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INVOLUNTARY SALE: BANISHING AN OWNER FROM THE CONDOMINIUM COMMUNITY

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INTRODUCTION AND OVERVIEW

Communal living arrangements often require a significant measure of accommodation and cooperation among members who presumably have joined a common interest community¹ because of commonly shared preferences, perceptions and practices. Of course, there may be varying or even faulty perceptions of those common tenets by individual members. Similarly, the development concept may be initially flawed (for example, by aggregating inappropriate or incompatible demographic groups) or may fall victim to the vicissitudes of the market-driven modifications (for example, a "seniors only" community concept giving way to inclusion of young married couples with children; a detached single family residential development modified to include multi-family, multi-storied attached units; an owner-occupied community joined with an apartment building). Moreover, since a community may have fluctuating membership composition (due to individual mobil-

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1. For purposes of this article, the definition of "common interest community" is adopted from the Uniform Common Interest Ownership Act ("UCIOA") of the National Conference of Commissioners on Uniform State Laws. Unif. Common Interest Ownership Act § 1-103(7) (amended 1994). A "common interest community" is defined as "[r]eal estate with respect to which a person, by virtue of his ownership of a unit, is obligated to pay for real estate taxes, insurance premiums, maintenance, or improvement of other real estate" *Id.* Common interest communities include condominiums, cooperatives and planned communities. *Id.* A "condominium" is defined as "[a] common interest community in which portions of the real estate are designed for separate ownership and the remainder of the real estate is designated for common ownership solely by the owners of those portions." *Id.* § 1-103(8). See also *Noble v. Murphy*, 612 N.E.2d 266, 269 (Mass. App. Ct. 1993) (defining condominium as a "hybrid" interest in real estate requiring an owner to sacrifice certain freedoms to obtain the economic advantages of association with other owners).

ity or morbidity), there is always the prospect of change in the membership with resultant positive or negative consequences for communal harmony. Finally, the impact of general societal change on the norms, lifestyles and economics of the common interest community is also a factor. Are truly insular and homogenous communities even possible in a multi-racial, multi-cultural society which is technologically linked to an even more diverse global village?

In view of the reality that there may be competing individual interests, as well as the community's overall interest, the seminal cases have characterized the condominium community with an emphasis on the individual's deference to the common good.² In *Hidden Harbour Estates, Inc. v. Norman*,³ the court proclaimed:

It appears to us that inherent in the condominium concept is the principle that to promote the health, happiness and peace of mind of the majority of the unit owners since they are living in such close proximity and using facilities in common, each unit owner must give up a certain degree of freedom of choice which he might otherwise enjoy in separate, privately owned property. Condominium unit owners comprise a little democratic subsociety of necessity more restrictive as it pertains to use of condominium property than may be existent outside the condominium organization.⁴

Similarly, in *Kilgore v. 2970 Lakeshore Drive Condominium Ass'n*,⁵ the court stated, "[a]lthough William Pitt, Earl of Chatham, may have declared, in a famous speech to Parliament, that a man's home is his castle, this is not necessarily true of condominiums."⁶ In another opinion, the Florida appellate court stated:

Every man may justly consider his home his castle and himself as the king [or queen] thereof; nonetheless his sovereign fiat to use his property as he pleases must yield, at least in degree, where ownership is in common and in cooperation with others. The benefits of condominium living and ownership demand no less. The individual ought not be permitted to disrupt the integrity of the common scheme through his desire [or disdain] for change⁷

Thus, a consistent judicial theme underscores the communal aspect of the condominium lifestyle and its accompanying subordination of individual self-interest.

Unfortunately, a common interest community will experience

2. See *Apple II Condominium Ass'n v. Worth Bank & Trust Co.*, 659 N.E.2d 93, 97 (Ill. App. Ct. 1995) (commenting that condominium living necessitates restraints on the individual owner's rights).

3. 309 So.2d 180 (Fla. Dist. Ct. App. 1975).

4. *Id.* at 181-82.

5. 1996 WL 31159 (N.D. Ill. Jan. 26, 1996).

6. *Id.* at *1.

7. *Sterling Village Condominium, Inc. v. Breitenbach*, 251 So.2d 685, 688 (Fla. Dist. Ct. App. 1971).

an almost inevitable clash of differing individual interests and preferences in the course of its existence. While disagreements may be resolved by establishment of consensus or by majoritarian determination, there remains the possibility of an individual member's failure to abide by the regulations and restrictions of a common interest community.⁸ While certain noncompliance can be attributable to ignorance or oversight, the more troubling situation relates to a member's knowing and persistent refusal either to form a consensus or to accept majoritarian determined outcomes. In response to disobedience or defiance, the common interest community generally has a range of remedies. Apart from peer pressure and informal persuasion, the common interest community may impose monetary fines,⁹ restrict or abrogate privileges to utilize certain common facilities,¹⁰ perfect and foreclose upon lien rights for unpaid monetary charges,¹¹ seek judicial orders enjoining misconduct¹² and obtain adjudication of monetary damage.¹³ In some instances, resort to alternative dispute resolution, such as internal administrative processes or arbitration and mediation, is also available or even encouraged.¹⁴ Depending on the nature of the infraction and the mentality of the delinquent member, there may be a variety of effective solutions.

This Article focuses on the right of a condominium association to compel the involuntary sale of a member's unit due to the member's breach of obligation. This remedy is notable due to its finality - - that is, the non-conforming member is legally and physically expelled from the community.

8. "Member" is used interchangeably with "unit owner" or "owner."

9. See Unif. Common Interest Ownership Act, § 3-102(a)(11) (imposing monetary penalties for late payments of assessments and violations of association rules). See also 765 ILCS § 605/18.4(l) (1996) (authorizing board managers to impose charges for late payment of common expenses and levy fines for violations of association rules).

10. See *Devins v. Leafmore Forest Condominium Ass'n of Owners*, 407 S.E.2d 76, 78 (Ga. App. Ct. 1991) (holding that condominium associations could terminate water and gas, limit access to cable television service, and limit use of a condominium unit if owner is past due in its assessments).

11. See Unif. Common Interest Ownership Act § 3-116(i) (providing for foreclosure upon non-payment of assessments). See also 765 ILCS 605/9(g), (h) (discussing the procedure for foreclosing on lien rights); N.J. STAT. ANN. § 46:8B-21 (West 1995) (describing associations' rights regarding liens).

12. *Courts at Beachgate v. Bird*, 545 A.2d 243, 248 (N.J. Super. Ct. Ch. Div. 1988).

13. *Id.*

14. See CAL. CIV. CODE § 1354(b) (West 1996); 765 ILCS 605/32 (1996); N.J. STAT. ANN. § 45:22A-44(c). All these statutes empower the association to provide a procedure for the resolution of disputes. See also N.J. STAT. ANN. § 46:8B-14(c) (West 1995) (authorizing the association to make rules governing the operation of the condominium property).

I. INVOLUNTARY SALE REMEDY

A. Typical Provision

In Illinois, a significant number of condominium communities claim the remedy of involuntary or forced sale of a member's unit (or interest) due to that member's breach of obligation to the community. These membership termination provisions are most often found in the condominium declaration or bylaws, which are typically filed on the public record.¹⁵ Such provisions are very similar to one another, indicating some common ancestor/drafter.

A typical condominium provision is as follows:

Involuntary Sale. If any Owner (either by his own conduct or any other occupant of his Unit) shall violate any of the covenants or restrictions or provisions of this Declaration or the regulations adopted by the Board, and such violation shall continue for thirty (30) days after notice in writing from the Board, or shall recur more than once after such notice, then the Board shall have the power to issue to the defaulting Owner a ten (10) day notice in writing to terminate the right of said defaulting Owner to continue as an Owner and to continue to occupy, use or control his Unit and thereupon an action in equity may be filed by the members of the Board against the defaulting Owner for a decree of mandatory injunction against the Owner or Occupant or, in the alternative, a decree declaring the termination of the defaulting Owner's right to occupy, use or control the Unit owned by him on account of the breach of covenant and ordering that the right, title and interest of the Owner in the Property shall be sold (subject to the lien of any existing mortgage) at a judicial sale upon such notice and terms as the court shall establish, except that the court shall enjoin and restrain the defaulting Owner from reacquiring his interest in the Property at such judicial sale. The proceeds of any such judicial sale shall first be paid to discharge court costs, court reporter charges, reasonable attorneys' fees and all other expenses of the proceeding and sale, and all such items shall be taxed against the defaulting Owner in said decree. Any balance of proceeds, after satisfaction of such charges and any unpaid assessments hereunder or any liens, shall be paid to the Owner. Upon the confirmation of such sale, the purchaser thereof shall thereupon be entitled to a deed to the Unit Ownership and to immediate possession of the Unit sold and may apply to the court for a writ of assistance for the purpose of acquiring such possession, and it shall be a condition of any such sale, and the decree shall provide, that the purchaser shall take the interest in the Property sold subject to this Declaration.¹⁶

15. Condominium declarations and by-laws typically must be filed with the local recorder's office. See Unif. Common Interest Ownership Act § 2-101 (a) (noting the steps necessary for creating a common interest community). See also 765 ILCS 605/6, 605/17 (explaining the necessity for recordation).

16. This provision was taken from the declaration for a large high rise con-

Note that, while not provided in the foregoing quoted provision, the consent of the unit mortgagee is sometimes required. Note also that the gravity of the offending behavior is typically not specified. For example, can the remedy be invoked against a chronic litterbug as well as the member causing a serious risk of personal harm or property damage to others? This remedy is often grouped with other remedies such as fines, damages, eviction and injunctive relief.

No appellate opinion rendered to date regarding condominiums has addressed the actual utilization of the involuntary sale remedy.¹⁷ Indeed, while the remedy may have been threatened and initiated, only limited anecdotal accounts have been identified.

B. Analogous Situations

The involuntary sale or other disposition of a member's interest can occur in a number of situations in which there is no fault or misconduct on the part of the member. In some instances, there is a partial limitation on ownership, whereas in others there is complete alienation.

For example, a decision to sell the condominium property as a whole (including the member's unit) can be accomplished without unanimous consent and the member is limited to recovery of his prorata interest in the resultant proceeds.¹⁸ Consequently, a solitary member's refusal or disinclination to sell his unit will not be determinative.¹⁹

dominium in Chicago, Illinois, and is on file with The John Marshall Law Review.

17. In *Kittel Glass v. Oceans Four Condominium Ass'n*, an owner was found to have committed multiple acts of "indecent exposure, public intoxication, reckless display of a firearm, and assault and battery." 648 So.2d 827, 828 (Fla. Dist. Ct. App. 1995). As a result of her violation of a temporary injunction against such misconduct, the trial court imposed a permanent injunction against her, enjoining her from occupying or entering any part of the condominium premises. *Id.* While reversing due to failure by the association to afford her due process in its internal disciplinary proceedings, the appellate court also determined that the trial court exceeded its authority in issuing the permanent injunction. *Id.* at 829. Indicating that the trial court could have utilized fines or incarceration, the appellate court concluded that the permanent injunction was equivalent to a judicially forced sale or lease of the unit, which was an eminent domain power that only delegated governmental entities could exercise. *Id.* However, this case is distinguishable from other cases as the trial judge apparently assumed a remedy not otherwise available to him, whereas the involuntary sale remedy is contractually included in the governing documents. *Id.* at 828-29.

18. See, e.g., 765 ILCS 605/15 (explaining the binding effect of the sale of an entire condominium complex on all unit owners of that complex); Uniform Common Interest Ownership Act § 2-118 (discussing the process of terminating the "common interest community").

19. See, e.g., 765 ILCS 605/15 (stating that only a majority of condominium unit owners in a given complex is needed to effectuate a sale of the entire con-

Also, less than full fee conveyance of a member's interests may be effectuated by grants of easements, licenses and exclusive use rights in the condominium common elements in which the member has a proportionate ownership interest.²⁰ Similarly, a member's interest in common elements may be diluted by annexation of additional units to the condominium.²¹

Certain sales contracts also provide that the developer can exercise a buy-back option against the purchaser, thereby reacquiring the unit. Such an option permits the developer to rid itself of a potentially problematic, unhappy purchaser. This arrangement is actually quite analogous to the condominium association's involuntary sale remedy.

Thus, the condominium concept allows for disposition of a member's unit and/or appurtenant interest in the common elements without that specific member's consent if the requisite majority of the community or the appropriate statutory authority is utilized.

C. Reason for Exercise

Through the acquisition of their respective units, members of a condominium community have made a commitment to abide by the requirements of the governing documents, unless and until they properly modify such requirements. Such a commitment is fundamental to the protection of both the community and the individual members. If this commitment is ignored or breached, then the very fabric of the community is threatened with unraveling, as each member relies on the other to make good on his commitment. Efficiency dictates that enforcement of the member's commitment be best handled by the governing body or association

dominium complex).

20. *See, e.g., id.* § 605/14.2 (providing that approval of only a two-thirds majority of condominium unit owners assembled at a condominium meeting is needed to "dedicate a portion of the common elements to a public body for use, or in connection with, a street or utility"); *id.* § 605/14.3 (providing that approval of only a majority of condominium unit owners assembled at a condominium meeting is needed to "authorize the granting of an easement for the laying of cable television cable"); *id.* § 605/14.4 (providing that approval of only a majority of condominium owners assembled at a condominium meeting is needed to "authorize the granting of an easement to a governmental body for construction, maintenance or repair of a project for protection against water damage or erosion"); Uniform Common Interest Ownership Act § 3-102(a)(9), 3-112 (stating that common interest community associations may grant "easements, leases, licenses, and concessions through or over the common elements," and also discussing the "conveyance and encumbrance of common elements" in common interest communities).

21. *See, e.g.,* 765 ILCS 605/25 (providing for the reallocation of "percentage interests in the common elements" of a condominium complex among condominium owners when a developer adds condominium units to an existing condominium complex).

entity, as opposed to individual action by a member against the offender.

If a member simply refuses to abide by his commitment, then there are compelling reasons to consider his expulsion. First, although the nonconforming member may be subjected to a variety of disciplinary actions, such as monetary fines, or judicial enforcement, such as injunctive relief, the repeated exercise of such remedies may be ultimately inefficient.²² While payment of a fine offers some satisfaction, if only in terms of compensation for loss or mere vindication, the offender may treat the fine as an acceptable price for non-conformity and persist in the deviant behavior, which is still unsatisfactory to the community. Indeed, such a situation would also produce the undesirable result that the more affluent member can merely buy his way into non-compliance. Such an outcome would not only leave the offender unrehabilitated but would also have an adverse impact on the morale of the rest of the members. Even injunctive relief has its shortcomings. Although a court may award such relief, the judiciary has little stomach for ongoing, long-term management of the relationship between a member and the association. Moreover, the repeated visits to the courthouse to enforce seemingly petty, or at least non-momentous, matters will likely incur judicial hostility to the association as well as to the delinquent member. Again, such an ineffective remedy will likely disillusion the rest of the community.

Second, if a member cannot live in reasonable conformity with the requirements of the community, that member is essentially not in accord with either the particular constraints of that community or, even more broadly, the essential nature of the common interest community lifestyle. Such particularized or generalized incompatibility is essentially adverse to the community itself. In addition, such a situation infringes upon the right of the other members of the community to live with whom they have chosen—that is, like-minded persons who embrace the same commitment to the same community scheme which attracted them all together in the first place. Just as the non-conforming member may claim his right to dissent, the balance of the members may properly claim their right not to associate with him.²³ Thus, the community has

22. See, e.g., 765 ILCS 605/18.4(l) (providing for the authority of condominium managers to impose fines upon condominium unit owners); *Courts at Beachgate v. Bird*, 545 A.2d 243, 247 (N.J. Super. Ct. Ch. Div. 1988) (discussing the fact that “a condominium association’s board of directors [is authorized by state statute] to seek injunctive relief to enforce its bylaws”).

23. See *Hill v. National Collegiate Athletic Ass’n*, 865 P.2d 633, 656 (Cal. 1994) (discussing the right of individuals to choose with whom they will associate and on what terms). This case states:

private conduct, particularly the activities of voluntary associations of persons, carries its own mantle of constitutional protection in the form of freedom of association. Private citizens have a right, not secured to

the right, and indeed obligation, to disassociate the member who rejects the commitment to the community.

These reasons touch upon the fundamental nature of the association: its communal nature and its set of specific conditions to which purchasers voluntary subject themselves.

D. Statutory Considerations

A condominium is a creature of statute and all states have enabling legislation for the creation and operation of that form of ownership. As a rule, a condominium declaration or master deed may not contain a provision which conflicts with the enabling statute.²⁴ However, no condominium enabling statute expressly deals with the validity of an involuntary sale remedy provision. Typically, the statute provides that the declaration may contain "[s]uch other lawful provisions not inconsistent with the provisions of this Act as the owner or owners may deem desirable in order to promote and preserve the *cooperative* aspect of ownership of the property and to facilitate the proper administration thereof."²⁵ It should be noted that in the foregoing quoted language, a guiding principle of the declaration provision is the preservation of the *cooperative* aspect of the condominium. Such cooperativeness clearly implies a compliance with common policies, restrictions and requirements. Conversely, breach of policies, restrictions and requirements would be clearly inimical to the cooperative aspect of the property. Thus, there is no apparent statutory bar against the involuntary sale remedy but that remedy must be applied in light of the overall condominium theme of cooperative property ownership and operations.

E. Private Membership Associations

In general, the courts will defer to a private voluntary association's decision to expel one of its members and will not re-examine the merits of such a decision.²⁶ However, procedural due

the government, to communicate and associate with one another on mutually negotiated terms and conditions . . . Freedom of association is also protected by the First Amendment and extends to all legitimate organizations, whether popular or unpopular.

Id.

24. See Unif. Common Interest Ownership Act § 1-104 (prohibiting variation of the Uniform Common Interest Ownership Act's provisions except in certain enumerated circumstances). See also 765 ILCS 605/2.1 (adapting Uniform Code § 1-104 for Illinois Statutes).

25. 765 ILCS 605/4(i) (emphasis added).

26. See, e.g., *Pitcher v. Board of Trade of City of Chicago*, 13 N.E. 187, 190 (Ill. 1887). In *Pitcher*, the court stated:

[i]t is claimed here that appellant has a valuable pecuniary and property interest in his membership, and that his expulsion deprives him of the legitimate profits which he would be able to make a large and profitable business . . . The discussion of such a distinction is rendered

process must be accorded, such as notice, opportunity for hearing and impartial adjudicators.²⁷ Moreover, the courts will intervene "when a substantial property, contract or other economic right that implicates due process is at stake," but "[n]ot all economic injuries implicate due process concerns," only those relating to economic livelihood or when the association's internal rules are "clearly subversive of personal or property rights."²⁸ Finally, while a member must exhaust internal remedies of his private association, the courts will interpose themselves if a member is seeking to secure property rights.²⁹

Similarly, in the commercial context, it is not unusual to have statutory or contractual expulsion mechanisms to effectuate elimination of a defaulting partner or dissenting shareholder due to a variety of circumstances.³⁰

unnecessary by the views herein expressed as to the finality of the judgment of expulsion against the appellant by reason of its having been rendered by a tribunal of his own choosing, and under rules by which he pledged himself to abide.

Id. See also *Werner Int'l Ass'n of Machinists*, 137 N.E.2d 100, 108 (Ill. App. Ct. 1956). The court stated:

[i]t is the law of this jurisdiction that a court of equity will not interfere to control the enforcement of the constitution, rules of order and by-laws of a voluntary association, such as a labor union, church or lodge, or to prevent such an association from expelling members for alleged violation of some of its rules or regulations unless some special ground for equitable intervention is alleged.

Id. See also *Finn v. Beverly Country Club*, 683 N.E.2d 1191, 1193 (Ill. App. Ct. 1997) (holding that a voluntary association's board decisions were subject to judicial review "only when they fail to exercise power consistently with their own internal rules or when their conduct violates the fundamental right of a member to a fair hearing").

27. See *Gaston Board of Realtors, Inc. v. Harrison*, 306 S.E.2d 809, 812 (N.C. Ct. App. 1983) *rev'd on other grounds* 316 S.E.2d 59 (N.C. 1984) (holding that given potential adverse effects on member's standing and business, "his expulsion must be done with some procedural due process" such as timely notice, "opportunity to present evidence and cross-examine opposing witnesses," representation by counsel and an impartial hearing panel); *Kilgore v. 2970 Lake Shore Drive Condominium Ass'n*, 1996 WL 31159, at *4 (N.D. Ill. 1996) (holding that due process includes "right to notice and opportunity to be heard at a meaningful time" and manner); *Kennedy v. Electric Heights Hous. Ass'n*, 433 A.2d 639, 641 (Pa. Commw. Ct. 1981) (holding that a cooperative member's expulsion was accomplished properly in compliance with statutory requirements, governing documents and due process requirements).

28. *Beverly County Club*, 683 N.E.2d at 1193; *Attoe v. Madison Prof'l Policemen's Ass'n*, 255 N.W.2d 489, 493 (Wis. 1977).

29. *Logan v. 3750 Lake Shore Drive, Inc.*, 308 N.E.2d 278, 281-82 (Ill. App. Ct. 1974) (holding that a cooperative shareholder's right to sublet her apartment was arbitrarily and unreasonably denied).

30. See, e.g., 805 ILCS 205/31(d) (discussing the expulsion of a partner); 805 ILCS 210/402(3) (regarding expulsion of a partner); 805 ILCS 5/11.65(a)(1) (regarding the elimination and valuation rights of dissenting shareholders in merger situations). See also *Fisher v. Parks*, 618 N.E.2d 1202, 1203 (Ill. App. Ct. 1993) *appeal denied* 624 N.E.2d 806 (Ill. 1993) (discussing expulsion pro-

In the case of an involuntary sale of a condominium unit, a member is entitled to procedural due process in light of his unquestionably substantial property interest, particularly if the unit constitutes his homestead. By the same token, the condominium association should not have any reservation in providing such due process inasmuch as its implementation of the remedy necessitates judicial involvement.

F. Standard of Review for Condominium Action

Commentators have discerned a variety of judicial review standards as applied to actions by condominium associations, with differing views as to the effects and desirability of those standards.³¹ While there are other variations, it appears that the two possibilities enjoying fairly significant support are the rule of reasonableness and the business judgment rule.³²

The rule of reasonableness simply states that the condominium association must act reasonably.³³ This process entails judicial second-guessing of the association's decision on a case-by-case basis. On one extreme, the court could uphold an action if it was reasonably related to the objectives of the association, thereby allowing virtually all such actions to stand regardless of offensiveness to general societal norms. On the other end of the spectrum,

visions of a partnership agreement to effectuate the elimination of a defaulting partner). A condominium declaration has been construed to be contractual in nature. *Streams Sports Club Ltd. v. Richmond*, 457 N.E.2d 1226, 1227 (1983).

31. See, e.g., Armand Arabian, *Condos, Cats, and CC&RS: Invasion of the Castle Common*, 23 PEPP. L. REV. 1, 16 (1995) (discussing the effect of judicial review on the rights of individual owners); Todd Brower, *Communities within the Community: Consent, Constitutionalism, and Other Failures of Legal Theory in Residential Associations*, 7 J. LAND USE & ENVTL. L. 203, 207 (1992) (proposing "a legal theory for judicial review of common interest developments which harmonizes the competing policies implicated in those developments in light of the role which residential associations play in the lives of their members and in larger society"); Katherine Rosenberry, *The Application of the Federal and State Constitutions to Condominiums, Cooperatives and Planned Developments*, 19 REAL PROP. & TR. J. 1, 5-6 (1984) (discussing the varying treatments by courts of restrictions placed on condominium unit owners by condominium associations); Lewis A. Schiller, *Limitations on the Enforceability of Condominium Rules*, 22 STETSON L. REV. 1133, 1140 (1993) (explaining that judicial review of the actions of condominium associations usually takes "the form of 'reasonableness' review").

32. The Constitutional requirement of state action dictated by the Fourteenth Amendment remains a little used standard. *Compare* *Midlake on Big Boulder Lake Condominium Ass'n v. Cappuccio*, 673 A.2d 340 (Pa. Super. Ct. 1996), *with* *Gerber v. Longboat Harbour North Condominium, Inc.* 724 F. Supp. 884 (M.D. Fla. 1989) *order vacated in part on reconsideration* 757 F. Supp. 1339 (M.D. Fla. 1991). See Rosenberry, *supra* note 31, at 5, for a more detailed discussion of the state action requirement.

33. *Hidden Harbour Estates, Inc. v. Norman*, 309 So.2d 180, 182 (Fla. Dist. Ct. App. 1975).

reasonableness could be used to impose an analysis in light of extra-community standards, which then could undermine the contrarian purposes of the association itself. Neither approach is fully satisfactory.

A variation of the reasonableness test is reflected in *Hidden Harbour Estates, Inc. v. Basso*,³⁴ wherein the Florida courts drew a distinction between restrictions embodied in the recorded covenants and restrictions embodied in rules or discretion exercised by the condominium governing board.³⁵ With respect to recorded restrictions, the courts will defer to them and enforce them even if somewhat unreasonable, unless they were "wholly arbitrary in their application, in violation of public policy, or that they abrogate some fundamental constitutional right."³⁶ On the other hand, with respect to board-promulgated restrictions, no deference is accorded and the board must demonstrate that the restriction is "reasonably related to the promotion of the health, happiness and peace of mind of the unit owners."³⁷ Under the *Basso* standard, the courts may be relatively comfortable in evaluating a case on a reasonableness standard as to board-adopted restrictions.³⁸ However, if a member is guilty of breaching a recorded covenant, which may itself be somewhat unreasonable, will a court of equity tolerate enforcement by way of involuntary sale of the offender's unit? Perhaps the court will treat the decision by the governing board to exercise the involuntary sale remedy as being an exercise of discretion (even though the remedy may also be embodied in the recorded covenants, but not mandated by the recorded covenants) and thereby evaluate the board's exercise under the reasonableness standard.

Another commonly utilized standard is the business judgment rule or something analogous to it,³⁹ whereby the decision of the governing board would be sustained unless ultra vires or tainted by self-dealing or bad faith.⁴⁰ In this approach, the court expressly recognized that the governing board of the association is in a superior position to understand, reconcile and resolve the myriad

34. 393 So.2d 637 (Fla. Dist. Ct. App. 1981).

35. *Id.* at 639-40.

36. *Id.* at 640.

37. *Id.*

38. *Id.* Compare *Ridgely Condominium Ass'n, Inc. v. Smyrnioudis*, 660 A.2d 942, 951 (Md. Ct. Spec. App. 1995) (applying a reasonableness standard to amendments of condominium bylaws), with *Apple II Condominium Ass'n v. Worth Bank & Trust Co.*, 659 N.E.2d 93, 99 (Ill. App. Ct. 1995) (refusing to apply a reasonableness standard to condominium bylaw amendments).

39. *Levandusky v. One Fifth Ave. Corp.*, 553 N.E.2d 1317, 1321 (N.Y. 1990). See also *Carney v. Donley*, 633 N.E.2d 1015, 1021 (Ill. App. Ct. 1994) (applying both reasonableness and business judgment standards of review).

40. *Levandusky*, 553 N.E.2d at 1321-22.

competing interests in the association.⁴¹ Thus, the board's decision may not be subject to scrutiny unless the decision making process was flawed.⁴² Given the relatively limited range of exceptions, it is possible that most governing board decisions would be insulated from judicial review.

II. IMPLEMENTATION OF INVOLUNTARY SALE

While there is no *per se* statutory or constitutional ban on the involuntary sale remedy, constitutional considerations are still applicable.⁴³ Specifically, due process must be afforded in the exercise of the remedy.⁴⁴ Since the involuntary sale is to be judicially implemented, due process will likely be satisfied by the very utilization of the courts. However, if any internal proceedings in the condominium association form the basis for the exercise of the involuntary sale remedy, that process must afford the delinquent owner with rudimentary due process.

The courts will likely conduct the involuntary sale along the lines of a mortgage foreclosure sale, in which maximum fair market price may not be readily obtainable for a variety of reasons (for example, lack of adequate time and marketing efforts). While the condominium association may participate as a bidder at the sale, it has little incentive to maximize the sale price of the unit. Rather, the association will expect other interested parties (for example, a purchase money mortgagee) to play the dominant role in the bidding. If maximum fair market value cannot be reasonably expected to result from the judicial foreclosure sale method, should the delinquent member be entitled to reject the sale? Should the condominium association have the ability to utilize judicial lien foreclosure proceedings without providing any special accommodation for the delinquent member? To the extent the prescribed judicial procedure for a mortgage foreclosure comports with due process, there is no compelling reason to alter that familiar format.⁴⁵ However, it is likely that this issue will be left to the discretion of the court, particularly if the remedial provisions do not specify the exact method for the sale. A cautious approach may dictate that the order contain a sale procedure whereby the sale

41. *Id.* at 1322.

42. *Id.* at 1321-22.

43. See U.S. CONST. amend. XIV § 1 (requiring due process before a state may act to deprive someone of property).

44. *Id.* (stating that a person is entitled to due process prior to the seizure of their property by the state); see also *United States v. Whitney*, 602 F. Supp. 722, 733 n.11 (W.D.N.Y. 1985) (stating that judicial foreclosure sales are a form of state action governed by the Fourteenth Amendment's Due Process Clause).

45. See *Whitney*, 602 F. Supp. at 733 n.11 (describing the requirement that judicial mortgage sales comport with due process).

price may be enhanced, though not necessarily maximized (for example, longer sale notice period, engagement of a broker). Of course, the institution of an involuntary sale proceeding may motivate a purchase money mortgagee or other lien holder to commence its own foreclosure proceedings. In that case, the court may decide to utilize the mortgage foreclosure sale format with its perceived deficiencies rather than require a special sale procedure more beneficial to the delinquent member.

Apart from constitutional concerns, consideration of the involuntary sale remedy entails public policy issues. Will the use of such a drastic remedy be readily entertained by the courts? Possible factors to consider include proportionality of the remedy in comparison to the member's misconduct. Many such involuntary sale provisions merely allow its invocation if the member commits an offense repeatedly within a given time frame or possibly even for a single isolated violation. Of course, there may be circumstances in which a single act or omission may be perceived as justifiable grounds, such as commission of a violent, heinous unprovoked attack on another resident. On the other hand, is there the same self-evident justification for the member whose misconduct is persistent but not as pernicious, such as the chronic litter bug or the thoughtless member playing loud stereo music? Does the community have the right to seek termination of even petty annoyances by a member whose lack of common courtesies lies at the heart of the misconduct? Equitable considerations by the court will play a role in the judicial enforcement of the involuntary sale remedy.⁴⁶ While equity may not kill a mouse with a cannon, should equity overlook a two hundred pound mouse? It is not difficult to imagine any number of factual scenarios which would entail apparently picayune and petty disputes, but ultimately the judiciary should not second-guess the will of the private community in such matters but should honor their right of association.⁴⁷

With the involuntary sale situation, the issue is not restricting alienation but rather compelling alienation. However, the remedy is invoked due to the breach of some restriction on the conduct of the member. Assuming that the prohibited conduct is not legally sacrosanct or that the required conduct is not legally repugnant, then the penalty imposed for breach of such requirements is logical and appropriate. Therefore, the courts should not be reluctant to execute the involuntary sale remedy.

46. See *Hayes v. Alaska USA Fed. Credit Union*, 767 P.2d 1158, 1159 (Alaska 1989) (stating that courts have equitable power in overseeing judicial foreclosure sales).

47. See, e.g., *111 Tenants Corp. v. Stromberg*, 640 N.Y.S.2d 1018, 1021-22 (N.Y. Civ. Ct. 1996) (holding that a cooperative shareholder's proprietary lease is properly terminable for refusal to supply duplicate key to apartment entry door lock required by the lease).

CONCLUSION

Ultimately, the fundament of the involuntary sale remedy is the basic right (and duty) of the community to uphold its covenants and codes, with majoritarian principles overriding a misplaced assertion of rugged individualism. To the extent that housing alternatives are available to match the wide range of human preferences (from rural isolation to densely interwoven urban settings), there is no inherent individual entitlement to remain in a private community with which the individual is incompatible, whether by intention or otherwise. Thus while "everyone has got to be somewhere,"⁴⁸ no one has an absolute right to be in a particular place.

It is likely that the use of the involuntary sale remedy will be self-limiting. Although these provisions typically allow for recovery of legal fees and expenses from the sale proceeds, up-front expense and lengthy delays in finally achieving the objective will likely deter the condominium association. The involuntary sale remedy will probably be reserved only for those extreme instances where the governing board is bereft of any other meaningful recourse and the general community sentiment will support the effort's inevitable expense and time commitment involved in an involuntary sale situation.

As is well established in statutory and case law, the governing board has a fiduciary duty to enhance the cooperative aspects of the community. This obligation is accompanied by the right to employ appropriate means of enforcement against persons and conditions which threaten or obstruct those objectives. If extraordinary situations arise, extraordinary responses are wholly justifiable. As Marcus Aurelius stated: "What is not good for the hive is not good for the bee."⁴⁹ The overriding operational principle for a common interest community is the common good, not individual supremacy.

48. Mel Antonen et al., *Baseball Notebook, Behind the Seams*, USA TODAY, May 10, 1991, at 5c (quoting Merle Swenson).

49. LAURENCE J. PETER, *PETER'S QUOTATIONS: IDEAS FOR OUR TIME* 445 (1977).