2006), get needed legislative support.

³⁹ N.J. GEN. ASSEMBLY, ASSEMBLY TASK FORCE TO STUDY HOMEOWNERS' ASSOCIATIONS, Assemb. Res. 47, 201st Leg. (1996), available at <http://www.njleg.state.nj.us/legislativepub/reports/homeown.pdf>.

⁴⁰ The staff consists of one person assigned full time and one with part-time duties to assist homeowners with their association problems. They must contend with all statewide complaints as well as with association attorneys only too happy to bill to oppose any State requests. They are located in the Homeowner Protection Bureau in the Codes Division within Community Affairs. To find them on their Department web site one must correctly make several counter-intuitive choices-such as selecting "Codes" then "new home warranties" to proceed further in finding help with their homeowner association problem. Considering their workload, it is perhaps fortunate that the Department provides no publicity for this function. See generally Bureau of Homeowner Protection, http://www.state.nj.us/dca/codes/newhome_warranty/nhw.shtml (last visited Apr. 11, 2008).

⁴¹ Query whether the Division of Consumer Affairs in the Department of Law and Public Safety could exercise jurisdiction over associations that are non-profit corporations since it has jurisdiction over same.

In the current scheme, except for very basic statutory rights such as the right to access meeting minutes, financial records and dispute resolution, owners are left to seek justice individually and at great cost. Even with constitutional rights at stake, without the intervention of the Rutgers Constitutional Law Clinic, the owners would have been unable to afford to advocate for their rights in court, or, as happened to the owners' rights advocacy group in *Valleybrook*,⁴² exhausted their funds trying their case and thus had no funds available to enforce their favorable arbitration decision. They were initially successful in preventing the board from obligating owners to pay millions of dollars for capital improvements (consisting mainly of a heated indoor swimming pool) without first allowing the owners to vote on the expenditure. The board, with the unlimited ability to impose special assessments, since it is essentially a taxing authority, naturally never runs out of money for "its" attorneys.⁴³

An excellent example of the current imbalance, even when one is represented by counsel, is the situation following the wake of *Micheve*.⁴⁴ In *Micheve*, the Appellate Division construed the Condominium Act to limit initial association charges to purchasers in accordance with what all the owners would pay according to their percentage interest.⁴⁵ Association

⁴² See *supra* note 4

⁴³ In *Twin Rivers* the board unflinchingly, and without any owner approval, authorized close to one million dollars to oppose owners' Constitutional Rights. One wonders at the fiduciary implications if not the practical business sense of such a course of conduct.

⁴⁴ *Micheve v. Wyndham Place at Freehold Condo. Ass'n*, 885 A.2d 35 (N.J. Super. Ct. App. Div. 2005). Following the decision there were a number of concerned buyer attorneys who wondered why the State refused to help individuals who could not afford to litigate blatant association violations of the Condominium Act, even though it was an easily winnable summary judgment case. To avoid the possibility that someone actually might put principle over money, the trade group lobbied successfully for A-2822/S-2188 amendments to the Condominium Act allowing associations to charge purchasers nine times the monthly fee to be used for any purpose the board may desire. Even a modest monthly maintenance fee of \$250 would force an owner to pay an extra \$2,250 if the Governor signs the bill. The effect it will have on those scrimping to purchase low or moderate housing is obvious.

⁴⁵ *Id.* at 38-39.

attorneys promptly strained to narrowly construe the decision, or simply ignored the decision, and challenged purchasers to expend the significant legal fees necessary to contest their position. Although a purchaser would easily win in court, it was obviously not economically prudent to spend thousands of dollars to save far less- even though unjustly charged. If the State promptly issued public guidance to associations and attorneys on this decision and intervened on behalf of initial purchasers faced with such legal bullying, associations' willingness to ignore the holding in *Micheve* would have lessened considerably.

When boards openly abuse their powers, owners have no simple or cost-effective recourse. Moreover, there is no personal consequence to Board members who deliberately violate their fiduciary obligations or refuse to follow bylaws. Even if dispute resolution is available, it is a process set up by the board and not binding on it. Board members can, and have, encouraged the association attorney to resist affording owners statutory rights without fear of consequence other than incurring significant legal expenses for all the owners. Owners can file a lawsuit to force boards to act properly (and must if they are in a homeowner's association as opposed to a condominium or cooperative) but without the prospect of counsel fees being paid for, that remedy is more theoretical than real.

Alternatively, the few owners who are both paying attention to and understanding what is happening can attempt to educate their fellow owners and organize an opposition to vote the board out. But as anyone who has ever tried to unseat what is essentially a dictatorship can attest, it is extremely difficult and usually unsuccessful if the board is determined- as they inevitably are- to remain in power.⁴⁶ Unlike the board, which can use all the association's resources including the newsletter, property manager and attorney to advance its position, owners are left to fund opposition themselves. Boards have owner lists

⁴⁶ If the association is a nonprofit corporation, the owners can pursue a Superior Court summary proceeding under the Non Profit Corporation Act (See N.J. STAT. ANN. § 15A: 5-23 (West 2008)) to challenge unfair elections, but otherwise are left on their own since, as noted previously, the only State entity with jurisdiction to ensure fair elections refuses to exercise it. See *supra* note 12. Boards have been known to simply ignore requests for recall elections as well as the outcomes from unfavorable ones.

they virtually always deny opposition owners so the board can effectively use its franking privilege to disparage those in opposition. Unfortunately, for various reasons, too many owners show little concern for board violations of governing documents and less for board discrimination against a few of their neighbors. Sadly they do not accept that one day they may be the recipients of the board's wrath.

In response to owner attempts to unseat them, boards have done such things as: destroyed opposition campaign literature; failed to acknowledge candidate petitions; left opposition candidates off of ballots; declared opposition candidates ineligible because of alleged rule violations; counted ballots themselves in secret (the more "enlightened" ones use friends or spouses); refused to schedule recall elections or refused to accept the outcome of unfavorable elections, etc. When there is only one "party" and it controls all the resources and all the governmental apparatus, there are no checks and balances to protect owners. Their only recourse is an enormously expensive and therefore highly impracticable recourse to the courts. Ironically, the suing owner will pay both sides' legal costs to get simple justice.

It would obviously be far more difficult for boards to behave in an undemocratic manner were it not for the willing complicity of too many association attorneys. These attorneys operate in a manner more correctly characterized as the board president's personal attorney rather than what they are required to be; namely the "association" attorney. The combination of misguided attorneys and uneducated board members with no personal risk for misbehavior is a fatal combination for owner rights.⁴⁷

⁴⁷ Unfortunately for owners, there is far greater profit for an attorney for fanning flames than putting them out. Thus, many times, when owners bring problems to the State and the State informs the association it needs to provide the owners with their minimal rights, the attorney supports the board's position, which is adversarial to owner rights. One would expect that in a business, which the trade group maintains an association is rather than a government, good "business judgment" would compel a board to minimize its legal costs and willingly comply with the law, especially when compliance is free; it benefits its members and disputing it is very expensive. This is compounded when the laws are for the protection of the very owners who run the association and on whose behalf the board members are supposedly exercising good "business judgment." Again, there is no better example than the *Twin Rivers* case. Could one imagine a board spending many hundreds

Although attorneys are bound by the Rules of Professional Conduct to represent the association as an entity and specifically not the Board, many of them have invented a convenient fiction.⁴⁸ They contend as follows: the board runs the association; therefore it is the association ergo whatever the board wants is, by definition, in the interest of the association. By that illogical, but quite profitable fiction, if the board does not want to comply with owners' statutory rights- or the bylaws- that becomes the association's position and it legitimizes spending owner money for legal expenses to pursue that position.⁴⁹ Essentially board members get an attorney to serve their personal interests for a tiny fraction of the cost and attorneys have a satisfied "client" happy to pay whatever they may bill.⁵⁰

of thousands of dollars of otherwise "profits" on lawyers to impose burdens on owners' rights to use their own clubhouse to discuss association concerns- or to stop editing opposing letters to the association newsletter? Any real businessperson would quickly settle the matter since they would not be simply able to pass costs along (as HOA boards are able to through special assessments).

⁴⁸ See generally N.J. RULES OF PROF'L CONDUCT R. 1.13, available at <http://www.judiciary.state.nj.us/rpc97.htm>.

⁴⁹ See MCKENZIE *supra* note 16, at 132. As Professor McKenzie noted "[c]ovenant enforcement litigation has become a profitable legal specialization for attorneys in states with many CIDS." *Id.* He further notes that attorneys also profit from members forced to sue their boards for breach of their fiduciary duties, negligence, abuse of authority, etc. *Id.* While association attorneys handling litigation advised the board of what was necessary, Professor McKenzie queries whether there is a prerequisite disinterestedness on the attorney's part. *Id.*

⁵⁰ As an example, in an association with 300 owners, the board members each pay \$1 an hour of the attorney's \$300 per hour bill. This basic flaw is naturally continued in full force in the UCIOA legislation being advanced by the trade group. Although its bill allows for the removal of board members who refuse to comply with the law- but not with bylaws- it allows for them to appeal any such removals, naturally at the owners' expense. The only adverse consequence to the board member is that he may lose his office. Meanwhile, all his legal fees are paid for by the association. The trade group adamantly opposes any personal fines on corrupt board members. Conversely, they have no objection to having owners pay board-imposed fines, along with both their own and the association's, legal fees.

SOLUTIONS

1. Replace the current passive State Paradigm with an active one beginning at the point that a common ownership development is established.⁵¹

There is a reason this is number one. All the developments in question are creatures of statute. As a consequence, the government has a special responsibility to protect the rights of those living in them. Owners are entitled to and desperately need a willing and activist State agency with the proper authority and responsibility to act publicly for the owners. It is important to recognize that these are two crucial and separate concepts. The designated State agency must act publicly and unequivocally in the owners' best interests. It cannot, as the current agency has, refuse not only to do everything it is statutorily authorized to do, but even refuse to acknowledge what has repeatedly been stated by the legislature and the courts, namely, that the PREDFDA is remedial legislation. Additionally, an effective agency cannot refuse to enforce owners' rights recognized by the courts; especially not the right to fair elections as the agency did in Radburn. Most importantly, no agency can have- or deserves- the owners' trust if it is willing to work behind closed doors with any trade group lobbying in the interests of those profiting off of associations and which actively opposes any meaningful owner rights.

There has been nothing preventing the State from recognizing the impracticality of the current POS, not only from an owner's viewpoint, but also from that of the state reviewers forced to cope with them. Common sense dictates that reviewers forced, under time constraints, to wade through five inch thick piles of paper consisting of pure legalese, searching for problems, are doomed to failure. Note must also be taken of the imbalance in participants. Just as in football, one would not expect even the best 175 pound lineman to consistently block highly motivated opponents weighing 295 pounds, no one can expect employees (often non-attorneys) earning perhaps \$70,000 to successfully do battle with attorneys earning \$250,000 and up when the latter's interest is to prevail with

⁵¹ The solutions are numbered for convenience in referencing them and, except for the first one, do not necessarily reflect their importance.

their clients wishes – which may not be compatible with the owners’ interests. At the least, in this modern age, developers should be required to submit applications in electronic form capable of review with word processing programs. Along with a requirement for form documents, electronic assistance would significantly ameliorate the burden on reviewers. Currently, the considerable imbalance in favor of the development applicant and against those attempting to protect prospective purchaser interests weighs heavily against the public.

To properly fulfill its role of protecting owner rights, the State needs to do things such as: hold press conferences; issue public service announcements; intervene in cases crucial to define owner rights; hold informational meetings around the State at association clubhouses and convenient public venues to solicit owner concerns and provide objective information. Currently the trade group occupies the field without any effective challenge and cooperates with boards seeking to minimize owner input and rights. As a result the only source of information to owners is that of a group serving its own special interests-which are too often diametrically opposed to those of owners.⁵²

2. With 30 years’ experience reviewing planned developments, the State is long overdue in preparing and distributing a simple functional brochure to prospective purchasers that actually educates them about the nature of association living and provides them with necessary information including where to go to seek help. In addition to informing owners, the State must provide for mandatory objective education for owners elected to the board to inform them of their obligations and owner rights.⁵³ The State must do this in

⁵² One of the first things to eliminate is allowing any trade group to include its fees in initial association budgets. If not prohibited outright, at least owners should be allowed to vote on whether to allow the board to pay such fees. If they failed to get their fees into the initial budget, it is not uncommon for a property manager trade member to simply include them as “routine” expenses. After all, there is no objective education to allow board members to protest. One wonders if the trade group informed owners of its fees while railing against legislation having a two-dollar annual fee to protect owners.

⁵³ To anticipate, and therefore eliminate, the effect of two immediate trade group objections; this will not be a year-long course, nor will it cost thousands of dollars. Rather it would occupy a few hours at a local community college or at

conjunction with recognized independent educational institutions such as state and county colleges that have no financial interest in association operations.

3. The State must develop standard association governance documents that could be revised by owners once they assume control. One of the first should be a standard association budget.⁵⁴ If other POS documents were standardized, reviewers could focus on specific project issues rather than starting from scratch on every application. Standard documents would have the additional effect of aiding developers by streamlining the approval process and reducing their costs. Although standardized, if necessary developers could modify them and, by specifically noting changes, State reviewers would save the current time necessary to read all of documents (approximately five inches thick) as they must do presently.

4. The Legislature needs to revise statutes in accordance with actual owners' experiences over the past 30 years and as documented in its own Task Force Report, which highlighted many of the problems.⁵⁵ These revisions must protect owners from documented and anticipated board abuses, especially in the areas of conflicts of interest, disclosures, bidding, record access and proper use of the association attorney.⁵⁶ Because experience amply demonstrates that neither the legislature nor

one of the numerous adult education courses offered at local schools and cost less than one hour of their standard hourly rates. Most importantly, it must be an objective course and not a course developed and taught by fellow trade group members-as in Florida, as its Ombudsperson related at the Conference.

⁵⁴ Considering that NJSA 40A:5-48 (2007) mandates the same format for all of New Jersey's widely disparate municipalities, all of which have financial considerations far more complicated than any association, this should not be a difficult task.

⁵⁵ See ASSEMBLY TASK FORCE TO STUDY HOMEOWNERS' ASSOCIATIONS, *supra* note 39.

⁵⁶ Although the legislature does not regulate attorneys, it can and should impose conditions on a board's use of them without owner approval. Owners must be allowed to determine whether they want to pay for attorneys to oppose their own interests.

any regulatory agency can expect uniform good faith compliance, statutes and necessary implementing regulations must be carefully and comprehensively drafted if they are to result in compliance.⁵⁷

5. A truly owner-protective statute must establish a clear separation of the developer from the owners' association. The developer controls the development- he cannot control the owner's association nor should he be allowed to act as or in the name of the association. This will avoid all confusion between acts of the developer and acts of the association. Additionally, because the developer has the right to control the development until 75% of the units are sold, any rules he wants (other than those infringing on constitutional rights) to enable him to market the property should be permitted. Once all the units are sold, or the developer has ceased to market units or an unreasonable time has elapsed, all developer rules (except those few expressly excepted by the State as necessary) should expire. Thereafter the only rules imposed on the owners will be those the owners themselves specifically and individually voted into effect.

6. A dedicated, energetic and owner protective State regulatory agency should be created, empowered to enact regulations to provide necessary details in or for such areas as governance (election procedures, voting, passing rules, etc), record access and dispute resolution. The absence of any such regulations, especially in light of N.J. STAT. ANN. 45:22A-48, is further evidence that the current agency has failed to meet the owners' needs.

7. Appropriate State regulators, in conjunction with independent educational institutions (such as the Bloustein Center for Government Services), should formulate standard

⁵⁷ To illustrate, Section 14(k) of the Condominium Act requires associations to provide a fair and efficient procedure for the resolution of disputes. N.J. STAT. ANN. § 46:8B-14(k) (West 2007). One notable trade group attorney refused to acknowledge that the statute required the procedure to be described in any authoritative writing. The due process implications of either an unwritten procedure, or one a board can secretly change at will, are obvious and severely detrimental to owner rights.

governing documents for associations and mandate them as initial documents.

8. To properly recognize the owners' true right of self-determination, owners must be allowed to impose restrictions on themselves that they vote for, pursuant to appropriate regulatory guidance. It is the owners themselves who should decide what rules to live by. The rules they decide to impose on themselves are simply, obviously and literally, none of the developer's business.⁵⁸ Most importantly, owners should not be required to undertake the heavy burden of organizing themselves to overturn existing developer-imposed restrictions.⁵⁹ If owners believe a restriction or rule is important let them vote for it or lose it. Equally important, any regulatory or statutory provision must prohibit "wholesale" adoptions of the existing rules, as the trade group would undoubtedly urge. Let the owners read and evaluate the long list of restrictions on their freedom and agree- or disagree- with them each in turn. The notice this would provide alone is worth the exercise.

9. Provide effective State oversight. To be effective, the State must be empowered to remove Board members found to have acted contrary to law, to association governing documents as well as for violations of election regulations, ethical restrictions, etc. Moreover, if the association bylaws allow the board to fine owners- fines should be imposed individually on culpable board members who refuse to correct their behavior or who are found culpable of having knowingly committed wrongful acts. Crucially, a board member under charges should be denied the

⁵⁸The best analogy I have heard about this, which applies to this entire area, is attributable to a radio host Shu Bartholomew (SP) observed in her program "On the Commons" that when our founding fathers were writing the Declaration of Independence and the Constitution they did not feel bound by the wishes of, nor did they seek the advice of, King George the Third.

⁵⁹ In answer to the trade group's protestations that many restrictions won't be enacted- welcome to true democracy. If the board with all its resources cannot convince owners to saddle themselves with numerous onerous restrictions, then why should such restrictions be imposed? In democracy we have accepted that people are competent to govern themselves. Moreover, if the owners should subsequently determine that a previously rejected restriction should be adopted, they could easily do so.

right to use the association attorney to oppose the action. In fact, a true “association” attorney would be supporting the action to rid the association of a board member demonstrating improper behavior. If the association insurer will not participate on the board member’s behalf, the member should provide for his own defense subject to reimbursement only if he successfully rebuts all the charges.⁶⁰

The trade group opposes all attempts at holding board members effectively accountable (they naturally support either State or owner actions which will either employ board attorneys or be too costly for owners to pursue). Ostensibly the basis for such over-protectiveness of board members is that true accountability deters people from volunteering. In contrast, experience has shown many board members’ desire to remain on the board can be viewed as an “unrelenting hunger” for recognition and special treatment.⁶¹ Additionally, the lack of volunteers is often a byproduct of the way the association itself is established and run. It has been observed that homeowners are not naturally or inherently apathetic. Rather, they are “browbeaten, penalized, erroneously charged and invoiced, ignored and silenced into apathy. Contrary to what one might have heard, American homeowners *want* to participate in how their association is run but they are effectively and very calculatingly prevented from that participation.”⁶²

⁶⁰ Inevitably, any attempt to hold any board member actually accountable leads to vociferous protestations from the trade group. Their argument is that this will eliminate volunteers. First, judging by the extremes to which board members go to cling to their positions- especially board presidents, this is a blatant bluff. Secondly, if the board member’s condition of service is to be able to violate owner rights, the bylaws and laws as well as their fiduciary obligations with impunity, who wants them? Finally, one trusts that board members subscribing to this position have turned in their driver’s licenses. The police can stop them at any time and charge them with a violation leading to a fine-or worse. Most importantly, the police are not generally inclined to issue a warning to them after they’re caught speeding past the clearly posted speed limit sign. A board member should know his obligations and, if not, he will be informed. If he thereupon refuses to comply- why should he not be penalized? On the topic of fines, one must note that the trade group has no such concern for any owners the board chooses to penalize.

⁶¹ See VANITZIAN & GLASSMAN, VILLA APPALLING, *supra* note 17, at 428.

⁶² *Id.* at 100.

10. Board powers must be limited to those absolutely necessary to manage common property and protect owners' interests. This is in stark contrast to current statutes that provide boards with broad powers. While boards must be afforded legitimate "business judgment" leeway, they should be constrained in the area of governance decisions. The fact that statutes and courts do not currently consistently reflect that associations are governmental entities should not prevent measuring a board's conduct against the appropriate standard. That is, when a board is exercising judgment, it must adhere to business judgment standards. However, when it acts in its governmental capacity, such as when passing an enforcing rules, it must be held accountable to governmental principles, not the business judgment rule. Boards should have no power to impose personal restrictions on owners without the owners' open and knowing consent as evidenced by an owner vote. It is also critical that owners be given the right to decide on all expenditures that are significant in the context of their association's budget and for all capital improvements regardless of the cost. Association bylaws should set specific dollar limits on board expenditure authority proportionate to the overall budget.

Currently, boards have virtually unlimited powers- especially when one considers that the owners must seek court action to stop boards from violating their own bylaws or statutes.⁶³ The limit on board authority should specifically include use of (what should be known as) the "owners' attorney." For example, other than in defense of third party actions, suits on contracts or for collections, the owners must be allowed to decide whether they

⁶³ Far too much emphasis is placed on broad grants of power under Title 15A and the Condominium Act and not enough on Section 44(b) which states that an association "shall exercise its powers and discharge its functions in a manner that protects and furthers the health, safety and general welfare of the residents of the community." N.J. STAT. ANN. § 45:22A-44(b) (West 2008). Note that the Condominium Act provides a different and lesser standard, namely: "[a]n association shall exercise its powers and discharge its functions in a manner that protects and furthers or is not inconsistent with the health, safety and general welfare of the residents of the community." N.J. STAT. ANN. § 46:8B-14(j) (West 2007) (emphasis added). The latter language benefiting boards and not owners is obviously preferred by the trade group and is repeated in its UCIOA.

want to incur legal fees. Since it is the owners who pay, it should be they who decide. As noted above, this is especially important with regard to use of the association attorney if the board wishes to contest State orders issued to protect owner rights.⁶⁴

11. Provide for independent oversight to ensure fair elections. As the Appellate Division found in *Twin Rivers* that the PREDFDA Supplement mandates, any owner-generated appeal should be simplified. Presently, pursuant to the Nonprofit Corporations and Associations Act, summary proceeding is required in Superior Court.⁶⁵ This is beyond the ability of owners who cannot afford counsel.

12. Change the nomenclature for boards- they should be called exactly what they are. They are neighbors elected to manage common elements and enforce community-adopted rules. They are not members of some grandiose “Board of Directors.” An appropriate title for them would be something like “Members of the Governance Committees” and the lead person elected by ones’ neighbors should be the “Committee Chairperson” - NOT the President of the Board of Directors (an actually absurd title in a neighborhood association).⁶⁶ Associations are only nonprofit corporations as a structural necessity because no other form currently exists to provide

⁶⁴ One expects that this will draw the loudest and most extreme protests from the trade group attorneys since it will cut heavily into their easy profits. Instead of convincing a few compliant board members of the desperate need to incur legal expenses, they would have to convince the owners. Again, welcome to actual democracy. Owners are not likely to be easily persuaded to pay tens or even hundreds of thousands of dollars for legal action against their own interests- as for example to pursue actions to avoid the board having to comply with owner rights.

⁶⁵ N.J. STAT. ANN. § 15A: 5-23 (West 2007).

⁶⁶ Other states have not seen grandiose terms as necessary for those governing common ownership associations. For example, in Maryland’s Montgomery County, they are referred to in general as Common Ownership Community boards; as the “Council of Unit Owners” in Condominiums. In homeowners’ associations they are the “Governing Body” and only in cooperative housing corporations are they the “Board of Directors” Montgomery County Code 10B-7.

necessary legal protection to this relatively new neighborhood configuration.⁶⁷

The corporate terminology in an association context facilitates confusion between acts that are governmental – such as enacting rules and penalizing people – with strictly corporate ones. However, considering the similarity of the actions taken by associations and municipalities, the fact that one is accepted as governmental and the other not, appears to be an illogical distinction. In any event, those elected by their fellow neighbors to hire landscapers should not be unnecessarily elevated simply because they live in an association. Logically, the less separation from being another neighbor- the less the encouragement for the abuses of power that are currently rampant.

13. Empower and encourage a suitable state entity to sue on behalf of owners in deserving, far-reaching cases to create a body of comprehensive case law supporting general owner rights. Currently case law is a haphazard compilation useful only to the owner with particular problems and sufficient financial resources. No doubt many owners with far better cases are left without redress due to a lack of resources. Ideally, once a body of reliable case law is established, the legislature should provide counsel fees for owners who are compelled to sue their board for deficiencies. Such fees should be contingent on establishing a case that the board failed to comply with its obligations and proof that the board was provided notice of the deficiency prior to the suit and did not take appropriate action to remedy the deficiency or agree voluntarily to comply.

14. The State needs to convene a panel including municipal and developer representatives to address the current widespread municipal practice of mandating an association in developments with *de minimus* common areas. It is not uncommon for municipalities to require a developer building a few homes to form a homeowner’s association to maintain a simple detention basin. In addition to being an unnecessary response to a minor concern, it saddles all the owners in perpetuity with another

⁶⁷ Notably, our municipalities are called “municipal corporations” but they are led by Mayors and Councilpersons and not Presidents of Boards of Directors, etc.

layer of government- or at least another entity to maintain and obey. Notably, passage of the Municipal Services Act⁶⁸ should have signaled an end to attempting to use common area developments as a means to eliminate normal municipal services. One shudders to think of all the existing home developments that would be associations if this mentality had existed 50 years ago. There are other methods to ensure that taxpayers are not burdened with private property maintenance without forming an association (such as by dedication, or establishing trusts or simply by special improvement assessments to account for the services).

15. Provide for State licensing or certification of, and oversight of, property managers to ensure both competency and accountability. Currently, anyone can present himself or herself as a property manager and owners have no venue to lodge complaints against unscrupulous managers. Without standards of conduct, good managers are at a disadvantage to those lacking any moral compass. There have been cases in which boards fired a competent, experienced property manager and hired one of their unqualified fellow board members to take the position. Presumably conflict of interest rules would prohibit such ill-advised actions. With standards, property managers will also have a basis to resist hiring relatives or companies wishing to “share” profits.

In enacting solutions the aim should be to remain true to the fundamental truth that democracy depends upon the informed, freely given consent of the governed. This includes the necessary corollary that people must be educated to allow them to properly exercise their vote. In the current situation there is not, nor can there be, any meaningful requisite consent to the contracts of adhesion imposed by developers with the State’s imprimatur. In the absence of a loyal opposition party in associations or any of the checks and balances expected in a democracy, such as an independent press and judiciary, special precautions must be provided to protect owners from board abuses.

Equally important, we must not lose sight of the central concept of democracy, namely that people can best decide for

⁶⁸ N.J. STAT. ANN. § 40:67-23.2 et. seq. (West 2007).

themselves what rules they should live under. This is in stark contrast with, for example, communism, the fundamental tenant of which is that people cannot be trusted and a central party should set the rules for them. Unfortunately, the latter has thus far been our model in the case of homeowner associations, with the developer playing the role of the party. We need to provide the requisite safeguards for owners at the outset to allow democracy to take root and flourish in associations if specific solutions are to have a positive effect. The simple fact of sharing property should not be the basis for lessening people's rights to self-government and self-determination.