

The Homeowner Association: A Descent Into Dante’s Inferno Palliated By A Summons To Improve The Hate-Hate Relationship Through Transparent Disclosures

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Abstract

Homeowner associations (“HOAs”) operate under a cloak of secrecy where innocent and unwitting owners have money extracted from their wallets, and then are subjugated to the dominion of potentially wasteful and extravagant expenditures authorized by condescending HOA board members. This article identifies three significant weaknesses under existing HOA law and proposes solutions to each problem in an effort to improve HOAs through methods of legally mandated transparency. Requiring public access to HOA budgets will enable owners to engage in meaningful comparative analysis, outside of an information vacuum, and help owners to ascertain if the HOA is operating efficiently and effectively. Requiring affirmative disclosure of the sum and identity of persons receiving more than \$500 per year will illuminate exactly who is receiving money from the HOA, and how much. Lastly, requiring HOA directors to disclose

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gifts from, and all dealings with persons who receive any money from the HOA will help to deter conflicts of interest and self-dealing, without the need for innocent owners to invoke audit rights or litigation to extract such information.

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I. INTRODUCTION AND CONTEXTUAL OVERVIEW OF HOMEOWNER ASSOCIATIONS (HOAs)

Homeowner associations (“HOAs”) are prolific throughout the nation.¹ HOAs began, in part, as a means for privileged individuals to

1. See *About HOA-USA*, HOA-USA, <https://hoa-usa.com/about/> (last visited Mar. 29, 2023) (“There are over 370,000 homeowner associations in the United States. Collectively, this represents over 40 million households (over 53% of the owner occupied households in America.)”); *HOA Statistics*, IPROPERTYMANAGEMENT, (Oct. 9, 2022), <https://ipropertymanagement.com/research/hoa-statistics> (“Homeowners’

exclude historically marginalized groups. “Early on, private restrictions in some developments were aimed at creating enclaves for the privileged by community beautification, as well as social and racial segregation.”² In the modern era, HOAs are marketed as establishing desirable communities³ through the imposition of covenants, conditions, and restrictions (“CC&Rs”)⁴ and rules⁵ in a neighborhood, with the purported outcome of enhancing quality of life and property values.⁶ To help accomplish this unsubstantiated and unproven utopian

associations in the United States manage 355,000 communities, with an average of 22 new associations forming daily. 82.4% of newly constructed homes sold in 2021 were part of HOA communities. 53% of all homeowners live in HOA communities.”).

2. James L. Winokur, *Critical Assessment: The Financial Role of Community Associations*, 38 SANTA CLARA L. REV. 1135, 1136 (1998).

3. See *Nahrstedt v. Lakeside Vill. Condo. Ass’n.*, 878 P.2d 1275, 1279 (Cal. 1994) (“Today, condominiums, cooperatives, and planned-unit developments with homeowners associations have become a widely accepted form of real property ownership. These ownership arrangements are known as ‘common interest’ developments. The owner not only enjoys many of the traditional advantages associated with individual ownership of real property, but also acquires an interest in common with others in the amenities and facilities included in the project.”); see also *Top 8 Benefits of Living in a Well Managed Homeowners Association*, PS MANAGEMENT, <https://psprop.net/hoa-management/top-8-benefits-of-living-in-a-well-managed-homeowners-association/#> (last visited Mar. 29, 2023); Valerie Kalfrin, *HOA Pros and Cons for Homebuyers: Rules, Fees, and Perfect Lawns*, HOMELIGHT, (Dec. 23, 2019), <https://www.homelight.com/blog/buyer-hoa-pros-and-cons/>.

4. See *CC&Rs Defined*, ADAMS STERLING PRO. L. CORP., <https://www.davis-stirling.com/HOME/C/CC-Rs-Defined#axzz1iyQyFe00> (last visited Mar. 29, 2023). See also UNIF. COMMON INT. OWNERSHIP ACT, § 2-101 (NAT’L CONF. OF COMM’RS ON UNIF. STATE L. 2021) [hereinafter UNIFORM ACT]; and CAL. CIV. CODE § 4250 (West 2014).

5. See *Adopting and Amending HOA Rules*, ADAMS STERLING PROFESSIONAL LAW CORPORATION <https://www.davis-stirling.com/HOME/A/Adopting-Amending-HOA-Rules> (last visited Mar. 29, 2023). See also UNIFORM ACT, § 3-120; and CAL. CIV. CODE §§ 4340 (West 2014), 4355 (West 1994), and 4360 (West 2019).

6. See *Top 8 Benefits of Living in a Well Managed Homeowners Association*, PS MANAGEMENT, <https://psprop.net/hoa-management/top-8-benefits-of-living-in-a-well-managed-homeowners-association/#> (last visited Mar. 29, 2023); Valerie Kalfrin, *HOA Pros and Cons for Homebuyers: Rules, Fees, and Perfect Lawns*, HOMELIGHT (Dec. 23, 2019) <https://www.homelight.com/blog/buyer-hoa-pros-and-cons/>.

vision,⁷ buildings or neighborhoods controlled by HOAs are subject to the imposition of HOA dominion via CC&Rs upon the underlying property⁸ as well as ad hoc rules and regulations.⁹ This exercise of dominion and control, administered by a Board of Directors or Executive Board (“Board of Directors”)¹⁰ is purportedly undertaken in

7. See Christopher C. McChesney, *Examining ROI and Time on Market Differences for Various Levels of Homeowners’ Associations* (Feb., 2009) (Ph.D. dissertation, Northcentral University) (ProQuest) [hereinafter McChesney] (This research indicated, in a sample of 1,559 dwellings in five cities from five states, that: (a) there was no statistically significant difference in return on investment (ROI) between homeowners’ association dwellings and non-homeowners’ association dwellings; and (b) there was no statistically significant difference in return per square foot between homeowners’ association dwellings and non-homeowners’ association dwellings; and (c) there was no statistically significant difference in the length of time on the market for homeowners’ association versus non-homeowners’ association dwellings). See also Armand Arabian, *Condos, Cats, and CC&Rs: Invasion of the Castle Common*, 23 PEPP. L. REV. 1, 1–2 (1995) (“The American dream of owning a home usually brings with it the assurance of a peaceful retreat from the demands of the outer world, including its constraints on many lifestyle choices. For those who purchase a condominium or similar residence in a planned development community, however, the expectation of protective insulation is often not realized. Such individuals are subject to the covenants, conditions, and restrictions (CC&Rs) contained in the development’s declaration or in the bylaws of its homeowners association (HOA). These restrictions not only impose limitations on conduct in common and publicly visible areas but they also often dictate basic aspects of a resident’s mode of living within the privacy of his or her own unit. A development’s rules and regulations are commonly enforced by the association’s board of directors, which holds substantial sway over the financial and property interests of residents. Many owners may be completely unaware of such a possibility when purchasing their units. Only after they have moved in and settled down do they discover that the development declaration contains a host of intrusive restrictions affecting their daily lives, including, quite possibly, the prohibition of household animals. Even when pets are confined entirely to an owner’s unit and do not impair the quiet enjoyment of others, the board, on behalf of the association, can institute enforcement proceedings and impose substantial fines pending capitulation. In most states, the legal system will uphold such actions in all but the most egregious of circumstances.”).

8. See *supra* note 4 and accompanying text.

9. See *supra* note 5 and accompanying text.

10. See UNIFORM ACT, *supra* note 4, §§ 3-101-03 (“3-103. EXECUTIVE BOARD MEMBERS AND OFFICERS. (a) Except as otherwise provided in the declaration, the bylaws, subsection (b), or other provisions of this [act], the executive board acts on behalf of the association”); CAL. CORP. CODE §§ 5047 & 7210 (West

2016 & 1980). “Each corporation shall have a board of directors. Subject to the provisions of this part and any limitations in the articles or bylaws relating to action required to be approved by the members (Section 5034), or by a majority of all members (Section 5033), the activities and affairs of a corporation shall be conducted and all corporate powers shall be exercised by or under the direction of the board. The board may delegate the management of the activities of the corporation to any person or persons, management company, or committee however composed, provided that the activities and affairs of the corporation shall be managed and all corporate powers shall be exercised under the ultimate direction of the board.” *Id.* § 7210. *See also Boards of Directors*, ADAMS STERLING PRO. L. CORP., <https://www.davis-stirling.com/HOME/B/Boards-of-Directors#axzz1p9SVRJ2G> (last visited Mar. 29, 2023).

the interest of fulfilling the goals of the HOA.¹¹ With the powers vested in the HOA Board of Directors to regulate behavior,¹² impose

11. *See generally*, McNally v. Sun Lakes Homeowners Ass’n, 382 P.3d 1216, 1217 (Ariz. Ct. App. 2016) (“The Association is managed by a seven-member Board. Members of the Board are elected by Association homeowners for three-year terms.”); Lake Lindero Homeowners Ass’n v. Barone, 306 Cal. Rptr. 3d 90, 96 (Cal. Ct. App. 2023), *review denied* (June 14, 2023) (“The Association is a California non-profit corporation charged with operating the Lake Lindero development—a 459-lot common interest development and golf community located in Agoura Hills. The Association common areas include a golf course, driving range, tennis courts, pool, restaurant, pro shop, and a lake. Membership in the Association is appurtenant to ownership of a lot within the development. The Association is governed by a five-member uncompensated board of directors.”); 68 PA. CONS. STAT. § 3303 (2023) (“(a) Powers and fiduciary status. Except as provided in the declaration, the bylaws, in subsection (b) or other provisions of this subpart, the executive board may act in all instances on behalf of the association. In the performance of their duties, the officers and members of the executive board shall stand in a fiduciary relation to the association and shall perform their duties, including duties as members of any committee of the board upon which they may serve, in good faith in a manner they reasonably believe to be in the best interests of the association and with such care, including reasonable inquiry, skill and diligence, as a person of ordinary prudence would use under similar circumstances.”); N.C. GEN. STAT. ANN. § 47F-3-103 (2006) (“(a) Except as provided in the declaration, in the bylaws, in subsection (b) of this section, or in other provisions of this Chapter, the executive board may act in all instances on behalf of the association. In the performance of their duties, officers and members of the executive board shall discharge their duties in good faith.”); Moretto v. ELK Point Country Club Homeowners Ass’n, 507 P.3d 199, 201 (Nev. 2022) (“Respondent Elk Point Country Club Homeowners Association, Inc. (hereinafter EPCC), is the governing body of the Elk Point subdivision, a common-interest community located at Lake Tahoe’s Zephyr Cove, in Douglas County, Nevada. EPCC was initially established in 1925 to manage land owned by the Northern Nevada chapter of the Elks Club. At that time, the land was held as a vacation area for local Elks Club members. Beginning in 1929, EPCC began selling individual lots within the subdivision. Since then, the subdivision has consisted of both individual lots held in private ownership and common property held by EPCC for the benefit of all individual property owners within the community. EPCC has retained control of the operation of common areas and facilities within the community. EPCC, as part of its management structure, has both articles of incorporation and bylaws. Like most bylaws, EPCC’s bylaws set forth the governing rules by which EPCC operates, including establishing a five-person executive board tasked with managing the affairs of the community. Also included in its bylaws is a provision giving EPCC’s executive board the power to adopt rules and regulations necessary to carry out its powers.”).

12. *See generally*, CONN. GEN. STAT. ANN. § 47-261b (West 2023) (“(f) An association may adopt rules that affect the use of or behavior in units that may be used

for residential purposes, only to . . . (2) Regulate any behavior in or occupancy of a unit which violates the declaration or adversely affects the use and enjoyment of other units or the common elements by other unit owners”); *Kaung v. Bd. of Managers of Biltmore Towers Condo. Ass’n*, 873 N.Y.S.2d 421, 431 (N. Y. Sup. Ct. 2008), *aff’d*, 895 N.Y.S.2d 505 (2010) (“Under the Governing Documents, Unit Owners elect members of the Board of Managers who are empowered to supervise the property and manage the affairs of the condominium (By-Laws, Article II, § 1). The Board’s powers include . . . the adoption and amendment of the Rules and Regulations covering the details of the operation [This] rule regulates the behavior of Unit Owners or residents by preventing the marring of the exterior appearance of the building by a plethora of aerals protruding from the residents’ windows.”); and *McMahon v. Pleasant Valley W. Ass’n*, 952 A.2d 731, 734 (Pa. Commw. Ct. 2008) (“ . . . McMahon has shown that the Association had the authority, through its declaration and the UPCA, to regulate the Conklins’ behavior in maintaining their dogs and to enforce such regulations through, for example, written warnings, fines, or restrictions on the use of common facilities” *See also*, Robin Miller, *Annotation, Restrictive Covenants or Homeowners Association Regulations Restricting or Prohibiting Flags, Signage, or the Like on Homeowner’s Property as Restraint on Free Speech*, 51 A.L.R.6th 533 (2010). *See generally infra* notes 16-27 and accompanying text.

sanctions,¹³ and assess fees,¹⁴ the HOA is tantamount to an omniscient, omnipresent, and omnipotent deity.

13. *See also* *Cocks v. Swains Creek Pines Lot Owners Ass’n*, No. 20200961-CA, 2023 UT App LEXIS 97 (Utah Ct. App. Aug. 24, 2023). *See generally* *King v. Chism*, 632 S.E.2d 463, 465 (Ga. Ct. App. 2006) (“In the instant case, the Declaration states that ‘[t]he owners and occupants shall comply strictly with the Declaration, the By-Laws, and the rules and regulations contained in or promulgated in accordance with the Declaration or By-Laws.’ In the section of the bylaws pertaining to the powers and duties of the board of directors of the Association, it states: ‘The Board of Directors shall manage the affairs of the Association and shall have all the powers and duties necessary for the administration of the condominium The Board shall have the power to adopt such rules and regulations as it deems necessary and appropriate and to impose sanctions for violations thereof, including without limitation, monetary fines.’ Therefore, the Declaration itself contemplates the creation of rules and regulations in accordance with the Declaration or bylaws and that owners shall comply with these rules. Furthermore, OCGA § 44-3-76 requires that unit owners comply with the Association’s rules and regulations.”); *Bixeman v. Hunter’s Run Homeowners Ass’n of St. John*, 36 N.E.3d 1074, 1078 (Ind. Ct. App. 2015) (“Hunter’s Run willingly agreed to the process of assessing sanctions that included ten days’ notice. If it did not want to or was unable to follow the process, it could have declined to assess the sanctions. However, if it wished to impose the sanctions, it was obliged to follow the process outlined in the covenants to which it and the homeowners, including the Bixemans, had agreed.”); *Walker v. Windsor Ct. Homeowners Ass’n*, 827 N.Y.S.2d 214, 216 (N.Y. App. Div. 2006) (“Pursuant to Article VI, Section 5 of the Declaration of Covenants, Restrictions, Easements, Charges and Liens for Windsor Court (hereinafter the Declaration), the Board can impose a lien on the property of a homeowner in the development for unpaid assessments. As is clear from Article VI, Section 3 and 4 of the Declaration, the term ‘assessment’ has its standard definition of a charge against real estate made by an association to cover maintenance and operating expenses. The Board thus was entitled to impose a lien on property for unpaid assessments but not for unpaid fines, which are sanctions imposed for failure to comply with the WCHA Rules and Regulations.”); UTAH CODE ANN. § 57-8a-213 (West 2011) (“(1)(a) The board shall use its reasonable judgment to determine whether to exercise the association’s powers to impose sanctions or pursue legal action for a violation of the governing documents . . .”).

14. *See generally* *Watts v. Oak Shores Cmty. Ass’n*, 185 Cal. Rptr. 3d 376, 378 (Cal. Ct. App. 2015) (“Here we hold, among other things, that homeowners associations may adopt reasonable rules and impose fees on members relating to short-term rentals of condominium units.”); *Bangerter v. Hat Island Cmty. Ass’n*, 504 P.3d 813, 814–15 (Wash. 2022) (“Matt Surowiecki Sr. sued the Hat Island Community Association (HICA), arguing, among other things not before us, that HICA violated its governing documents by not charging assessments on an equitable basis. We conclude that HICA’s governing documents grant the association broad discretion in setting assessments and that the association’s decision on assessments is entitled to

“Here it comes, the hate train.”¹⁵ HOAs are often riddled with CC&RS and rules that contain subjective standards as to beauty, color, or other conformity.¹⁶ These subjective standards invite not only the imposition of non-objective, personal interpretations of colors, styles, appearances, and beauty, but also introduce disparate impact.¹⁷ For

substantial deference. Here, the association’s elected board of trustees made the decision to raise funds through a combination of use-based fees and per-lot assessments as authorized in its governing documents.”); *Zerquera v. Centennial Homeowners’ Ass’n*, 721 So. 2d 751, 752 (Fla. Dist. Ct. App. 1998) (“Zerquera first maintains that the Association did not have the authority to assess fines against him based upon violations of the amended covenants, because he purchased his property before the covenants were amended. We conclude that the grantor exercised its right to amend the covenants in a reasonable manner. Thus, the amended covenants are valid and enforceable against Zerquera.”).

15. CRIME, HATE TRAIN (Rainbo Records 2007).

16. See Sharon L. Bush, *Beware the Associations: How Homeowners’ Associations Control You and Infringe Upon Your Inalienable Rights!!*, 30 W. ST. U. L. REV. 1, 1 (2003) (“They can dictate the color of your home. They can place a lien on your property and foreclose on it. They can tell you the type and height of your fence and when to repair your roof. Imagine an invasive private form of government that can do all of the above and can also tell you whether you can have a basketball hoop over your garage, or even how long you can keep your garage door open. ‘They’ exist. ‘They’ are called homeowners’ associations. They are alive and their presence threatens homeowners everywhere.”); Hannah Wiseman, *Public Communities, Private Rules*, 98 GEO. L.J. 697, 725 (2010) (“Under the rules and regulations adopted by the homeowners’ association, homeowners wishing to change the color of their fence must submit a ‘request for painting or staining fences’ to the design review committee, and fence colors must ‘harmonize with surroundings.’ ‘[D]og houses must be reasonably isolated and adequately screened from adjacent properties, and located in the rear or side yard,’ and their design must first be approved by the committee. All new trees that are planted must be at least 2.5 inches in circumference, and willows, poplars, box elders, Siberian elms, and silver maples are prohibited.”); Patrick K. Hetrick, *Of “Private Governments” and the Regulation of Neighborhoods: The North Carolina Planned Community Act*, 22 CAMPBELL L. REV. 1, 44 (1999) (“A homeowners’ association revises rules and regulations to reflect new aesthetic standards for the planned community. These new standards include the requirement of prior approval from an aesthetic committee on matters such as paint colors, design and location of fences, and landscaping in front yards. Subject to case law dealing with the reasonableness of esthetic standards, the association appears to have the statutory power to revise its rules and regulations.”).

17. See Richard R.W. Brooks, *The Banality of Racial Inequality*, 124 YALE L.J. 2626, 2638 (2015) (“Roithmayr takes homeowners’ associations to be ‘the poster children for racial cartels.’ Chicago’s homeowners’ associations were ‘a model in

example, there is a requirement to be “completely dressed at any and all times”¹⁸ It is unclear from the rule what constitutes being completely dressed, and whether the rule is limited to common areas. Window shades trigger prolific regulation, including requirements to be “uniform in color and physical appearance”,¹⁹ “white, off-white, or light beige”,²⁰ or “of a neutral . . . color”²¹ The ability to place a doormat at the entry way, a wreath on the door, or a mezuzah²² at the door is conditioned upon subjective scrutiny and prior approval

efficient racial exclusion’ she writes, ‘[t]ightly coordinated, well run, and legally armed with the restrictive covenant.’”); David L. Callies, *Public and Private Land Development Conditions: An Overview*, 52 J. MARSHALL L. REV. 747, 748 (2019) (“Private land use controls, in the form of the ubiquitous conditions, covenants and restrictions (CC&Rs), increasingly control the form, if not the pace, of development. Attached for decades to the plat of subdivision filed with local government authorities for public subdivision approval, CC&Rs form the basis for the land use controls—indeed governance—of nearly all common interest communities, whose numbers grow exponentially with each passing year. In many parts of the country, it is increasingly difficult for prospective homeowners to find housing outside such communities, severely limiting, if not destroying, the choice-of-location option that underlies the freedom to privately enforce the elements of such CC&Rs without public oversight. The covenanted community in the United States raises various concerns including exclusion, social fabric and the like.”).

18. *Rules and Regulations, CASA BELLE II HOMEOWNERS ASS’N*, *2 <https://www.visioncommunitymanagement.com/media/vcmdocs/1378154.pdf?64e115ac61bd4> (last visited Sept. 1, 2023).

19. *Id.* at 5.

20. 2200 PACIFIC HOMEOWNERS ASS’N, AMENDED AND RESTATED DECLARATION OF COVENANTS, CONDITIONS AND RESTRICTIONS § 7.4.5 at 30 (San Francisco Assessor-Recorder 2014).

21. PACIFIC PLACE, DECLARATION OF CONDITIONS, COVENANTS AND RESTRICTIONS OF PACIFIC PLACE, A CONDOMINIUM PROJECT § 7.12 at 35 (San Francisco Assessor-Recorder 2001). This provision was in effect from 2001 until 2011, at which time the restriction was changed to “white or off-white color, unless expressly approved in writing by the Board.” PACIFIC PLACE, FIRST AMENDED AND RESTATED DECLARATION OF CONDITIONS, COVENANTS AND RESTRICTIONS OF PACIFIC PLACE, A CONDOMINIUM PROJECT § 3.20 at 16 (San Francisco Assessor-Recorder 2011).

22. A mezuzah is a religious object in the Jewish faith, customarily affixed to the door entryway. *See generally* UNION FOR REFORM JUDAISM, *What Is a Mezuzah? Why and How Do We Use It?* <https://reformjudaism.org/beliefs-practices/lifecycle-rituals/what-mezuzah-why-and-how-do-we-use-it> (last visited Sept. 1, 2023); WIKIPEDIA.ORG, *Mezuzah*, <https://en.wikipedia.org/wiki/Mezuzah> (last visited Sept. 1, 2023).

at the sole discretion of the HOA Board or its subcommittees through restrictions which forbid any “doormat, door covering, or decoration . . . except as may be approved by the Architectural Review Committee or pursuant to Rules adopted by the Board.”²³ Restrictions against subjectively “offensive activities”²⁴ exist, coupled with a prohibition of “excessive noise . . . from voices”²⁵ as well as rules regarding “odor emissions from a Unit.”²⁶ Once imposed, subjective standards create opportunities for selective enforcement, where one homeowner is singled-out, challenged, persecuted, harassed, and tormented with demands for strict compliance under the standards of interpretation imposed by the HOA Board of Directors, while other, more beloved homeowners who are venerated members of the in-crowd clique, are left unscathed and untouched by the havoc and terror inflicted by the HOAs’ selective demeanor.²⁷ If, in the opinion of the governing HOA

23. WATERMARK HOMEOWNERS ASS’N, AMENDED AND RESTATED COVENANTS, CONDITIONS AND RESTRICTIONS at 66 (San Francisco Assessor-Recorder 2018).

24. See 2200 PACIFIC HOMEOWNERS, *supra* note 20, § 5.13, at 20.

25. *Id.*

26. *Id.* § 5.14.

27. Hannah Wiseman, *Public Communities, Private Rules*, 98 GEO. L.J. 697, 752–53 (2010) (“Somewhat paradoxically, private covenanted communities may offer the least assurance that implemented rules will remain in place or, alternatively, that rules will be flexible where necessary. This uncertainty results from the property owners’ association board’s wide discretion in enforcing rules and, in some cases, abandonment of rules through lack of enforcement or varied enforcement. The level of rule modification in private covenanted communities, in other words, depends largely on the actions of a small group of people that typically has broad discretion to act without the official input of community members. Despite residents’ attempted objections at board meetings and other efforts at expressing their dissatisfaction, the board may, as is the stereotype, enforce the rules too rigidly and resist needed changes. Then again, if a board purposefully fails to consistently enforce a requirement, a court may strike down the board’s later attempt to enforce this requirement on a landowner’s property. This could lead to the steady and consistent erosion of a number of rules that were originally intended to form a unified community aesthetic.”); Rebecca J. Huss, *No Pets Allowed: Housing Issues and Companion Animals*, 11 ANIMAL L. 69, 107–08 (2005) (“In addition to litigation over the placement and adoption of pet restrictions, unit holders fighting the enforcement of a restriction may argue that there has been arbitrary application, selective enforcement, waiver, changed conditions, estoppel, or that the statute of limitations has run. An example of selective enforcement is a recent Florida case where a condominium association brought an action seeking an injunction to bar a resident from keeping a

Board of Directors, one goes astray of such CC&Rs, fines and other penalties, up to and including confiscation and foreclosure of the property.²⁸ For example, shutters painted a color not approved by the

dog on the premises. In *Prisco v. Forest Villas Condominium Apartments, Inc.*, an appellate court found that a resident was entitled to raise the affirmative defense of selective enforcement of a covenant when a condominium association allowed cats but not dogs, despite a prohibition in the declaration against pets other than fish or birds.”); Edward R. Hannaman, Esq., *Homeowner Association Problems and Solutions*, 5 RUTGERS J.L. & PUB. POL’Y 699, 699–700 (2008) (“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 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.”). Utah’s legislation related to homeowner associations contains at least an inkling of hope for those subjected to selective enforcement, through language which provides that “(3) The board may not be arbitrary, capricious, or against public policy in taking or not taking enforcement action.” UTAH CODE ANN. § 57-8a-213 (West 2023).

28. See *Bodine v. Harris Vill. Prop. Owners Ass’n*, 699 S.E.2d 129, 133–34 (N.C. Ct. App. 2010) (“On 1 November 2007, Homeowners filed a declaratory judgment action seeking a declaration that the CCRs did not prevent them from erecting a 320-square-foot-covered porch on their residential lot in the subdivision. This complaint was subsequently amended on 12 March 2008. On 11 January 2008, the HOA Board of Directors filed a motion to dismiss and counterclaim seeking fines, declaratory and injunctive relief, and attorneys’ fees. Afterward, the HOA Board of Directors met on 11 December 2007 and found Homeowners in violation of the CCRs. Homeowners were advised that a daily fine of \$100.00 would be imposed beginning

3 January 2008, and would continue until the alleged violations were remedied. When Homeowners did not respond, defendant HOA, on 15 February 2008, filed a Claim of Lien against Homeowners' property. Following discovery, Homeowners filed a motion for summary judgment which was denied. A trial of this matter came on before Judge Mark E. Klass on 2 February 2009. At the conclusion of Homeowners' evidence, defendant HOA made a motion for directed verdict, which was denied. At the close of all evidence, Judge Klass granted a directed verdict for HOA. In his order, Judge Klass awarded attorneys' fees totaling \$96,000.00 to HOA's counsel, granted the HOA liens for fines totaling \$39,700.00, and ordered that the 14 × 42 foot structure be removed. The court, however, allowed Homeowners to keep their pool and the 10 × 14 foot pool house. In addition, the HOA was given permission to foreclose on the house in the event that Homeowners did not comply with the court's orders by a specified date."); *Nationstar Mortg., LLC v. Saticoy Bay LLC Series 2227 Shadow Canyon*, 405 P.3d 641, 649 (Nev. 2017) ("Nationstar's first argument relies on NRS 116.31162(5), which provides that an HOA 'may not foreclose a lien by sale based on a fine or penalty.' Here, because it is undisputed that the HOA's lien was comprised of fines in addition to monthly assessments, Nationstar argues that the sale violated NRS 116.31162(5) and therefore is void. We believe Nationstar's interpretation of the statute is untenable. In particular, NRS 116.3116(1) is the statute that authorizes an HOA's lien, and that statute provides that an HOA has a lien for fines *and* monthly assessments and that those fines and assessments automatically become part of the HOA's lien as soon as they become due. Thus, under Nationstar's construction of NRS 116.31162(5), an HOA could never foreclose on its lien if it had imposed a fine on the homeowner, regardless of whether the HOA's lien was also comprised of unpaid monthly assessments. It does not appear that the Legislature intended this result, as NRS 116.31162(5) was enacted in 1997, six years after the Legislature enacted the UCIOA (i.e., NRS Chapter 116), which included NRS 116.3116(1)."). *See generally*, Karen Ellert Peña, *Reining in Property Owners' Associations' Power: Texas's Need for A Comprehensive Plan*, 33 ST. MARY'S L.J. 323, 337–38 (2002) ("A POA's power to make and collect assessments is typically upheld by courts. Members who challenge the computation or enforcement of the assessment and refuse to pay their assessment face various penalties. Of these penalties, a property lien and a suit for money damages are the most common. However, both carry the potentially drastic consequence of lien foreclosure."); Brindee L. Collins, *There Oughta Be a Law: Observations and Recommendations for Idaho's Community Association Law*, 62 ADVOCATE 22, 25 (2019) ("For example, Utah, in its Community Association Act, expressly allows every board of a community association to assess violation fines against a violating owner, but requires certain reasonable notice be given to the owner in advance and ensures that the owner has the opportunity to challenge the fine. These provisions in the Utah Community Association Act allow an association to effectively enforce its governing documents, while also protecting owners and giving them the opportunity to be heard. Washington, in its Homeowners' Associations Act, expressly defines the powers and standards of a Board of Directors of a homeowners association, giving an association the power to collect its assessments, impose violation fines, enforce the governing documents, hire employees, and hold or

HOA triggered penalty enforcement action, which was exacerbated when the resident had the audacity to thereafter remove the seemingly offensive, plum colored shutters.²⁹ Absurdity can prevail, such as HOA

dispose of property.”); *Sugarmill Wood Oaks Vill. Ass’n, v. Wires*, 766 So. 2d 487, 488 (Fla. Dist. Ct. App. 2000) (“Does the issuance of a tax deed to a lot extinguish a homeowner association’s lien placed on such lot, pursuant to a declaration of covenants, recorded prior to issuance of the tax deed, where the declaration provided for homeowner association liens to be placed on lots for delinquent homeowners association assessments, and the homeowners association recorded the lien pursuant to the declaration prior to the issuance of the tax deed? The trial court ruled that the liens were extinguished. We affirm.”); Carl B. Kress, *Beyond Nahrstedt: Reviewing Restrictions Governing Life in a Property Owner Association*, 42 UCLA L. REV. 837, 850–52 (1995) (“In 1988, plaintiff Natore Nahrstedt and her three cats moved into a unit in the Lakeside Village condominium development. All units in the development were subject to a provision in the ‘Declaration of Covenants, Conditions and Restrictions’ (‘CC&Rs’) which barred cats and dogs from the premises. However, Nahrstedt alleged that she was nonetheless unaware of the restriction. A neighbor spotted one of the cats sunning itself in the window in 1988 and complained to the board. After Nahrstedt refused to remove her cats, the board imposed fines as provided in the CC&Rs and sought to foreclose on the unit when the fines remained unpaid. In response, Nahrstedt sued for a declaratory judgment that the pet restriction and fines were unreasonable and should not be applied to her, and also for invasion of privacy, harassment by the association, negligent infliction of emotional distress, invalidation of the fines, and an injunction against levying of fines. The trial court dismissed her suit but the appeals court reversed, rejecting the association’s argument that the restriction was reasonable, and remanded for a determination whether the restriction was reasonable as applied to her situation.”); Courtney Ruby, *Let It Grow: Freeing the Lawn from Aesthetically Rigid and Environmentally Damaging Real Covenants*, 87 UMKC L. REV. 435, 435 (2019) (“The perfect lawn is deeply [i]ngrained in American culture. Emerald green grasses, freshly mown and heavy with water droplets, are found in memories, quotations, media, and art. A pristine lawn is a status symbol—one that America has embraced. Occupying 63,248 square miles of land—a total area three times larger than the surface of irrigated corn—turf grass is the single largest irrigated crop in the United States. Lawns also account for five percent of air pollution in America, contribute to soil and water pollution through improper fertilization, and demand enormous water usage. Despite these costs, homeowner associations, relying on contractual real covenants, harass homeowners’ free use and enjoyment of their private property in the name of property values, assailing them with fines, lawsuits, and court-ordered injunctions. In extreme cases, homeowners can be held in contempt of court and jailed, all because their private yards do not match community guidelines.”).

29. Diane Wilson & Catherine Chestnutt, *What’s Wrong With This House? Homeowner Fined Thousands by HOA*, ABC7 EYEWITNESS NEWS (Feb. 1, 2018),

rules which require owners to keep the garage door open from 8:00am through 4:00pm on weekdays, with the purported goal being to expose owners with persons residing inside the garage.³⁰ Ridiculous, unnecessary, and duplicative restrictions also exist which demand that owners must comply with already applicable laws, such as “each Owner and Resident shall comply with all requirements of all federal, state, and local governmental authorities and all laws . . .”³¹ and that “all uses shall be in conformity with the zoning ordinances of the City and County . . .”³²

Articles and marketing brochures related to HOAs proliferate with visions of sugar plums, fairies, and utopia,³³ all in thanks to the HOA deity. Consider residing in a place where any non-conforming and disruptive behavior is rapidly extinguished through a stern and powerful governing body made up of residents who gratuitously and

<https://abc7chicago.com/troubleshooter-homeowners-association-hoa-debra-blue/3023034/>.

30. *California HOA Backs Down on Demand to Keep Garage Doors Open*, ABC7 NEWS (Jan. 12, 2018), <https://abc7news.com/hoa-garage-doors-sacramento-open-demands/2935472/>; *See also*, Vince Cestone, *Northern California Community Upset After Homeowners Association Tells Them to Leave Garage Doors Open*, KRON4 (Jan. 5, 2018), <https://www.kron4.com/news/video-northern-california-community-upset-after-homeowners-association-tells-them-to-leave-garage-doors-open/>.

31. *See* 2200 PACIFIC HOMEOWNERS ASS’N, *supra* note 20, § 5.12 at 20.

32. THE INFINITY, DECLARATION OF COVENANTS, CONDITIONS AND RESTRICTIONS § 8.5 at 54 (San Francisco Assessor-Recorder 2008).

33. *See The Top 10 Benefits of Living in an HOA*, ASSOCIATED ASSET MGMT. <https://www.associatedasset.com/hoa-resources/hoa-tips-blog/2021/4/9/top-10-benefits-of-living-in-an-hoa/> (last visited Sept. 3, 2023); Bill Gassett, *5 Benefits of Having a Homeowners Association*, RIZMEDIA <https://www.rizmedia.com/2022/05/09/benefits-having-homeowners-association/> (May 9, 2022); *See also*, *Perry v. Bridgetown Cmty. Ass’n*, 486 So. 2d 1230, 1234 (Miss. 1986) (“A landowner who wilfully purchases property subject to control of the association and derives benefits from membership in the association implies his consent to be charged assessments and dues common to all other members.”); *ECC Constr., Inc. v. Ganson*, 98 Cal. Rptr. 2d 292, 295 (Cal. Ct. App. 2000) (“By definition, the association acts for the benefit of the owners.”).

selflessly contribute their time, energy, and expertise.³⁴ This is the utopia marketed by HOAs,³⁵ but falls far from the cold, hard truth.

The HOA is indeed “a quasi-government entity paralleling in almost every case the powers, duties, and responsibilities of a municipal government.”³⁶ As miniature governments, elected or

34. Steven S. Weil & Kathleen Janics, *Tips for the General Practitioner in Dealing with a Homeowners Association*, ORANGE CNTY. L., Apr. 2015, at 30, 30 (“Homeowner or community associations are usually incorporated as nonprofit mutual benefit corporations for the purpose of managing and operating a common interest development, such as a condominium project or a single-family development. Associations are governed by a volunteer board of directors (comprised of three to seven members of the association) elected by the homeowners in the common interest development. Most board members either have ‘day’ jobs or are retired. They do not receive pay for their service on the board and they are not professional board members. They donate their time and energy, often after work and on weekends, to the community association. Serving as a volunteer association director is often a thankless job.”); Scott D. Weiss, *Community Associations: The New Protectors of Civil Rights?*, TENN. B.J., Nov. 2016, at 16, 16 (“Under the Tennessee Nonprofit Corporation Act, volunteer board members of a homeowner or condominium association must discharge their duties in good faith, with the care an ordinarily prudent person in a like position would exercise under similar circumstances, and in a manner that the director reasonably believes to be in the best interest of the association. This is best described by the ‘business judgment rule.’ In other words, when boards make decisions based upon good business judgment, considering all available information on a subject, consulting with experts on an issue, listening to all sides of an issue and making a decision about a particular issue with the best interest of the association in mind, they generally cannot be held liable should their decision not work out as they planned.”).

35. See *supra* note 33. But see Pasadera Homes, “No HOA’s [sic],” FACEBOOK (June 3, 2021), <https://www.facebook.com/pasaderahomes/>.

36. Wayne S. Hyatt & James B. Rhoads, *Concepts of Liability in the Development and Administration of Condominium and Homeowners Associations*, 12 WAKE FOREST L. REV. 915, 918 (1976); Cohen v. Kite Hill Cmty. Ass’n 191 Cal.Rptr. 209, 214 (Cal. Ct. App. 1983); see also Anna di Robilant, *The Virtues of Common Ownership*, 91 B.U.L. REV. 1359, 1366 (2011) (“For instance, the owners of condominium units gather in the condominium association to ‘design’ their neighborhood, making decisions that involve aesthetic values, issues of public morality, and maximization of their property market value. As often noted, they draw a sort of mini-constitution.”). See generally *In re Levandusky v. One Fifth Ave. Apartment Corp.*, 553 N.E.2d 1317, 1320 (N.Y. 1990) (“As courts and commentators have noted, the cooperative or condominium association is a quasi-government—‘a little democratic sub society of necessity.’ The proprietary lessees or condominium

appointed residents on the HOA board of directors oversee all facets of activity within the neighborhood, concomitantly assessing fees, authorizing expenditures, and imposing their will upon others. Like municipal governments, membership on the HOA board of directors does not require the members to have any skills, education, talent, intelligence, or other positive attributes; merely winning a popularity contest of election³⁷ or appointment³⁸ within the small enclave is sufficient to unbridle the wrath of such persons serving on the HOA Board.

HOAs operate in a vacuum of opaqueness, devoid of transparency. Budgets are hurled into the hands of owners with no comparative information publicly available to benchmark costs;³⁹ there is no affirmative disclosure regarding the identity of persons receiving significant sums of money or contracts with the HOA;⁴⁰ and there is no affirmative disclosure by HOA directors regarding gifts from, or dealings with persons who also receive money from the HOA via contracts or other business dealings.⁴¹ As directors of the HOA are in

owners consent to be governed, in certain respects, by the decisions of a board. Like a municipal government, such governing boards are responsible for running the day-to-day affairs of the cooperative and to that end, often have broad powers in areas that range from financial decision making to promulgating regulations regarding pets and parking spaces.” (quoting *Hidden Harbour Estates v. Norman*, 309 So.2d 180, 182 (Fla. Dist. Ct. App. 1975)).

37. See UNIFORM ACT, *supra* note 4, §§ 3-103, 3-106, 3-110; CAL. CIV. CODE §§ 5100, 5103, 5105, 5110, 5115, 5120, 5125, 5130.

38. See UNIFORM ACT, *supra* note 4, § 3-103; and CAL. CORP. CODE § 7224(a) (West 1980).

39. See UNIFORM ACT, *supra* note 4, § 3-123; see also CAL. CIV. CODE §§ 5300, 5320, 5570, and 5615.

40. The identity and amount of contracts and other payments made are not affirmatively disclosed to owners, regardless of value. Instead, owners must invoke a timely right of inspection to obtain such information. See UNIFORM ACT, *supra* note 4, § 3-118; see also CAL. CIV. CODE §§ 5200(a) & (b), 5210(a), 5300.

41. Directors are supposed to avoid conflicts which are tantamount to a breach of fiduciary duties, but identification of such conflicts can be difficult, or impossible, in the absence of affirmative disclosure to the members of the HOA regarding gifts and relationships with persons who receive money from the HOA in the form of contracts or other business dealings. See UNIFORM ACT, *supra* note 4, § 3-103; See also *Cohen v. Kite Hill Cmty. Ass'n* 191 Cal.Rptr. 209, 214 (Cal. Ct. App. 1983) (“Furthermore, in recognition of the increasingly important role played by private homeowners’ associations in such public-service functions as maintenance and repair

the line of approval for contracts and other HOA business dealings, this lack of transparency invites corrupt transactions for a variety of nefarious reasons, such as contractors and other vendors being selected due to friendships, and HOA Board members receiving preferential prices or gratuitous services in exchange for HOA community funded contract awards. These ailments of HOAs require immediate treatment, in the form of corrective transparency legislation. Although such legislation to remedy these issues may not necessarily guide HOAs onto a path of righteousness, it will at least serve as a guardrail for the unknowing, unwitting, or naïve.

Despite the propaganda containing fairytale descriptions of the wonderful attributes of HOA life,⁴² there is an alternative allegory meriting consideration. Suffering from the lack of transparency permitted under current HOA law can be analogous to a descent into Dante's *Inferno*, where there were nine circles of hell. This article identifies, explores, and poses a solution to three critical structural problems, or circles of hell, related to the lack of transparency under current HOA regulation. The resultant monkeyshines of HOA Boards caused by lack of transparency are traumatic and alarming, but this analogy to Dante's historic work takes a positive perspective, in that perhaps HOAs are only one third as bad as hell, with only three circles instead of the nine identified in Dante's *Inferno*.

The three major flaws (or circles of hell) of HOA organizational transparency consist of the following: (1) The inability to compare and benchmark HOA budgets caused by a lack of publicly available comparative budget information, thereby allowing HOAs to operate in isolated enclaves of expenditures without any reasonable way for residents to benchmark effective and efficient cost management with other HOAs; (2) the lack of affirmative disclosure regarding the

of public areas and utilities, street and common area lighting, sanitation and the regulation and enforcement of zoning ordinances, the courts have recognized that such associations owe a fiduciary duty to their members.); *Golden Eagle Land Inv., L.P. v. Rancho Santa Fe Assn.*, 227 Cal. Rptr. 3d 903, 924 (Cal. App. 2018) (“Generally, fiduciary duties owed by a homeowners association to its members are limited to those arising from its governing documents and relevant statutory requirements.”); *Frances T. v. Vill. Green Owners Assn.*, 723 P.2d 573, 587 (Cal. 1986) (“Directors of nonprofit corporations such as the Association are fiduciaries who are required to exercise their powers in accordance with the duties imposed by the Corporations Code.”); *see also* CAL. CORP. CODE §§ 310, 5239, 7231, 7231.5, 7233, & 7234.

42. *See supra* notes 33–34 and accompanying text.

identity of the recipient and dollar amount of sizeable expenditures or contracts; and, (3) the lack of affirmative disclosure from Directors regarding receipt of gifts, performance of services, or other dealings with persons who also have contracts with, or receive payment from, the HOA.

In addition to identifying these circles of hell, this article also offers cogent and reasonable solutions to rectify such flaws which undermine the integrity of HOAs. This article explores the topic within the context of the Uniform Common Interest Ownership Act (UCIOA) as well as the California Davis-Stirling Act, but the underlying problems, and solutions, can be easily translated and adapted for use in any state.

II. HOA BUDGET DISCLOSURES.

HOA annual budgets contain aggregated categories of financial information for owners, but there is no public repository enabling comparative analysis to other HOAs, thereby vitiating the ability to determine if one's HOA is fiscally prudent or not.

A. HOA Circle of Hell I: The Inability to Compare and Benchmark Budgets with Other HOAs

HOAs are required to distribute an annual budget report to only *owners within the HOA*.⁴³ This may sound like a wonderful slab of information for the owner to consume, with lists such as anticipated monthly assessment income, and expenses broken down into broad and generic maintenance, utility, and administration categories.⁴⁴

43. See UNIFORM ACT, *supra* note 4, § 3-118(a)(8)–(b) (“(8) financial and other records . . .” are “(b) Subject to . . . examination and copying *by a unit owner* . . .” (emphasis added)); CAL. CIV. CODE § 5300(c) (West 2016) (“The annual budget report shall be made available to the members pursuant to Section 5320.”) Member is defined in CAL. CIV. CODE § 4160 as an owner in the HOA.

44. See CAL. CIV. CODE § 5300 (West 2016) (“(a) Notwithstanding a contrary provision in the governing documents, an association shall distribute an annual budget report 30 to 90 days before the end of its fiscal year. (b) Unless the governing documents impose more stringent standards, the annual budget report shall include all of the following information: (1) A pro forma operating budget, showing the estimated revenue and expenses on an accrual basis. (2) A summary of the association’s reserves, prepared pursuant to Section 5565. (3) A summary of the reserve funding

However, this annual budget information is nearly useless to an owner, because it arrives in a vacuum without any benchmark for comparison. That is, HOA owners do not have access to financial information for any other HOA.⁴⁵ The only viable method to compare and benchmark financial information and fiscal performance is to obtain a courtesy copy from a friend in another HOA,⁴⁶ own another HOA property,⁴⁷ or

plan adopted by the board, as specified in paragraph (5) of subdivision (b) of Section 5550. The summary shall include notice to members that the full reserve study plan is available upon request, and the association shall provide the full reserve plan to any member upon request. (4) A statement as to whether the board has determined to defer or not undertake repairs or replacement of any major component with a remaining life of 30 years or less, including a justification for the deferral or decision not to undertake the repairs or replacement. (5) A statement as to whether the board, consistent with the reserve funding plan adopted pursuant to Section 5560, has determined or anticipates that the levy of one or more special assessments will be required to repair, replace, or restore any major component or to provide adequate reserves therefor. If so, the statement shall also set out the estimated amount, commencement date, and duration of the assessment. (6) A statement as to the mechanism or mechanisms by which the board will fund reserves to repair or replace major components, including assessments, borrowing, use of other assets, deferral of selected replacements or repairs, or alternative mechanisms. (7) A general statement addressing the procedures used for the calculation and establishment of those reserves to defray the future repair, replacement, or additions to those major components that the association is obligated to maintain. The statement shall include, but need not be limited to, reserve calculations made using the formula described in paragraph (4) of subdivision (b) of Section 5570, and may not assume a rate of return on cash reserves in excess of 2 percent above the discount rate published by the Federal Reserve Bank of San Francisco at the time the calculation was made. (8) A statement as to whether the association has any outstanding loans with an original term of more than one year, including the payee, interest rate, amount outstanding, annual payment, and when the loan is scheduled to be retired. (9) A summary of the association's property, general liability, earthquake, flood, and fidelity insurance policies. For each policy, the summary shall include the name of the insurer, the type of insurance, the policy limit, and the amount of the deductible, if any. To the extent that any of the required information is specified in the insurance policy declaration page, the association may meet its obligation to disclose that information by making copies of that page and distributing it with the annual budget report . . .").

45. *See supra* notes 43–44 and accompanying text.

46. Unless subject to some form of confidentiality restriction, the owner in another HOA could share such information provided in the annual report. *See id.*

47. *See Id.*

obtain such information as part of a disclosure related to a potential purchase in another HOA.⁴⁸

For example, pretend that your medical doctor told you that your blood test result for a specific compound was “174.” You might ask your doctor how this compares to other scores. Does this fall within a normal range? What is the average range for people your age? How do others compare with this number? If your doctor were an HOA, there would be no response. The HOA simply tells you that the number is what the number is, with no contextual or comparative information.⁴⁹

Under current law, the HOA Directors might be authorizing comparatively inordinate sums for management company fees, legal fees, office supplies, landscaping, custodial supplies, or anything else conceivably possible. Conversely, the HOA Directors may be significantly under budgeting in some categories, which could be an indication of either excellent cost management or a disregard of critically necessary expenditures, such as necessary maintenance work which is not outwardly visible, but critical to maintain safety and integrity of infrastructure. Either way, the HOA owner has absolutely no way to benchmark any of the data in the annual budget report to determine if the sums are excessive or reasonable without access to comparative information from other HOAs. There may be a perfectly rational explanation for expenditures that are higher, or lower, than comparative properties, but the inability to access comparative data serves to hamstring the budget analysis by owners.⁵⁰

This vacuum chamber derails a prudent owner from being able to determine if outlays are excessive. In turn, this quashes due diligence inquiries for expenditure justification, and can lead to self-

48. See UNIFORM ACT, *supra* note 4, § 4-109 (requiring a unit owner to furnish to a purchaser “(6) the most recent regularly prepared balance sheet and income and expense statement, if any, of the association; (7) the current operating budget of the association. . . .”); CAL. CIV. CODE § 4525(a) (West 2014) (“The owner of a separate interest shall provide the following documents to a prospective purchaser . . . (3) A copy of the most recent documents distributed pursuant to Article 7 (commencing with Section 5300) of Chapter 6.”). This disclosure, pursuant to CAL. CIV. CODE § 5300(b) (West 2016) requires “(b)(1) A pro forma operating budget, showing the estimated revenue and expenses on an accrual basis. (2) A summary of the association’s reserves, prepared pursuant to Section 5565. (3) A summary of the reserve funding plan adopted by the board”.

49. See *supra* notes 43–44 and accompanying text.

50. *Id.*

serving, conclusory, unsubstantiated, and snarky responses from the HOA Board that the expenditures are completely customary and reasonable.⁵¹ The lack of comparables for owner evaluation allows for such HOA Board self-serving assertions to go unchecked. This lack of comparable information leaves the HOA owner with no conclusion other than “it is what it is,” rather than asking what it should be.

B. Solution 1: Publicly Disclose Basic Budget Information

To solve the problem above, and with logistical details below, HOAs should be required to *publicly disclose* the annual pro-forma budget,⁵² which includes the reserve summary⁵³ and reserve funding plan,⁵⁴ as well as the most recent reserve study.⁵⁵ Why? Information

51. *Id.*

52. *See* CAL. CIV. CODE § 5300 (West 2016).

53. *Id.*

54. *Id.*

55. *Id.* *See also*, Sarah R. Karl & Todd J. Skowronski, *Transition of Control from Condominium Developer to Co-Owners: A Critical Time for Condominium Association Boards to Conduct Reserve Studies and Secure Their Future*, 49 MICH. REAL PROP. REV. 19, 22 (2022) (“The bottom line is that as soon as the transitional control date happens, the new non-developer controlled board should (A) inspect all records, budgets, financial documents, and bank accounts, (B) strongly consider hiring its own professionals, (C) either obtain a new reserve study or closely review an existing reserve study to ascertain the existing condition of the common elements, and (D) review any developer management contracts, noting the limited time frames in which to act to terminate. Aside from the new board, the advisory committee (and any co-owner generally) can demand to inspect these sorts of records under document inspection request provisions in the Nonprofit Corporation Act and Condominium Act even prior to transition of control if the developer is not otherwise willing to share this information.”); Gregory J. Fioritto, *Lessons from the Surfside Tragedy: Deconstructing Red Flags from the History of Champlain Towers South Condominium to Build a Better Future for Community Associations*, 49 MICH. REAL PROP. REV. 38, 41 (2022) (“A reserve study, in short, is a budget planning tool which identifies the components that the association is responsible for maintaining or replacing, the current status of the association’s reserve fund, and a stable and equitable funding plan to offset the association’s anticipated future major common area expenditures. A reserve study contains two components, which are (1) a physical analysis of the common areas, which includes the component inventory, condition assessment, and life and valuation estimates; and (2) a financial analysis, consisting of a breakdown of the association’s current reserve fund status (measured in cash or

is power, and that power aids in accountability. As discussed above, HOA owners generally have no access to financial information of other HOAs for purposes of comparison. The inability for owners in the HOA to compare financial information with other HOAs creates an information vacuum, rife with the possibility for abuse of discretion in expenditures by the HOA Board. Transparency is crucial in assisting owners to maintain prudent oversight of the HOA Board.

Why require public disclosure? The answer is simple: HOAs are tantamount to miniature quasi-governments.⁵⁶ Just like access to government records⁵⁷ and the disclosure of information on registered securities,⁵⁸ a certain amount of affirmative public financial disclosure

as a percent funded) and a recommendation for an appropriate reserve contribution rate (i.e., a funding plan).”).

56. *See supra* note 36 and accompanying text.

57. *See generally* Freedom of Information Act (FOIA) 5 U.S.C. § 552 (2016); California Public Records Act CAL. GOV'T. CODE § 7920 (West 2021); Troy Michael Harter, Comment, *The Public Records Police and Legislative Overreach: Shutting the Door on Citizen Enforcement of Ohio Public Records Law*, 41 CAP. U. L. REV. 407 (2013) (“Statutes mandating the maintenance of public records by government offices enable citizens to scrutinize the activities of those government entities and to bring abuse of government authority to the public’s attention.”); Theresa M. Costonis, *What Constitutes Commercial or Financial Information, Exclusive of Trade Secrets, Exempt from Disclosure Under State Freedom of Information Acts – Specific Applications*, 8 A.L.R.6th 117 (2005) (“Certain types of government records tend to give rise to claims they are exempt from disclosure under state information statutes as commercial or financial information with some frequency. For example, records of government contracts are often claimed to be protected from disclosure pursuant to such exemptions. General types of records related to government contracts have been found to be exempt (§ 4), not exempt (§ 5), partially exempt (§ 6), and to require remand (§ 7).”); Frank D. LoMonte et al., *Open and Shut? The Promise – and Problems – of Government Open Data Portals in Meeting Community Information Needs*, 28 UCLA J.L. & TECH. 93, 96 (“Data helps answer questions such as: Is crime getting better, worse, or staying the same? Are taxes being assessed and collected equitably, and if not, who bears the brunt of the inequity? Are standardized test scores increasing or declining, and how do those outcomes correspond with school demographics or funding levels?”).

58. *See generally* Securities Act of 1933, 15 U.S.C. § 77f(d) (2023) (“The information contained in or filed with any registration statement shall be made available to the public under such regulations as the Commission may prescribe, and copies thereof, photostatic or otherwise, shall be furnished to every applicant at such reasonable charge as the Commission may prescribe.”); Ann M. Lipton, *Not Everything is About Investors: The Case for Mandatory Stakeholder Disclosure*, 37

is required. This disclosure is not limited merely to those who own, or intend to own, the company. Instead, the information provides the business marketplace with details for benchmarking and comparative analysis.⁵⁹

YALE J. ON REG. 499, 507–08 (2020) (“There are three paths by which a company becomes ‘public’ and thus obligated to disclose information pursuant to the federal securities laws. First, the company may directly undertake to sell securities to the public. The question whether a sale counts as ‘public’ or ‘private’ is a complex one, but, in general, public sales are those made on an unrestricted basis to a dispersed set of investors who have no special qualifications or inside information. If a company chooses to sell its securities in this manner, it must file a publicly available registration statement with the SEC and additional reports every quarter thereafter, with emergency updates on an as-needed basis. The issuing company must also file a copy of its proxy statement in advance of any stockholder meeting. Second, the company may choose to list its securities for trading on a national exchange. Typically, an exchange listing is accompanied by a public sale of securities but not always; for example, the company may sell small amounts of securities privately over a prolonged period and later decide to make those securities available on an exchange. Once it does so, it, too, becomes obligated to file a standard package of operational and financial disclosures with the SEC—where they can be accessed by the general public—and to file quarterly updates and proxy statements. Third, a company may become subject to federal disclosure requirements if a certain number of its securities has generally fallen into public hands, even without a formal public offering. This might occur if, again, the company sells securities privately over a prolonged period and a large enough segment of the public ends up holding its stock or bonds. Whatever path the company takes to becoming ‘public,’ once it does so, it remains subject to the securities disclosure regime, at least so long as the triggering securities remain in public hands. Among other matters, these companies must provide detailed information about cash flows; assets; capital structure; trends likely to affect liquidity, profits, and capital resources; compensation paid to top executives and the objectives of the compensation program; and a variety of other topics that are, or could be, relevant to companies’ future financial performance and, thus, to their investors. Though Congress has set forth the general disclosure regime via the Securities Act of 1933 and the Securities Exchange Act of 1934, the details of these disclosures and the means of their dissemination are mostly governed by regulations promulgated by the SEC.”).

59. *See generally* Securities Exchange Act of 1934, 15 U.S.C. § 78m (2023) (“(a) Every issuer of a security registered . . . shall file with the Commission, in accordance with such rules and regulations as the Commission may prescribe as necessary or appropriate for the proper protection of investors and to insure fair dealing in the security: (1) such information and documents (and such copies thereof) as the Commission shall require to keep reasonably current the information and documents required to be included in or filed with an application or registration

Similarly, requiring public disclosure of summary budget and reserve information will enable HOA Boards to engage in a comparative and competitive analysis regarding their own business expenditures, and reinforce the conduct of HOA Boards who are behaving diligently and with fiscal prudence. HOA owners will also be empowered to analyze how the HOA compares to other similar HOAs, which will enable the owners to inquire about excessive expenditure aberrations, as well as commend the Board for conservative fiscal prudence, as appropriate.

This public disclosure solution would be executed as follows:

statement . . . (2) such annual reports (and such copies thereof), certified if required by the rules and regulations of the Commission by independent public accountants, and such quarterly reports (and such copies thereof), as the Commission may prescribe.”; Securities Exchange Act of 1934, 15 U.S.C. § 78o(d)(1) (2023) (“Each issuer . . . shall file with the Commission in accordance with such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors, such supplementary and periodic information, documents, and reports as may be required pursuant to . . . this title.”). *See also*, Patrick J. Gallagher, *Going Public Secretly: The SEC's Unavailing Effort to Increase Initial Public Offerings Through Confidential Registration*, 2019 COLUM. BUS. L. REV. 305, 355 (2019) (“This is why encouraging companies to go public is vital to the health of the American economy. When companies list on a public stock exchange, rather than finance through private capital, society as a whole benefits more. Gains are spread among investors across the socioeconomic class spectrum, rather than enjoyed just by the wealthy. And because public companies must comply with disclosure requirements, public stock is more accurately valued than private stock in which company information can more easily be kept behind a veil, despite investor demands. If more companies remain private and therefore are not subject to public transparency rules, ‘a rising share of important American companies will operate in the relative comforts of opacity.’” (quoting Gwynn Guilford, *US Startups Don't Want to Go Public Anymore. That's Bad News for Americans*, QUARTZ, (Feb. 1, 2018), <https://qz.com/1192972/us-startups-are-shunning-ipos-thats-bad-news-for-americans/>); Elisabeth de Fontenay, *The Deregulation of Private Capital and the Decline of the Public Company*, 68 HASTINGS L.J. 445, 448 (2017) (“From their inception, the federal securities laws proposed a simple bargain to U.S. companies: disclosure in exchange for investors. Companies that went public took on the obligation of publicly disclosing substantial amounts of information and, in return, were permitted to solicit the largest (and therefore cheapest) source of capital: the general public. Conversely, private companies were restricted to raising capital primarily from insiders and financial institutions, without publicity and subject to severe limitations on subsequent transfers of their securities—effectively precluding any sort of market for private company equity.”).

(i) Exclude extremely small HOAs from this requirement, such as those with less than five (5) members and those with an annual budget of less than \$50,000;

(ii) All other (non-excluded) HOAs would be required to publicly post the most recent five (5) years of summary pro-forma budget and reserve summary. The categories should include disclosure of fixed costs, operating costs, reserve, administration, and contingency, similar to the information listed on pages three, four, and five of the California Department of Real Estate Form 623.⁶⁰

(iii) Rather than requiring a government department to post and maintain these disclosures, the HOAs would be required to post this information on the web by using any multitude of available low cost document hosting options. HOA management companies could offer the hosting of this information as part of the management services.

(iv) Each HOA would be required to provide a short informational summary to its State Department of Real Estate (DRE), consisting of the name of the HOA, physical address of the HOA building location, number of units in the HOA, name and contact information for the HOA, and website location of these publicly posted disclosures. The DRE would make this information publicly available, such as through its website. This DRE information would not need to be updated unless there was a change to the underlying details, such as a new location for the posted disclosures hosted by the HOA.

This solution provides a method for any HOA owner to search for other HOAs, whether by street address, zip code, and/or units, and find the link to the website location for the comparative budget data. A sample listing, or search result, would appear as follows:

(Department of Real Estate HOA Disclosure Website
Information):

NAME: Feline Homeowner Association
ADDRESS: 123-205 Cat Street
CITY: San Francisco, CA
ZIP: 94123
OF UNITS: 82

60. See Form 623 (Budget Worksheet), STATE OF CAL., DEP'T OF REAL ESTATE, <https://www.dre.ca.gov/files/pdf/forms/re623.pdf> (last visited Sept. 3, 2023).

CONTACT: Nekko Gato HOA Management, 9 Lives Way, San Francisco, CA 94123

BUDGET

WEBSITE: <https://nekkogatohoamanagement/feelinehomeownerassociation/budgetdis.closure>

The HOA hosted website would contain the five years of required disclosures. Critics might proclaim that the solution requires a state agency to receive and post information. Yes, but the information is merely summary data, as exemplified above, with a website link to the disclosures. State agencies already require, maintain, and post much more extensive information for other business entities (e.g. corporate filing information), as well as for state licensed persons such as accountants, attorneys, insurers, contractors, and the like.⁶¹ This solution does not require the state agency to review, post, and maintain the budget disclosures, but merely requires listing the link to the HOA hosted budget disclosure website. Moreover, this information, once filed, would only require updates if the HOA changes its contact information or website link, which is a simple amendment.

Those opposed might express concern that posting such budget information poses a risk to owners, by disclosing to the public the underlying expenditures and average monthly assessment. Balderdash! Budget and reserve disclosures are already required to be provided to the owners,⁶² and owners have an obligation to disclose relevant

61. See, e.g., *How Do I Verify if a Contractor has a Valid License?*, TENN. ST. GOV'T COM. AND INS. CUSTOMER SERV. CTR., <https://support.commerce.tn.gov/hc/en-us/articles/208924838-How-do-I-verify-if-a-contractor-has-a-valid-license> (last visited Sept. 3, 2023); *Find a Lawyer*, TEX. ST. BAR, https://www.texasbar.com/AM/Template.cfm?Section=Find_A_Lawyer&Template=/CustomSource/MemberDirectory/Search_Form_Client_Main.cfm (last visited Sept. 3, 2023); *License Search*, CAL. ST. ARCHITECTS BD., https://www.cab.ca.gov/consumers/license_search.shtml (last visited Sept. 3, 2023); *Public Accounting License Information*, ILL. DEP'T OF PRO. AND FIN. REG., <https://idfpr.illinois.gov/profs/pa.html> (last visited Sept. 3, 2023); *Consumer Services (Insurance)*, ST. OF FLA. <https://myfloridacfo.com/Division/Consumers/> (last visited Sept. 3, 2023); *License Search*, COMMONWEALTH OF MASS., BD. OF REGISTRATION OF REAL ESTATE BROKERS AND SALESPERSONS, <https://www.mass.gov/orgs/board-of-registration-of-real-estate-brokers-and-salespersons> (last visited Sept. 3, 2023).

62. See *supra* notes 43–44 and accompanying text.

information to prospective purchasers.⁶³ As such information must already be disclosed to owners and third parties,⁶⁴ there is no security or other risk since the information is already in the hands of a select few, random set of non-owners. If the content of that information embarrasses the HOA Board, then this is indicative of the very problem sought to be solved through transparency and comparative analysis, thereby enabling owners to challenge imprudent HOA Boards. Consultants to the HOA might proclaim fear and concern of having reserve study information⁶⁵ publicly available, as such studies may contain copyrighted work product. Nonsense. The public posting of such information does not undermine legitimate copyright ownership, as is already demonstrated by architect ownership of plans which are available for public viewing.⁶⁶

63. See generally CAL. CIV. CODE § 4525 (West 2023) (“(a) The owner of a separate interest shall provide the following documents to a prospective purchaser of the separate interest, as soon as practicable before the transfer of title or the execution of a real property sales contract . . . : (1) A copy of all governing documents . . . (3) A copy of the most recent documents distributed pursuant to Article 7 (commencing with Section 5300) of Chapter 6 [which includes the pro-forma budget and reserve funding plan summary]”); FLA. STAT. ANN. § 720.401 (West 2023) (“(1)(a) A prospective parcel owner in a community must be presented a disclosure summary before executing the contract for sale. The disclosure summary must be in a form substantially similar to the following form: . . . 3. YOU WILL BE OBLIGATED TO PAY ASSESSMENTS TO THE ASSOCIATION. ASSESSMENTS MAY BE SUBJECT TO PERIODIC CHANGE. IF APPLICABLE, THE CURRENT AMOUNT IS \$____ PER _____. YOU WILL ALSO BE OBLIGATED TO PAY ANY SPECIAL ASSESSMENTS IMPOSED BY THE ASSOCIATION. SUCH SPECIAL ASSESSMENTS MAY BE SUBJECT TO CHANGE. IF APPLICABLE, THE CURRENT AMOUNT IS \$____ PER _____ 8. THE STATEMENTS CONTAINED IN THIS DISCLOSURE FORM ARE ONLY SUMMARY IN NATURE, AND, AS A PROSPECTIVE PURCHASER, YOU SHOULD REFER TO THE COVENANTS AND THE ASSOCIATION GOVERNING DOCUMENTS BEFORE PURCHASING PROPERTY.”).

64. See *supra* notes 62–63 and accompanying text.

65. See *supra* notes 44 & 48 and accompanying text.

66. See Richard M. Russell, *Copyright in Architectural Drawings and Works*, 92 MASS. L. REV. 25, 26 (2009) (“Copyright, whether in a building or drawings, is said to protect an architect’s ‘choices regarding the shape, arrangement and location of the buildings, the design of the open space, the location of parking and sidewalks, [and] . . . the combination of these individual design elements.’ The author’s contributions need only ‘meet [a] low threshold of originality required’ to obtain copyright protection. Copyright protection attaches upon

III. RECIPIENTS OF HOA FUNDS

Owners are obligated to pay ongoing sums to the HOA,⁶⁷ and yet they do not automatically receive information about who is receiving this money, or how much is being received. HOA owners

creation, and copyright registration is not required for protection to attach. The Copyright Act grants to a copyright owner the following exclusive rights, among others: the right to reproduce the work (the 'reproduction right'); the right to prepare derivative works (the 'adaption right'); and the right to distribute copies of the work to the public by sale or rental (the 'distribution right'). These rights have been held to be separate and distinct, and they are severable from one another. A copyright notice, frequently represented by the character '©,' is no longer strictly required to obtain protection. An architect preparing drawings for a particular project, with no intent of distributing the drawings beyond those involved in the project, will not surrender copyright remedies for lack of a copyright notice." See also David E. Shipley, *The Architectural Works Copyright Protection Act at Twenty: Has Full Protection Made A Difference?*, 18 J. INTELL. PROP. L. 1 (2010); Lauren Jean Bradberry, *Putting the House Back Together Again: The Scope of Copyright Protection for Architectural Works*, 76 LA. L. REV. 267, 268–69 (2015) ("The protections against unlawful copying of architectural works are found in the 1990 Architectural Works Copyright Protection Act ('AWCPA'). The AWCPA amended the section of the Copyright Act on subject matter to include 'architectural works' within its scope, and it also added an expansive definition of those works. The definition supplied in the AWCPA states that '[a]n 'architectural work' is the design of a building . . . includ[ing] the overall form as well as the arrangement and composition of spaces and elements in the design.'").

67. See UNIFORM ACT, *supra* Note 4 § 3-102 ("(a) Except as otherwise provided . . . the association . . . (2) shall adopt and may amend budgets under Section 3-123, may collect assessments for common expenses from unit owners, and may invest funds of the association . . ."); CAL. CIV. CODE § 5650 (West 2023) ("(a) A regular or special assessment and any late charges, reasonable fees and costs of collection, reasonable attorney's fees, if any, and interest, if any, as determined in accordance with subdivision (b), shall be a debt of the owner of the separate interest at the time the assessment or other sums are levied. (b) Regular and special assessments levied pursuant to the governing documents are delinquent 15 days after they become due, unless the declaration provides a longer time period, in which case the longer time period shall apply . . . (3) Interest on all sums imposed in accordance with this section, including the delinquent assessments, reasonable fees and costs of collection, and reasonable attorney's fees, at an annual interest rate not to exceed 12 percent, commencing 30 days after the assessment becomes due, unless the declaration specifies the recovery of interest at a rate of a lesser amount, in which case the lesser rate of interest shall apply. (c) Associations are hereby exempted from interest-rate limitations imposed by Article XV of the California Constitution, subject to the limitations of this section.").

would benefit from knowing where the money has traversed and into whose hands it has landed.

*A. HOA Circle of Hell 2: No Affirmative Disclosure of Persons
Receiving Substantial Sums from HOA*

HOA owners do not receive affirmative disclosures regarding the identity of those receiving significant reimbursements, expenditures, or contracts.⁶⁸ HOA owners can only obtain this information if they invoke an inspection of HOA records.⁶⁹ Why is this problematic? Persons or entities receiving significant sums from the HOA are not known to the HOA members, because budget disclosures merely lump expenditures into generic categories without disclosure of exactly who received the money, and how much they received. HOA meeting minutes do not necessarily disclose this information. As a result, this invites the potential for significant funds being channeled to individuals or entities without transparency, lending itself to potential corruption in the selection and expenditure process.

It is easy to spend other people's money, and HOA Directors gladly do so. The identity of vendors receiving contracts, amount paid to vendors (including utilities), and sums paid to persons as reimbursements, is relevant in maintaining oversight over the HOA Board of Directors.

For example, assume that a painting company receives an annual contract for services each year. The identity of that vendor, and the amount of the contract, is relevant in maintaining oversight on expenditures. If the contract increases each year, especially in excess of inflation, it could signal a sweetheart deal, violative of HOA owner interests.⁷⁰ HOA management companies are in an especially powerful

68. This information is not required to be affirmatively disclosed, and instead is subject only to invocation of affirmative inspection rights by an owner. *See* UNIFORM ACT, *supra* note 4, § 3-118(a)(9); CAL. CIV. CODE §§ 5200, 5205, and 5210.

69. *Id.*

70. *See* UNIFORM ACT, *supra* note 4, §§ 3-103; *see also* *Coley v. Eskaton*, 264 Cal. Rptr. 3d 740, 752 (Cal. App. 2020) (“The trial court correctly set out the three elements of the cause of action at issue: existence of a fiduciary relationship, breach of fiduciary duty, and damages. And as it further explained, the directors of a nonprofit mutual benefit corporation, like the Association here, are fiduciaries who must act for the benefit of the corporation and its members.”); *Frances T. v. Vill. Green Owners Ass’n.*, 723 P.2d 573, 587 (Cal. 1986) (“Directors of nonprofit corporations

position to increase fees without recourse, as managers and boards build relationships, especially with on site managers. These relationships/friendships with HOA Board members may support increases in annual fees and contract renewals, while fiduciary business prudence does not.

Also, assume that an HOA director wines and dines friends and colleagues, with reimbursement at the expense of HOA owners. This all occurs under the veiled justification of screening potential vendors. Without disclosure of the HOA's director's name and the amount of money spent, HOA owners would have no clue that they sponsored lavish wines and food through the reimbursements, and no indication that deeper inquiry may be fruitful.

Those opposed to this affirmative disclosure might interject that any HOA owner can invoke a right to inspect books and records of the HOA to evaluate such payments.⁷¹ This is not entirely true. The HOA

such as the Association are fiduciaries who are required to exercise their powers in accordance with the duties imposed by the Corporations Code.”); Charles C. Marvel, *Construction of contractual or state regulatory provisions respecting formation, composition, and powers of governing body of condominium association*, 13 A.L.R.4th 598 (1982).

71. See generally UNIFORM ACT, *supra* note 4, § 3-118 (“(b) Subject to subsections (c) and (d), all records retained by an association must be available for examination and copying by a unit owner or the owner’s authorized agent: (1) during reasonable business hours or at a mutually convenient time and location; and (2) upon [five] days’ notice in a record reasonably identifying the specific records of the association requested. (c) Records retained by an association may be withheld from inspection and copying to the extent that they concern: (1) personnel, salary, and medical records relating to specific individuals; (2) contracts, leases, and other commercial transactions to purchase or provide goods or services, currently being negotiated; (3) existing or potential litigation or mediation, arbitration, or administrative proceedings; (4) existing or potential matters involving federal, state, or local administrative or other formal proceedings before a governmental tribunal for enforcement of the declaration, bylaws, or rules; (5) communications with the association’s attorney which are otherwise protected by the attorney-client privilege or the attorney work-product doctrine; (6) information the disclosure of which would violate law other than this [act]; (7) records of an executive session of the executive board; or (8) individual unit files other than those of the requesting owner.”); CAL. CIV. CODE § 5210 (West 2023) (“(a) Association records are subject to member inspection for the following time periods: (1) For the current fiscal year and for each of the previous two fiscal years. (2) Notwithstanding paragraph (1), minutes of member and board meetings are subject to inspection permanently. If a committee has decision-making authority, minutes of the meetings of that committee shall be made

record keeper can play games to obfuscate certain types of information, making it difficult to ascertain the identity of the recipient.⁷² Additionally, large sums which are made in multiple small payments made over time may be difficult to readily identify, unless the HOA owner singles out clearly identified vendors in the journal and conducts an exhaustive, fine tooth combed search of the records. The Board of Directors of the HOA can also blockade inspection efforts by asserting that an insufficient number of members are making the request or an improper purpose exists.⁷³ Lastly, HOA owners who invoke the right to inspect books and records can be singled out for retaliation and selective enforcement efforts by the Board. In such circumstances, the HOA owner may invoke her right of review of records, resulting in the HOA Board engaging in retribution against the owner by selectively taking issue with the owner's landscaping, choice of window covering, or other HOA regulations. Indeed, the fear of HOA Board retribution

available commencing January 1, 2007, and shall thereafter be permanently subject to inspection. (b) When a member properly requests access to association records, access to the requested records shall be granted within the following time periods: (1) Association records prepared during the current fiscal year, within 10 business days following the association's receipt of the request. (2) Association records prepared during the previous two fiscal years, within 30 calendar days following the association's receipt of the request.”).

72. The HOA management can “play games” by asserting that the information request is overbroad and therefore not possible to collect, providing information in a piecemeal method, asserting that the request entails compilation of information, that the information might compromise privacy of an individual member (e.g. HOA director), or is being requested for an improper purpose. *See* UNIFORM ACT, *supra* note 4, § 3-118(f) (“(f) An association is not obligated to compile or synthesize information.”); CAL. CIV. CODE § 5215 (West 2023) (“(a) Except as provided in subdivision (b), the association may withhold or redact information from the association records if any of the following are true (4) The release of the information is reasonably likely to compromise the privacy of an individual member of the association. (5) The information contains any of the following: (A) Records of goods or services provided a la carte to individual members of the association for which the association received monetary consideration other than assessments.”).

73. *See, Parker v. Tract No. 7260 Ass'n.*, 215 Cal. Rptr. 3d 660, 669 (Cal. Ct. App. 2017) (“Here, Parker sought inspection rights of the membership list as a single member. As such, the HOA was not required to seek court involvement, and when Parker brought suit, the HOA had the right to argue that Parker's purpose was improper.”).

and selective enforcement may well be an invisible cudgel that prevents HOA owners from asking questions and asserting audit rights. Affirmative disclosure will help to disarm this ugly beast.

B. Solution 2: Disclose the Identity of Persons Receiving \$500 or More Per Year

Accompanying every annual budget disclosure transmittal, HOAs should be required to provide an affirmative disclosure to all HOA owners of the identity of persons/entities receiving \$500 or more in reimbursements, contract awards, or payments during the past year. This disclosure should include the name of the person/entity, the total aggregate dollar amount (regardless if arising under multiple payments or contracts), and a summary description of the underlying purpose or justification (such as painting services, or expense reimbursement). This type of disclosure alleviates the need of individual owners from invoking audit rights and spending hours culling through arcane accounting records, and tallying up individual journal entries while HOA management companies play hide and go seek with the identity of recipients. Such disclosure will enable HOA owners to perform due diligence and engage in further inquiry if necessary or desirable.

This affirmative disclosure also helps owners to assure that transactions are prudent, necessary, and competitive. This is partly due to annual budget disclosure documents only providing aggregate amounts in a generic manner, without revealing whether the sums were made to one person/entity, or multiple persons/entities.

One limitation to this disclosure would be the exact salary paid to employees of the HOA, such as custodians and door staff. This could be accomplished by allowing W-2 wage employees of the HOA to be disclosed by name along with a statement that the sum received is for employee wages in excess of \$500. This would preserve the confidentiality of salary information, and prevent potential infighting among employees having exact salaries disclosed. Should further inquiry be necessary, the owners of the HOA could dig deeper based upon this summary disclosure.

Legislatively, this goal can be accomplished by requiring that “every annual budget disclosure provided to owners shall be accompanied by a list of the names of all persons/entities receiving \$500 or more in reimbursements, contract awards, or any other

payments during the most recent completed fiscal year. This list shall include the full name of the recipient person/entity, the total aggregate dollar amount received, and a summary description of the underlying purpose or justification for such payment. Payments made to employees directly employed by the HOA and paid as W-2 employee wages shall not include the specific sum paid, but shall only be listed as greater than, or less than, \$500.”

IV. GIFTS AND BUSINESS INTERACTIONS OF HOA DIRECTORS

“You lie, lie, lie, lie, lie; tell me why, tell me why; why’d you have to lie?”⁷⁴ Rather than rely upon honesty and integrity of HOA Directors to avoid engaging in self-dealing, an affirmative disclosure of economic interests would be a more effective way to dissuade inappropriate behavior by such Directors. For those Directors who insist upon deceit, such disclosures would be the foundation of fraud and breach of fiduciary duty litigation.

A. HOA Circle of Hell 3: Lack of Affirmative Disclosure by Directors Regarding Gifts or Dealings with Persons Who Conduct Business with the HOA

We are told that HOA directors, officers, and committee members all serve in these roles for an eleemosynary purpose.⁷⁵ Indeed, we should be so lucky to have HOA governance populated with these Mother Theresa emulators. Although the fiduciary duties of HOA boards dictate both a duty of care and avoidance of self dealing,⁷⁶ in the real world, directors can too easily play “catch me if you can” through secretive concealment of gifts, favors, and other conflicts of interest. How can HOA directors game the system? Firstly, they can receive gifts from a variety of vendors, impacting decisions on who receives contract awards and renewals. This can be manifested in holiday gift baskets, tickets to sporting or other events, or just plain cash.

Secondly, HOA directors can also game the system by engaging in personal transactions at a reduced cost with persons or business

74. SEX PISTOLS, *LIAR* (Virgin Records 1977).

75. See *supra* note 34 and accompanying text.

76. See *supra* note 70.

entities who also conduct business with the HOA. Those HOA vendors were selected and approved by the HOA directors. For example, if the HOA board approves a contract with a painting company, it becomes all too easy for one or more directors to cozy up with the vendor and ask if any leftover paint, surely to be disposed of, might be applied to their personal unit. Or, the HOA director might receive preferential pricing, below the price offered to other members of the public and other owners in the HOA. The HOA Board might authorize expenditures to a particular vendor who has a relationship with one or more Board members, and that vendor may then offer discounts for work performed for those individual Board members. A member of the HOA Board might receive “free” or discounted landscaping or painting services from a vendor, in return for selecting that vendor. This undermines fairness, transparency, and fiduciary duties,⁷⁷ but becomes nearly impossible to identify and ascertain unless a member of the HOA invokes ongoing review of HOA expenditure records and uncovers the facts. Moreover, the HOA member who invokes such review may be subjected to retaliation in the form of selective enforcement, veiled as unrelated to the expenditure inquiries.⁷⁸

This type of self dealing is terribly difficult to ferret out, because both the vendor and the corrupt director will act in their own self interest to conceal the matter. As a result, accountability for breach of fiduciary duty is challenging, to say the least.

B. Solution 3: Require Directors to Annually Affirmatively Disclose Gifts or Dealings with Persons/Entities Who Also Conduct Business with the HOA, Unless the Director Recused Herself/Himself from All HOA Board Votes Involving Engagement of the HOA with Such Persons/Entities.

“The only notes that really count are the ones that come in wads.”⁷⁹ As the HOA is indeed a quasi-government,⁸⁰ the HOA Directors should be required to affirmatively disclose all gifts and all

77. *Id.*

78. *See supra* note 27 and accompanying text.

79. SEX PISTOLS, *THE GREAT ROCK ‘N’ ROLL SWINDLE* (Virgin Records 1979).

80. *See supra* note 36 and accompanying text.

transactions with vendors of the HOA.⁸¹ As a director of the HOA, it is too easy to approve of a painting or landscaping contract or some other transaction, and then ask the vendor for preferential rates or terms as a quid pro quo. An affirmative disclosure requirement of every transaction by a director with any HOA vendor will create a disincentive to self-deal, as well as a signal for further examination by HOA owners as appropriate.

The role and duty of directors is to capably manage the affairs of the HOA.⁸² Personal gifts and business relationships embedded with discounts from HOA vendors undermine this role and invite the director to line his/her pockets with lucre at the cost of other owners in the HOA.

Directors who breach the fiduciary duty by engaging in self dealing through quid pro quo transactions with HOA vendors can easily be aided and abetted in this deceit by the vendors, because the vendor is receiving the benefit of the HOA contract with the director's support. Therefore, neither the self-serving director nor the vendor have any incentive to disclose the self dealing.

Requiring each director to promptly disclose both gifts received from persons who conduct business with the HOA, as well as all transactions with persons who conduct business with the HOA, fosters an environment of lucidity and clarity which concomitantly hinders self dealing. By requiring the directors to disclose this information

81. As the HOA entity has already been acknowledged as a type of quasi-governmental entity, *see supra* note 36 and accompanying text, the HOA Directors are therefore quasi-public officials. Accordingly, HOA Directors should be subject to the same types of anti-corruptive practices found in government regulation. *See generally*, California Political Reform Act, CAL. GOV'T. CODE § 1090 (West 2023). As described by the FPPC, "Every elected official and public employee who makes or influences governmental decisions is required to submit a Statement of Economic Interest, also known as the Form 700. The Form 700 provides transparency and ensures accountability in two ways: [1] It provides necessary information to the public about an official's personal financial interests to ensure that officials are making decisions in the best interest of the public and not enhancing their personal finances. [2] It serves as a reminder to the public official of potential conflicts of interest so the official can abstain from making or participating in governmental decisions that are deemed conflicts of interest." *Statement of Economic Interests Form 700*, CAL. FAIR POL. PRAC. COMM'N, <https://www.fppc.ca.gov/Form700.html> (last visited Sept. 2, 2023).

82. *See supra* note 70.

affirmatively, owners can dig deeper through further inquiry and ascertain if the situation requires action. For example, Director A approves a painting contract for the HOA with Vendor B, and then proceeds to hire Vendor B to perform various painting work in Director A's personal residence. Without affirmative disclosure, directors can self-deal with great abandon and frequency at the expense of the other HOA owners. In the event that a director fails to affirmatively disclose a gift or transaction with a person who conducts business with the HOA, the law should designate that this constitutes *prima facie* evidence that the director has breached her/his fiduciary duty and engaged in self dealing, placing the burden of proving otherwise upon the director. This affirmative disclosure requirement places the onus on directors to disclose who they are receiving gifts from and dealing with, thereby empowering HOA owners to engage in deeper inquiry if deemed necessary or desirable.

Under current law, if the well intentioned owner believes that something is afoul, and desires to learn whether the director is engaged in self dealing, the only meaningful way to obtain relevant information is to invoke audit rights of HOA records and/or initiate litigation against the director, or the entire Board of Directors. Great effort to punish the innocent and reward the guilty is built into the current HOA governance system through its lack of required affirmative, transparent, disclosures.

Critics might assert that this disclosure requirement would be invasive to personal financial privacy of the HOA directors. This is a red herring, because HOA directors are legally obligated to be protecting the interests of the entire HOA and not be engaged in self dealing.⁸³ Disclosing personal gifts and transactions with vendors who also transact with the HOA merely provides transparency and helps to alleviate temptation of wrong doing. To help temper this disclosure requirement and make it more practical, a three (3) year transaction window period would be appropriate. If a period of greater than three (3) years has passed since the last HOA contract or transaction with such vendor, there would be no need for the director to disclose personal gifts or transactions with that vendor, unless the HOA subsequently engages in a transaction with that same vendor within three (3) years after the date that the director received personal gifts or

83. *See supra* note 70.

engaged in transactions with that vendor. This three (3) year forward and backward buffer balances the duty of disclosure with the alleviation of potential *quid pro quo* transactions between the vendor and director, as such transactions presumably come at some expense to the other, innocent owners in the HOA. Directors who recused themselves and abstained from voting on approval of contracts or disbursements to a specific HOA vendor would not need to disclose gifts or other dealings with that vendor, as the recusal and abstention would aid in obviating a conflict of interest.

The only information that would be revealed would involve disclosure of business entities or persons with whom the director is simultaneously dealing with both individually and as a fiduciary in the role as a director on behalf of the HOA. This very scenario is tantamount to a conflict of interest which merits disclosure and scrutiny.

Legislatively, an approach to this solution would be: “Within sixty (60) days following the conclusion of each calendar year, each director who served any portion of such calendar year shall provide to all owners an annual disclosure of gifts and personal transactions with any vendor/person/entity (“Vendor”) with whom the HOA has or had a contract or payment relationship within the most recent three (3) year period. Such disclosure shall include the name of the Vendor, and the dollar amount and description of the gift or transaction during such annual period. A director’s disclosure obligation hereunder, and the definition of Vendor, also extends to any business entity or enterprise in which the director has a majority or controlling interest. If a director is exempt from disclosure due to Vendor transactions being outside of the three (3) year period described above, but the Vendor subsequently enters into any contract with, or receipt of payment from, the HOA within three (3) years after the date that a director received any gifts or engaged in any personal transactions with such Vendor, the director or former director shall be required to issue a disclosure hereunder within thirty (30) days thereof to all owners. Directors shall be exempt from disclosure under this provision for gifts and personal transactions with a Vendor if the director recused himself/herself and abstained from approval of the contract and any amendments and renewals with such Vendor. Violation of this provision shall constitute *prima facie* evidence of breach of fiduciary duty, and self dealing, by the director.”

V. CONCLUSION

The burning inferno caused by dealing with the opacity of HOAs can be easily chilled and soothed through the salvation of transparency in budgets, expenditures, gifts, and business dealings. Open public access to HOA budgets will provide captive owners with comparative data, enabling accountability and demands for fiscal prudence; affirmative disclosure of the identity of persons receiving over \$500 annually will provide visibility and oversight over the recipients of such precious owner funds; and affirmative disclosure by directors of gifts and personal dealings with HOA vendors will help to absolve the likelihood and temptation of fiduciary breaches and self dealing. Only when such information is affirmatively disclosed will innocent owners be armed with the necessary fodder to challenge renegade HOA directors and command accountability and positive change.