

HF- 5032

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Summary

I am interested in being on this committee as a homeowner.

I would like to see adjustments to the purpose of the committee.

Highlights of my qualifications

I am a homeowner in the Woods at Elk River Station HOA/CIC in Elk River.

Our board was appointed by the management company

We haven't had an annual meeting in 3 years

We have money in 5 different banks and there are no homeowners
who are signers on the accounts

Management company won't let me speak to the board without their permission

I have been advocating for homeowners for approximately three years.

I am knowledgeable in current Minnesota law.

I have met people from all over the state with a variety of issues with their HOAs. A few examples include:

Lady in Minneapolis got an assessment of \$7,000 with no explanation

Man in Lino Lakes got fined \$1,000 for just asking if he could use his unit
for an AirBnB

Lady in Elk River has been threatened with a fine for wanting to pull buckthorn
from her property

Family in Anoka has to pay \$10,000+ in assessments and legal fees to save
their home from foreclosure, but there is nothing to prevent it from
happening again

Disabled homeowner in Eagan being harassed by her board for putting up a
shed to store a riding mower

Our master plan insurance policy has us, as homeowners, paying for employee theft coverage. Our association doesn't have employees. The insurance company says it's "industry standard" for homeowners to pay that for management companies. When I asked about the conflict of interest involved in this, they called the police to try to get a restraining order on me to get me to stop asking questions.

When I asked our board about changing management companies because of how we were being treated by ours, I got a letter from the attorney my dues is paying for telling me if I want to talk to the board, I have to send a snail mail letter to the management company's address in Bloomington, and they will decide whether or not the board sees it.

When I asked the attorney general's office for a conversation about removing the information they have on their website and replacing it with better, more accurate information, I got screamed at and hung up on three different times. The attorney general's office also has told several people that HOAs are a "government agency," but can't explain why or how that is.

The city of Eagan issued a permit to a disabled homeowner to build a shed for her riding mower, but when the HOA started harassing her after it was built, the city was nowhere to be found. When I asked the city council how an HOA has the ability to override the authority of the city, the council chair ended the call.

I went to the Minnesota Department of Human Rights to get them involved in the Eagan situation, and they refused to do it because it was an HOA. However, when I asked for a meeting with the commissioner so we could talk about why the response they gave was off and wrong, all I got was ignored. However, I was able to help with getting a federal investigation in place through HUD.

I went to the Minnesota Council on Disabilities to help advocate for the Eagan homeowner, and they refused to get involved.

I have asked the Minnesota Board on Aging for a meeting to talk about policies and ways they could help. So far, they are refusing to respond to my request.

When MHFA came out with their anniversary video about a year ago, it included a vignette of a person they helped put into a condo. I got a meeting with Commissioner Ho to show her what all that meant for the homeowner, and at the time she agreed to a follow up meeting to see what else they could be doing. All I got from her since that time is ignored.

Minnesota doesn't require management companies to be licensed. Department of Commerce said they would support the licensing of management companies, if there was a directive from the legislature.

Since many of the laws in place for renters would benefit HOA homeowners, if we were included in them, I asked Mike Vraa, managing attorney at HOMELine, if they would consider helping with HOA homeowners. He said they didn't have the financing to put the needed infrastructure in place to add that to what they were doing.

Since there is no real good way to track data on what organizations are incorporated for the purpose of being a HOA, I asked Steve Simon's office if they could add a check box to the annual registration form. They said they would be willing, but would need a directive from someone other than me to do it.

I asked the city of Elk River to convene a task force to collect stories and identify sound business practices. The mayor's response was that they don't get involved in "disputes between neighbors." If my neighbor's dog poops on my lawn and doesn't clean it up, I can get the police to help, so I asked the mayor how homeowners can matter more than dog poop. He stopped talking to me.

When I first started working on this, I got a call from an attorney at the law firm of Messerli and Kramer. They are lobbyist for CAI and management companies, and the purpose of the call was to get me to stop wanting to make things "inconvenient" for boards and management companies. When I asked about why the "inconvenience" homeowners were experiencing through financial exploitation, all I got was screamed at and hung up on.

I met with two people from the City of Brooklyn Park about HOAs. The city has been hearing a lot of complaints and they were trying to figure out what is available and what they can do. They said they'd be interested in a follow up meeting, but so far it hasn't happened.

Rationale

HOA's are established in the builders contract between the municipality and the builder. It is a promise of people as a condition of selling the land, but it is the only part of the contract that does not have any terms or conditions for how the business is to be set up and run.

Although they benefit from this arrangement they established with the builder, local municipalities take no responsibility for ensuring that sound business practices are utilized to prevent homeowners from being financially exploited.

Minnesota law doesn't require the board of directors of an HOA to have any sound business practices, as it does to some degree of public charities and other for-profit companies.

Adjustments to the Purpose of the Committee

- 1) Because HOAs start with the contract between the municipality and the builder, I would like to see the Association of Minnesota Counties as well as the League of Minnesota Cities represented at the table, as well.
- 2) The text says that the group is to come up with recommendations for new laws. Given who is included in on this, please clarify and specify that the laws are to benefit the homeowner. My concern is that leaving it open will cause it to lose sight of the homeowners. For example, CAI is the reason our master plan insurance company has us paying for employee theft coverage for the management company as well as why our board doesn't think there's anything wrong with not having an annual meeting. CAI is also very against requiring boards to do any kind of reporting.
- 3) Defining and declaring the nature of the relationships needs to happen. For example, among other places, the attorney general's office keeps saying that a HOA is a "government agency," but can't explain how, why or where that happens. Our HOA is incorporated as a nonprofit, but is not a public charity. If it were a public charity, Minnesota would require the board to have a duty of loyalty to the organization. Instead, all HOA homeowners get from the law is that the board just has to do their "best effort."
- 4) Defining the nature and purpose of the bylaws. There's a great deal of misinformation around this where it comes to HOAs. The only real legal purpose of bylaws is for the initial incorporation, but there are no standards for what must be included in them.
 - a. Some say they are a contract, but current Minnesota law says the board doesn't have to follow them if they don't want to.
 - b. In the case of Eagan and Lino Lakes, the board was going to adjust their bylaws to accommodate their response *after* the situations happened.
 - c. When I asked our management company where their authority comes from, the response was "the bylaws." Our bylaws haven't been updated since the association was formed, and it was the management company who wrote them.
- 5) Defining the role and the purpose of a HOA – why do we need them, and what purpose do they serve that homeowners can't do without them? Whose purpose do they serve?
- 6) Identify sound business practices that are to be used as a standard of conduct. For example, Minnesota requires a public charity with revenues of \$750,000 or more to have an audited financial statement. It's done for the protection of the organization, but HOAs have no requirements. It's part of how the management company of the HOA in Arden Hills was able to embezzle \$700,000 and there wasn't anything anyone can do about it.

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NOTE

YOUR HOA DOES NOT WORK FOR YOU: WHY HOAs ARE NOT AGENTS AND DO NOT OWE FIDUCIARY DUTIES

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I. INTRODUCTION

As the housing market continues to flourish in the United States, homeowners and potential buyers are willing to compromise their property rights in exchange for membership in a homeowners' association (HOA). HOAs are a form of common interest communities or community associations, along with condominium associations and housing cooperatives. Common interest communities are properties where individually owned lots are burdened with private land-use restrictions

* Juris Doctor candidate, Oklahoma City University School of Law, May 2023. This Note is dedicated to my husband, Zebulon, who has been a constant source of love, support and encouragement during the challenges of law school. I am truly grateful to have you in my life. This work is also dedicated to my Aunt Shannonn and my siblings Nathan, Trent, and Lainey, who have always encouraged me to pursue my interests and supported me. A special thank you to my faculty sponsor, Dean Paula Dalley, for her patience and guidance during the production of this publication. Finally, thank you to the members of Oklahoma City Law Review, Professor Carla Spivack, and Professor Tami Hines for making this publication a reality.

administered by their community association.¹ Community associations are extremely common and found in all regions of the United States with California, Florida, and Texas counting the highest number of community associations. California alone accounts for nearly 50,000 associations.² Community association membership is not exclusive to large states with high populations, as a remarkable 74.1 million United States citizens were estimated to be residing in community associations in 2020.³ Despite the quantity of homeowners residing in HOAs, vagueness surrounding the HOA's obligations have led to frequent complaints by homeowners.

Many property owners believe that their HOA will work to preserve and increase their property values and maintain tranquility in their neighborhoods, but they often find themselves subject to arbitrarily enforced rules and exorbitant fines. Both homeowners and HOAs are bound by HOA covenants, bylaws, and conditions and restrictions (CC&Rs) where HOAs are responsible for enforcing community rules and homeowners promise to follow these community rules. Inevitably, as HOAs enforce their community guidelines, many homeowners are surprised by the amount of authority and power their HOA actually has. Some HOAs have gone as far as forcing homeowners to keep their garage doors open during the day with violations subject to a \$200 fine and an administrative hearing.⁴ Others have imposed a \$25 per day fine for the installation of screen doors⁵ or have required trees exceeding a certain height be trimmed at the expense of the homeowner.⁶ “[T]he quantity of

1. *Common Interest Communities*, BLACK'S LAW DICTIONARY (9th ed. 2009).

2. Foundation For Community Association Research, *2020-2021 U.S. National and State Statistical Review*, FOUND. CMTY. ASS'N INST. (2020), https://foundation.caionline.org/wp-content/uploads/2021/07/2021StatsReview_Web.pdf (last visited July 7, 2022).

3. *Id.*

4. Ken Mashinchi, *Auburn Community Upset after HOA Tells Them to Leave Garage Doors Open*, FOX40 (Jan. 5, 2018 6:10 PM), <https://fox40.com/news/local-news/auburn-community-upset-after-hoa-tells-them-to-leave-garage-doors-open/> (last visited Feb. 4, 2022); *See also*, Kyle Cheromcha, *Homeowner's Association Enacts Insane Policy Forcing Residents to Keep Garage Doors Open*, THE DRIVE (Jan. 9, 2018, 1:41 PM), <https://www.thedrive.com/news/17496/homeowners-association-enacts-insane-policy-forcing-residents-to-keep-garage-doors-open> (last visited Feb. 4, 2022).

5. *Sprunk v. Creekwood Condo. Unit Owners' Ass'n*, 573 N.E.2d 197, 198-99 (Ohio Ct. App. 1989); *See also*, *Esposito v. Riviera at Freehold Homeowners Ass'n*, No. A-6001-09T1, 2011 N.J. Super. Unpub. LEXIS 1725, at *2-5 (N.J. Super. Ct. App. Div. June 30, 2011).

6. *Ekstrom v. Marquesa at Monarch Beach Homeowners Ass'n*, 86 Cal. Rptr. 3d 145, 148 (Cal. Ct. App. 2008).

litigation arising out of homeowner challenges to association actions in recent years may be regarded as excessive.”⁷ As a large portion of the American population resides in an HOA, the issues between HOAs and homeowners often arise out of a misconception that HOAs work for the homeowner as their agent, and must accordingly uphold fiduciary duties to the individual.

The purpose of this Note is to explain why neighborhood HOAs are incapable of being an agent and do not owe fiduciary duties to homeowners. To do so, the Note will detail a brief history of neighborhood HOAs, discuss the purpose of modern HOAs, establish the requirements of an agency relationship, and provide an explanation of fiduciary duties of an agent. Following this explanation, this Note will explore the diverging views states have on the HOA relationship. This Note will then address how the relationship fails to meet the requirements of agency law and will accordingly reject the idea that HOAs owe fiduciary duties to individual homeowners. The Note concludes with a recommendation that HOAs should be regarded as government entities and urges local governments to impose greater regulations on HOA actions.

II: THE FRAMEWORK OF HOMEOWNERS’ ASSOCIATIONS IN THE UNITED STATES

A. A Brief History of Homeowners’ Associations

As suburban neighborhoods prospered in the early 20th century,⁸ American neighborhoods faced the reality that actions of one landowner could significantly impact the ability of neighboring owners to enjoy their own properties.⁹ Although many attempted to resolve their neighborhood disputes through zoning, many issues with that approach arose due to the political dynamics of local government.¹⁰ The tension caused by neighborhood politics and the difficulty of justifying zoning decisions resulted in incoherent zoning laws and a struggle to correct zoning issues.¹¹

In 1947, the first relatively modern neighborhood association formed

7. RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 6.13, cmt. b (Am. L. Inst. 2000).

8. Robert H. Nelson, *Homeowners Associations in Historical Perspective*, 71 PUB. ADMIN. REV. 546, 546 (2011).

9. *Id.*

10. *Id.* at 547.

11. *Id.*

in Levittown, Long Island.¹² The Levittown community was one of the first to enact the restrictive community covenants seen in many contemporary HOA bylaws and CC&Rs.¹³ At the time, the purpose of the restrictive covenants was to maintain the neighborhood property values, which typically meant excluding minorities.¹⁴ Only a year after Levittown was established, the Supreme Court held in *Shelley v. Kraemer* that enforcement of racially restrictive CC&Rs violated the Equal Protection Clause of the Fourteenth Amendment.¹⁵

Undeterred by the Supreme Court ruling, the growing popularity of HOAs brought with it racially restrictive covenants supported by state governments and the Federal Housing Administration. The Federal Housing Administration even required racially restrictive covenants in order to insure a neighborhood until 1950, and supported mortgages for whites-only properties until 1962.¹⁶ Furthermore, state courts' refusal to enforce the Court's holding allowed HOAs to write explicitly discriminatory covenants in their CC&Rs.¹⁷ States continued their defiance until the *Barrows v. Jackson* ruling in 1953 which both reaffirmed *Shelley* and expanded it even further, striking down judicial enforcement of racially restrictive covenants running with the land.¹⁸ As implementations of racially restrictive covenants escalated as a private form of neighborhood regulation, Congress passed the Fair Housing Act of 1968 which put an end to legal discrimination concerning the sale, rental, and financing of real property.¹⁹

Although this Note will only briefly discuss the discrimination many minorities face from their HOAs, it is not uncommon to find racist

12. A. Mechele Dickerson, *Systemic Racism and Housing*, 70 EMORY L.J. 1535, 1548 (2021) (citing *Levittown History*, LEVITTOWN PUB. LIBR., <https://levittownpl.org/levittown-history/> (last visited July 7, 2022)).

13. *Id.*

14. *Id.* (citing David Kushner, LEVITTOWN PUB. LIBR., <https://levittownpl.org/levittown-history/> (last visited July 7, 2022)).

15. *Shelley v. Kraemer*, 334 U.S. 1, 19-21 (1948).

16. Tracey Wilson, et al., *Restricting with Property Covenants*, ON THE LINE (last updated Mar. 31, 2022) (ebook), <https://ontheline.trincoll.edu/restricting.html#fn53>.

17. Donald M. Cahen, Comment, *The Impact of Shelley v. Kraemer on the State Action Concept*, 44 CAL. L. REV. 718, 727 (1956) (providing examples of state reluctance to enforce *Shelley v. Kraemer*).

18. *Barrows v. Jackson*, 346 U.S. 249, 252-54 (1953).

19. *History of Fair Housing*, U.S. DEP'T OF HOUS. & URB. DEV., https://www.hud.gov/program_offices/fair_housing_equal_opp/aboutfheo/history (last visited July 8, 2022).

language in HOA documents even today.²⁰ Despite the Congressional protection in the Fair Housing Act, a 2019 study conducted by Wyatt and Freedman found HOA neighborhoods are more racially segregated than non-HOA neighborhoods.²¹ Because 74.8% of residents in HOAs are white,²² Freedman suggests HOAs “may be a way of facilitating segregation, or at least serving as a tool for exclusion of some groups.”²³ These findings are supported by case law documenting facially discriminatory CC&Rs that still exist, as well as racially neutral CC&Rs that are being arbitrarily enforced with discriminatory results. Although it was eventually found to be unenforceable, a Latino couple discovered their 2019 HOA contract had terms stating that “[n]o persons other than those wholly of the white Caucasian race . . . shall reside . . . [on the] real property, except servants or domestics of another race employed by . . . a white Caucasian owner.”²⁴ Some states have attempted to combat racially restrictive covenants by suing HOAs who fail to remove discriminatory terms from their governing documents.²⁵ However, removing discriminatory covenants has not stopped other HOAs from engaging in

20. Foundation For Community Association Research, *2020 Community Association Fact Book Part III - Associations in Perspective: Historical Housing Data, Company Towns, Chronology of Federal Involvement, Restrictive Covenants & Race, and Historical Housing Papers* 59, FOUND. CMTY. ASS'N INST. (2021), https://foundation.caonline.org/wp-content/uploads/2021/07/FB_federal_involvement_2020.pdf (last visited July 8, 2022).

21. Wyatt Clarke & Matthew Freedman, *The Rise and Effects of Homeowners Associations*, 112 J. URB. ECON. 1, 1, 19 (2019) (explaining that their research is consistent with previous research suggesting “HOAs facilitate segregation within local areas” because “people living in HOA neighborhoods [] are on average more affluent and racially segregated than those living in other nearby neighborhoods.”).

22. *Id.* at 39 tbl.3.

23. David Montgomery, *HOAs Are Popular Where Prejudice Is Strong and Government Is Weak*, BLOOMBERG (June 4, 2019, 10:22 AM), <https://www.bloomberg.com/news/articles/2019-06-04/do-homeowners-associations-replace-local-law#:~:text=Overall%2C%20HOA%20residents%20are%20disproportionately,%2C%20than%20non%2DHOA%20residents> (quoting Matthew Freedman).

24. Gwen Aviles, *An Ugly Legacy: Latino Couple Finds Racist Covenant in Housing Paperwork*, NBC NEWS (Nov. 15, 2019, 2:21 PM), <https://www.nbcnews.com/news/latino/ugly-legacy-latino-couple-finds-racist-covenant-housing-paperwork-n1082476>.

25. Craig Proffer, *Missouri AG Files Suit Against Kansas City Homeowners Associations for ‘Racially Restrictive Covenants,’* KSDK-TV (Sept. 25, 2020, 3:13 PM), <https://www.ksdk.com/article/news/local/missouri-attorney-general-lawsuit-against-kansas-city-homeowners-association/63-84c870ca-2d78-4400-9a96-5f368045eea3>.

racially motivated enforcement of their CC&Rs.²⁶ Despite the discriminatory effect of some HOAs, prospective homeowners may seek out and join HOAs for reasons unrelated to racism.

B. Why People Join Homeowners' Associations

According to the Restatement (Third) of Property: Servitudes, HOAs function “to protect property values and quality of life by managing the common property, exercising design-control and land-use [decision-making] powers granted by the declaration, and carrying out other functions set forth in the governing documents.”²⁷ While there are many reasons people wish to join a neighborhood HOA, the three most common motivations are: (1) neighborhood services, (2) uniformity and comradery of like-minded groups, and (3) increasing or maintaining property values.

As a representative of the neighborhood, the HOA can serve as “a cost-effective way to provide local services” since the HOA can tailor its rules to meet the community’s needs.²⁸ Incidentally, HOAs are viewed as “cash cows” for local governments because while the neighborhood residents continue to pay property taxes, the HOA furnishes “quasi-government[al]” services to individuals, which reduces the governments

26. See Elizabeth Kim, *In Flushing, Enforcement of A 1906 Ban on Fences Raises Accusations of Racism*, GOTHAMIST (Feb. 14, 2020), <https://gothamist.com/news/flushing-enforcement-1906-ban-fences-raises-accusations-racism> (reporting on a New York HOA suing three Asian-American residents for covenants enacted in 1906, but failing to enforce the same covenant against white homeowners); Lauren Sue, *Homeowners Associations are Just as Problematic as They've Always Been. Twitter Users Show Why*, DAILY KOS (Aug. 24, 2021), <https://www.dailykos.com/stories/2021/8/24/2047861/-HOAs-literally-exist-to-prevent-the-upward-mobility-of-Black-folx> (reporting on multiple social media posts of homeowners who were racially targeted by their HOAs); Mariette Williams, *When Homeowners Associations Were First Created, They Helped Keep Black People Out of the Neighborhood. They're Still Doing it Today*, BUS. INSIDER (Sept. 18, 2020, 9:21 AM), <https://www.businessinsider.com/personal-finance/homeowners-associations-black-americans-discriminaiton-2020-9> (providing examples of homeowners across the US who found racially restrictive covenants in their HOA covenants); Angelia L. Davis, *Simpsonville Man's Dispute with HOA may Lead to Jail Time*, THE GREENVILLE NEWS (last updated Feb. 5, 2019, 9:24 AM), <https://www.greenvilleonline.com/story/news/2019/02/01/simpsonville-mans-dispute-hoa-may-lead-jail-time/2657386002/> (reporting on an African American man in South Carolina being sued by his HOA for covenant violations while plantation structures belonging to slave owners had been ‘grandfathered in.’).

27. RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 6.14, cmt. b (AM. L. INST. 2000).

28. Ron Cheung & Rachel Meltzer, *Why and Where Do Homeowners Associations Form?*, 16 CITYSCAPE 69, 69-70 (2014).

obligations to taxpayers.²⁹ Common HOA services include trash collection, street maintenance, lawn care, and snow removal.³⁰ A number of HOAs in family neighborhoods also provide bus transportation, health clinics, and child care facilities.³¹ Property owners may be drawn to an HOA because “the advantages of private associations are their efficient decision making and the responsiveness of the ‘government’ to local concerns.”³² Homeowners justify the extra cost of HOA membership by relying upon the specialized services and homogenous appearance of the neighborhood attributed to the HOA.

Ensuring a uniform aesthetic for homes in the neighborhood is the cornerstone of modern HOAs.³³ The orderly appearance of HOA neighborhoods is typically traced to the customary CC&Rs that require the exterior of a home be similar to other homes in the neighborhood. A prevailing exterior uniformity requirement is that homeowners use “HOA Approved” paint colors. These paint color requirements are so common that companies such as Sherwin-Williams³⁴ and Behr³⁵ have dedicated webpages to help homeowners find colors that comply with their HOA rules. Other exterior features of a property which are frequently restricted include roofs, front doors, gutters, and landscaping.³⁶ HOA approval may

29. EVAN MCKENZIE, BEYOND PRIVATOPIA: RETHINKING RESIDENTIAL PRIVATE GOVERNMENT 5-6 (2011).

30. Robert H. Nelson, *The Private Neighborhood*, 27 REGUL. 40, 43 (2004).

31. *Id.*

32. Ron Cheung, *Homeowners Associations and Their Impact on the Local Public Budget*, in MUNICIPAL REVENUES AND LAND POLICIES. 338, 343 (Lincoln Inst. of Land Pol’y ed., 2010), https://www.lincolnst.edu/sites/default/files/pubfiles/2068_1391_LP2009-ch12-Homeowners-Associations-and-Their-Impact-on-the-Local-Public-Budget_0.pdf (quoting William Thomas Bogart, *The Economics of Cities and Suburbs* 228 (1998)).

33. Dickerson, *supra* note 12, at 1561.

34. *Homeowners Association Color Archive*, SHERWIN-WILLIAMS, <https://www.sherwin-williams.com/homeowners/color/find-and-explore-colors/hoa> (last visited July 8, 2022).

35. *Select Your HOA: HOA Color Service*, BEHR, <https://www.behr.com/hoa> (last visited July 8, 2022).

36. See, e.g., *Homeowners Associations: Problems and Solutions Conference 2007 - First Session: An Overview of HOAs In the United States: The Development of Mini-Municipalities*, 5 RUTGERS J.L. & PUB. POL’Y 631 (2008) (providing examples of ‘extensive covenants’ on pets, the color of window shutters, signs, landscaping, cooking, and sports equipment); Jay M. Zitter, Annotation, *Uniform Common Interest Ownership Act*, 59 A.L.R. 7th art. 1 (1994) (referencing cases where HOA restrictions include landscaping, architectural design, and other aesthetic qualities); Christopher R. Moore, Esq., *Enforcing Conformity: Home Improvement Projects and Architectural Review*

also carry over to interior renovations including installing new flooring, rewiring electrical systems, adding rooms, moving plumbing, and conducting other major renovations.³⁷ These uniform restrictions are illustrative of the purpose of the HOA: to facilitate a community of like-minded individuals. Members of the neighborhood HOA “are like-minded in regard to what they expect to give and get from their community.”³⁸ According to social psychologist Dr. Jasmine Martirosian, “[p]art of the reason that people buy into community association living is the predictability and assurances it offers—they have a sense they won’t have to suddenly deal with somebody’s purple house or orange gates . . . [i]t brings most people peace of mind.”³⁹

While homebuyers may not knowingly seek out HOA-governed communities, buyers may be subconsciously drawn to the homogeneity of the neighborhoods.⁴⁰ Potential homebuyers may be charmed by the color scheme of the houses in the neighborhood, the pristine lawns, or the “neighborhood watch” signs. Additionally, an HOA may be especially useful for unique neighborhoods. For example, there are 617 fly-in communities in the United States.⁴¹ These private communities use airplane runways instead of main streets as their main roads.⁴² Because these are private communities seeking to maintain their specialized way of

Boards in HOAs, HOMEOWNERS PROT. BUREAU, LLC (HOPB), <https://www.hopb.co/blog/hoa-home-improvement-projects-and-architectural-review-boards> (last visited July 8, 2022).

37. Elite Housing Management, *Everything You Need to Know About HOA Home Renovations*, EHMUSA BLOG, <https://www.ehmusa.com/everything-you-need-to-know-about-hoa-home-renovations> (last visited July 8, 2022).

38. Community Association Management, *Why Live in an HOA*, CAS (Aug. 19, 2020), <https://www.casnc.com/2020/why-live-in-an-hoa/>.

39. Ann Connery Frantz, *Uniformity in Community Association Design*, COOPERATORNEWS NEV. (May 3, 2016), <https://nevada.cooperatornews.com/article/uniformity-in-condo-design> (quoting Dr. Jasmine Martirosian, *Decision Making in Communities: Why Groups of Smart People Sometimes Make Bad Decisions*, CMTY. ASS’N PRESS (2001)).

40. See Domini Hedderman, *What Does it Take? What is it Worth*, COOPERATORNEWS N.J. (Apr. 2008), <https://nj.cooperatornews.com/article/what-does-it-take-what-is-it-worth>.

41. Rob Stumpf, *Wide Streets, Massive Garages: Meet the Neighborhoods Designed for Pilots and Small Planes*, THE DRIVE (Jan. 5, 2021, 12:40 PM), <https://www.thedrive.com/news/38555/wide-streets-massive-garages-meet-the-neighborhoods-designed-for-pilots-and-small-planes> (referencing LIVING WITH YOUR PLANE (Blog), <https://livingwithyourplane.com/blog/>).

42. See *id.*

life, most residential airparks are governed by HOAs.⁴³ The utility of HOA governance is not limited to residential airparks as many HOA homes are comprised of families seeking child-friendly communities. The popularity of family-centric communities was reflected in the 2021 Census which reported that 67% of newly built single-family homes were in HOAs.⁴⁴ Whether it is the appearance of the homes in the neighborhood or the desire to live with compatible neighbors, HOAs serve as a means for the joining of like-minded groups.

When considering property in a neighborhood HOA, property owners hope this aesthetic uniformity and regulation will protect their property values.⁴⁵ This desire has been supported by data from the past two decades which shows that properties located in HOA communities are more likely to sell at a premium rate.⁴⁶ Additionally, research published in the *Journal of Housing Economics* in 2014 indicated that HOA properties sold at higher prices and were less vulnerable to negative price externalities from neighboring foreclosures.⁴⁷ This sentiment is commonly accepted by homeowners, potential buyers, real estate agents, and the HOA itself.⁴⁸

43. See, e.g., *About Us: Mid Valley Airpark*, MID VALLEY AIRPARK, <https://www.midvalleyairpark.com/> (last visited July 8, 2022); Deborah Goonan, *FL Homeowner Pilot Sues His "Fly-In" HOA*, INDEP. AM. CMTY.'S (Feb. 21, 2016), <https://independentamericancommunities.com/2016/02/21/fl-homeowner-pilot-sues-his-fly-in-hoa/> (a list of Fly-In community associations in the United States is available at <https://www.bifold.com/fly-in-communities.php>).

44. *Characteristics of New Housing*, U.S. CENSUS BUREAU, <https://www.census.gov/construction/chars/> [<https://perma.cc/9WCU-DCNV>] (under the 'Item' column, find 'Homeowners' Association,' the available information is 'Single-Family Completed' homes Percent Distribution for the United States).

45. Center for Community Association Volunteers, *An Introduction to Community Association Living* 2-3, CMTY. ASS'N INST. (2006), <https://www.caionline.org/AboutCAL/Documents/IntroToCALiving.pdf> (last visited July 8, 2022).

46. See Cheung & Meltzer, *supra* note 28, at 69-70 (referencing Jeremy R. Groves, *Finding the Missing Premium: An Explanation of Home Values within Residential Community Associations*, 84 LAND ECON. 188, 188-208 (2009)).

47. Ron Cheung et al., *Do Homeowners Associations Mitigate or Aggravate Negative Spillovers from Neighboring Homeowner Distress?* 24 J. OF HOUS. ECON. 75, 81, 87 (2013), available at https://www2.oberlin.edu/faculty/rcheung/cheungetal_foreclosures.pdf.

48. See, e.g., Kim Posey, *Denver Bill Would Require Rights, Resource Notice Before HOA Foreclosures*, FOX 31 (May 25, 2022), <https://kdvr.com/news/local/denver-city-council-addresses-homeowners-associations-and-foreclosures/> (quoting the Masters Homeowners Association for Green Valley Ranch stating the HOA increases property values); *What We Do*, PELICAN BAY PROP. OWNERS ASS'N, <https://pbpoa.org/> (last visited July 8, 2022) (an HOA website advertising it is "Protecting [Your] Property Values" and

This preservation of property value may be attributed to the belief that “[t]hese HOAs theoretically are formed in response to some underprovision or lack of heterogeneity in public services and regulation.”⁴⁹ The exclusivity of neighborhood HOAs—coupled with a desire for certain neighborhood services, uniformity, and comradery of like-minded neighbors—creates demand for membership and results in stabilized property values.

Despite the benefits provided by HOAs, many homeowners become frustrated with their HOAs due to confusion surrounding the HOAs’ obligations. Whether the homeowner’s motivation for joining the HOA was to meet a particular need or the choice to join was subconsciously made, homeowners’ expectations are founded on the false premise that the HOA is their agent. Homeowners’ dissatisfaction with their HOA can be traced to the misalignment of their purpose for joining and the reality that their HOA does not work for them.

C. After Joining the Homeowners’ Association: Agency Relationships and Fiduciary Duties

After the purchase of a home, a homeowner may reasonably expect the HOA to deliver the benefits of HOA membership. Like the maintenance of property values, these benefits are attributed to the HOA and may serve as the basis for a homeowner’s decision in buying a home. The HOA-agent perception homeowners have is not uncommon, as several states have in fact determined this to be an agency relationship.

Interests for the Next Generation); Matt Welch, *Coventry Group Aims to Make Communities Home*, THE WINCHESTER STAR (Nov. 12, 2021), https://www.winchesterstar.com/winchester_star/coventry-group-aims-to-make-communities-home/article_15e61b97-729d-59cb-a6a9-12e6794f2462.html (homeowners stating their belief that “[t]he HOA is in place to maintain property values”); *How an HOA can Impact Home Values*, HENDERSON PROP.’S, <https://www.hendersonproperties.com/2019/10/hoa-home-value/> (last visited July 8, 2022) (a real estate agency stating HOA’s have an effect on property values); *Homeowner Associations (HOA): Everything you Need to Know*, RAMSEY SOL.’S (June 21, 2022), <https://www.ramseysolutions.com/real-estate/what-is-an-hoa> (stating that there is a “[p]ossible increased home value” for homes in neighborhood HOAs, reiterating the popular belief that HOAs increase property values, and advising individuals to do their own research before buying.).

49. Cheung & Meltzer, *supra* note 28, at 71 (referencing Robert W. Helsley & William C. Strange, *Potential Competition and Public Sector Performance*, 30 REG’L SCI. & URB. ECON. 405 (2000)).

However, there are specific legal requirements the HOA must meet in order to be a homeowner's agent.

III: AGENCY RELATIONSHIPS AND ELEMENTS OF AN AGENCY

A. Agency Relationships and Elements of an Agency

An agency relationship is “the fiduciary relationship that arises when one person (a “principal”) manifests assent to another person (an “agent”) that the agent shall act on the principal’s behalf and subject to the principal’s control, and the agent manifests assent or otherwise consents so to act.”⁵⁰ Typical agency relationships include employer–employee, corporation–officer, client–attorney, and partnership–general partner.⁵¹ It is not uncommon for people to enter agency relationships without a full grasp of the legal implications they owe to and are subsequently owed by the other party. Agency relationships require three elements: (1) manifestation of assent by both a principal and an agent, (2) assent that an agent shall act on behalf of the principal, and (3) control of the agent by the principal.⁵²

1. Manifestation of Assent

Manifestation of assent is the communication of an agreement or promise through conduct that is both observable and expresses meaning.⁵³ A person generally manifests assent “through written or spoken words or other conduct [that implies intent to enter into an agreement].”⁵⁴ Assent may look like a verbal agreement between parties, a written contract, or even an approving nod during a conversation.

A principal generally enters into an agency relationship in order to have an agent “act on [their] behalf, as well as subject to [their] control.”⁵⁵ For example, a petroleum company may hire someone to negotiate gas leases with the expectation that the company will control who the individual will negotiate with, control where the individual will travel, and

50. RESTATEMENT (THIRD) OF AGENCY § 1.01 (AM. L. INST. 2006).

51. *Id.* at cmt. c.

52. *See* U.S. v. Bonds, 608 F.3d 496 (9th Cir. 2010).

53. RESTATEMENT (THIRD) OF AGENCY § 1.03, cmt. b (AM. L. INST. 2006).

54. *Id.* § 1.03.

55. *Id.* § 1.01, cmt. g.

control the duration and price of the lease.⁵⁶ Ultimately, the petroleum company has employed another party—their agent—to contract leases for the company. A principal, such as the petroleum company, grants authority and instructs their agent's actions.⁵⁷

In return, an agent consensually agrees to be directed by the principal and subjects themselves to the instructions of the principal.⁵⁸ The individual hired by the petroleum company has agreed to negotiate oil leases in accordance with the specifications given by the company, in the area the company has requested, and with the parties identified by the company. An agent in an agency relationship “promise[s] only to make reasonable efforts to accomplish the [principal’s] directed result.”⁵⁹ Therefore, the individual employed to negotiate oil leases must make reasonable efforts to contract at the price and duration defined by the company because that is the petroleum company’s desired result.

2. Acting ‘On Behalf Of’ the Principal

When an agent is acting on behalf of the principal, the agent is representing that principal. The agent is “an extension of the principal’s own legal personality.”⁶⁰ For example, when the individual negotiates oil leases with a third party, the individual is considered an agent and legal representative of the petroleum company. The third party will view the agent’s statements regarding price and duration as specifications made by the company. An agent’s actions are for the benefit of the principal, and as an extension of the principal, the actions of an agent impact the legal rights and duties of the principal.⁶¹ Generally, the principal’s purpose in employing an agent is for the agent to act on their behalf, thereby leaving the principal free to embark on other matters.⁶² Due to the representative nature of the relationship, the delegation of authority “implies the existence of limits on the scope of the agency relationship and on the extent to which the principal is accountable for the agent’s acts.”⁶³ Simply

56. This example is a reference to *Soderback v. Townsend*, 644 P.2d 640, 641-642 (Or. Ct. App. 1982).

57. RESTATEMENT (THIRD) OF AGENCY § 1.01, cmt. d (AM. L. INST. 2006).

58. *See generally id.* § 1.01.

59. RESTATEMENT (SECOND) OF AGENCY § 377, cmt. b (AM. L. INST. 1958).

60. RESTATEMENT (THIRD) OF AGENCY § 3.10, cmt. b (AM. L. INST. 2006).

61. *Id.* § 1.01, cmt. b-c.

62. *Id.* at cmt. g.

63. *Id.* at cmt. c.

put, an agency relationship cannot exist if the principal has no right to control the actions taken on their behalf.⁶⁴

3. The Principal's Right to Control

The principal's right to control the agent's actions is crucial to an agency relationship and persists throughout the relationship. This includes the right to terminate the agent's authority.⁶⁵ "It is the element of continuous subjection to the will of the principal which distinguishes the agent from other fiduciaries and the agency agreement from other agreements."⁶⁶ Influence and domination may be present in some relationships like families, friendships, and religion, but influence and dominance alone are not enough to create an agency relationship.⁶⁷ An agency relationship exists only when an agent consents to domination and influence on behalf of and at the will of the principal.⁶⁸

The right to control is present at the formation of the relationship when "the principal initially states what the agent shall and shall not do, in specific or general terms."⁶⁹ This right is present for the duration of the relationship, allowing the principal "to give interim instructions or directions to the agent."⁷⁰ In the case of the petroleum company, the company may provide general instructions to the individual at the beginning of the relationship. The general instructions may, for example, include price and duration but not specify the individual's work schedule or quotas. This would give the individual flexibility regarding the hours worked and the number of contracts successfully negotiated.⁷¹ Later, the company may add or modify their earlier general instructions by requiring the individual to negotiate at least five oil contracts within a two-week period. To meet this new demand, the agent may be forced to agree to prices higher and less favorable to the petroleum company than previously specified, however, the agent must comply with the company's revised instructions.

Notably, "[a] principal's failure to exercise the right of control does

64. *Id.* at cmt. f(1).

65. *Id.* at cmt. c.

66. RESTATEMENT (SECOND) OF AGENCY § 1, cmt. b (AM. L. INST. 1958).

67. RESTATEMENT (THIRD) OF AGENCY § 1.01, cmt. f(1) (AM. L. INST. 2006).

68. *Id.*

69. *Id.*

70. *Id.*

71. *Soderback*, 644 P.2d at 642.

not eliminate it.”⁷² With regard to the individual negotiating oil leases, if the company does not initially give any instructions about pricing or duration, the lack of guidance does not remove the company’s ability to later specify how the negotiations should proceed.

The right to control the agent’s actions throughout the relationship “assumes that the principal is capable of providing instructions to the agent and of terminating the agent’s authority . . . otherwise the principal will not be able on an ongoing basis to assess the agent’s performance.”⁷³ Generally, an agency relationship ceases to exist if a principal has lost this capacity.⁷⁴ If the principal can no longer direct an agent’s actions, the ability to control the agent is lost and the relationship is terminated. The ability to control the agent is paramount in the relationship because, ultimately, the agent’s actions are imputed to the principal. To enable the agency to function, the law enforces an agent’s fiduciary duties to their principal.

B. Fiduciary Duties of an Agent

A fiduciary relationship is one that is held or founded in trust or confidence.⁷⁵ Typical relationships with implied fiduciary duties are agents and principals, trustees and beneficiaries, and corporate officers and their corporation.⁷⁶ In the context of agency relationships, an agent is “a person [who has] a duty, created by [their] undertaking, to act primarily for the benefit of another in matters connected with [their] undertaking.”⁷⁷ The three primary fiduciary duties an agent owes to the principal are the duties of loyalty, care, and disclosure. This Note will primarily focus on the duty of care and the duty of loyalty.

72. RESTATEMENT (THIRD) OF AGENCY § 1.01, cmt. c (AM. L. INST. 2006).

73. *Id.*

74. RESTATEMENT (SECOND) OF AGENCY § 122 (1) (AM. L. INST. 1958).

75. *Fiduciary relationship*, Webster’s Dictionary, <https://www.merriam-webster.com/legal/fiduciary%20relationship>.

76. *See* RESTATEMENT (SECOND) OF TORTS § 770, cmt. b (AM. L. INST. 1965); RESTATEMENT (SECOND) OF TORTS § 874, cmt. b (AM. L. INST. 1965).

77. RESTATEMENT (SECOND) OF AGENCY § 13, cmt. a (AM. L. INST. 1958).

1. Duty of Care

In an agency relationship, the duty of care requires that an agent will do what is necessary in the relevant transaction(s) to effectuate the principal's end objective.⁷⁸ As previously discussed, the motivation for an agency relationship is the principal's end goal. The principal defines the end objective, and the agent acts in order to accomplish the end objective on the principal's behalf. For the petroleum company example, the company's end objective is to obtain leases for plots of land and to secure as much oil as possible; the individual was hired to negotiate the leases at the price most beneficial to the company. To satisfy their duty of care, the individual must use all reasonable means to negotiate for the best price per lease and follow any guidelines provided by the company to accomplish the company's goal. The reasonable efforts an agent must take include acting "with the care, competence, and diligence normally exercised by agents in similar circumstances."⁷⁹ Statutory provisions and state laws are also relevant for determining the duties of care an agent owes to their principal.⁸⁰ The duty of care represents what a principal expects out of their agent's performance and the level of effort an agent must use in matters related to the relationship.

2. Duty of Loyalty

"[A]n agent must act loyally in the principal's interest as well as [and] on the principal's behalf" in all matters connected with the relationship.⁸¹ Among other things, the duty of loyalty prohibits an agent from: (1) dealing adversely with the principal in matters connected with the agency (meaning as an adversary or on behalf of an adverse party);⁸² (2) using the principal's property for their own purpose or the purpose of another;⁸³ or (3) using the principal's confidential information for their own purpose or for the purpose of a third party.⁸⁴ A familiar example of this is a non-compete clause in an employment contract, but the duty of loyalty does not have to be included in a contract clause. For example, the individual

78. See *Carrier v. McLlarky*, 693 A.2d 76 (N.H. 1997).

79. RESTATEMENT (THIRD) OF AGENCY § 8.08 (AM. L. INST. 2006).

80. *Id.* at cmt. b.

81. *Id.* § 1.01, cmt. e; See also *id.* § 8.01.

82. *Id.* § 8.03.

83. *Id.* § 8.05.

84. *Id.*

hired to negotiate oil leases would not share the petroleum company's plans for future leases and expansions because they are confidential. "An agent occupies a relationship in which trust and confidence is the standard." An agent must act primarily for the benefit of the principal in all matters connected with the relationship, never placing their own interests above those of the principal.⁸⁵ The duty of loyalty is especially relevant when discussing conflicts of interest and dual agency.

While an agent should try to avoid potential conflicts of interest, difficulties may arise as the relationship develops. In the case of the individual hired to negotiate oil leases, a Wisconsin petroleum company may have employed the individual based on their prior experience negotiating leases in Texas. If the company was later planning to expand its business south to include Texas, the individual would have the duty to inform the company of third parties they previously negotiated with on behalf of a competitor. While no conflicts of interest were present in the initial employment of the individual, the company's expansion to Texas would trigger the individual's duty to disclose potential conflicts.

3. Dual Agency

*It is a doctrine as old as the Bible itself, and the common law of the land follows it, that a man cannot serve two masters at the same time; he will obey the one, and betray the other. He cannot be subject to two controlling forces which may at the time be divergent.*⁸⁶

In a dual agency, the duty of loyalty is altered to fit the circumstances of the agency but is never to be entirely disregarded by the agent. Although an agent owes fiduciary duties such as the duty of loyalty to their principal, in some cases agency law permits an agent to have multiple principals under the dual agency rule. "The same person or entity may act as the agent for two parties interested in the same transaction when their interests do not conflict and where loyalty to one does not necessarily constitute breach of duty to the other."⁸⁷ For example, "[a] valid escrow agreement is a triangular arrangement" because the buyer and the seller acknowledge that

85. Gelfand v. Horizon Corp., 675 F.2d 1108, 1110 (10th Cir. 1982).

86. Atwood v. Chicago, Rock Island. & Pac. Ry. Co., 72 F. 447, 455 (W.D. Mo. 1896).

87. Young v. Nev. Title Co., 744 P.2d 902, 903 (Nev. 1987) (referencing Nev. Nickel Syndicate, Ltd. v. Nat'l Nickel Co., 96 F.133, 147 (C.C.D. Nev. 1899)); *see also*, RESTATEMENT (SECOND) OF AGENCY § 391, cmts. b, d (AM. L. INST. 1958).

the escrow agent represents each of their interests after negotiating the terms of the arrangement in advance.⁸⁸ Thus, the escrow agent is a “dual agent of both parties until . . . the conditions of the escrow agreement . . . have been fully performed.”⁸⁹ Additionally, an agent acting for multiple principals in a transaction has the duty to disclose that the agent is acting for the other principal, gain the consent of each principal, deal fairly with each principal, and disclose all material facts to both principals.⁹⁰ “An agent who acquires a position adverse to the principal, but fails to disclose it, simultaneously breaches the duties of loyalty and care.”⁹¹ Due to the increased level of trust and confidence placed in an agent, the standards of a dual agent are strictly applied by courts.⁹²

C. The Board as a Subagent

A subagent is “a person appointed by an agent to perform functions that the agent has consented to perform on behalf of the agent’s principal and for whose conduct the appointing agent is responsible to the principal.”⁹³ Simply put, a principal may hire an agent, and authorize said agent to appoint another agent, i.e., the subagent. With regards to the subagent’s fiduciary duties, the Restatement (Third) of Agency states:

An agent who appoints a subagent delegates to the subagent power to act on behalf of the principal that the principal has conferred on the agent. A subagent acts subject to the control of the appointing agent, and the principal’s legal position is affected by action taken by the subagent as if the action had been taken by the appointing agent. Thus, a subagent has two principals, the appointing agent and that agent’s principal. Although an appointing agent has the right and duty to control a subagent, the interests and instructions of the appointing agent’s principal are paramount.⁹⁴

88. *Hoffman v. Eighth Jud. Dist. Ct.*, 523 P.2d 848, 850 (Nev. 1974).

89. *Ferguson v. Caspar*, 359 A.2d 17, 22-23 (D.C. 1976).

90. See RESTATEMENT (THIRD) OF AGENCY § 8.06 (AM. L. INST. 2006).

91. *Estate of Eller v. Bartron*, 31 A.3d 895, 898 (Del. 2011).

92. See Howard L. Oleck & Martha E. Stewart, *Nonprofit Corporations, Organizations, & Associations* 881 (Prentice Hall, 6th ed. 1994).

93. RESTATEMENT (THIRD) OF AGENCY § 3.15 (1) (AM. L. INST. 2006).

94. *Id.* at cmt. b.

While a homeowner joins an HOA to fulfill their needs, the HOA is but a legal entity, not a real person able to fill those needs. Therefore, it is the real people of the HOA board who act on behalf of the HOA. In the context of the HOA relationship with a homeowner, if the homeowner was viewed as a principal, then the HOA board would be viewed as a subagent.

IV. LEGAL STATUS OF HOMEOWNERS' ASSOCIATIONS

Homeowners' associations present a unique complication to the interpretation of fiduciary duties in that they are typically nonprofit corporations.⁹⁵ Some states even require nonprofit incorporation of HOAs.⁹⁶ A nonprofit corporation is “a group organized for purposes other than generating profit and in which no part of the organization’s income is distributed to its members, directors, or officers.”⁹⁷ The HOA “is entrusted with the management of the common property and other affairs of the community in order to facilitate collective management of shared resources and provision of services to enhance the quality of life and maintain property values.”⁹⁸ The HOA therefore resembles an agent. Like an agent, the HOA has a duty of good faith, must deal fairly with its members, must comply with the law of that state and governing documents of the HOA, and must act with ordinary care.⁹⁹ However, because the relationship between an HOA and the homeowner is a question of state law, each state has its own specific rules regarding whether the HOA is an agent and whether the HOA owes fiduciary duties.¹⁰⁰

A. State Views on the HOA-Homeowner Relationship

Certain legal complications arise from the fact that HOAs are viewed as legal persons, leading to the belief that there could be an agency

95. Foundation for Community Association Research, *The Community Association Fact Book 2020* at 66, app. three: Comparing Association Financial Management to For-Profit & Tax-Exempt Entities, FOUND. CMTY. ASS'N INST. (2021), https://foundation.caionline.org/wp-content/uploads/2021/07/FB_Narrative_2020.pdf.

96. WASH. REV. CODE ANN. § 64.34.300 (West, Westlaw through all legislation from the 2022 Regular Session of the Washington Legislature).

97. Legal Information Institute, *Non-profit Organizations*, CORNELL L. SCH., https://www.law.cornell.edu/wex/non-profit_organizations (last visited July 8, 2022).

98. RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 6.14, cmt. a (AM. L. INST. 2000).

99. *Id.* § 6.13.

100. *Vodicka v. Peruna Prop.'s*, 286 F. App'x 160, 162 (5th Cir. 2008).

relationship between homeowners and their HOA. Corporate personhood is founded in the idea that “incorporation’s basic purpose is to create a distinct legal entity, with legal rights, obligations, powers, and privileges different from those of the natural individuals who created it, who own it, or whom it employs.”¹⁰¹ Like corporations, HOAs “may become an agent of an individual or of another corporation, as it does when it makes a contract on the other’s account.”¹⁰² As the popularity of HOAs has increased in the United States, several courts now either regard HOAs as agents of their individual members, or recognize a broader fiduciary relationship.

B. State Recognition of an Agency Relationship

The ability of corporations to act as agents of an individual extends to most housing cooperatives, including HOAs. In fact, several states treat the HOA as an agent of the individual where the individual has sued for CC&R violations. For example, the Eighth Circuit stated that Minnesota law provides “cooperatives act as agents for their members” to perform acts necessary to the conduct of the cooperatives’ business.¹⁰³ New York has held that HOAs are agents of homeowners because they are “formed as a convenient instrument by which the property owners may advance their common interests . . . [homeowners look] to that organization as the medium through which enjoyment of their common right might be preserved equally for all.”¹⁰⁴ The Western District of Texas also held that a:

homeowners’ association is not a discrete party performing maintenance services for a fee. It is merely the agent of each an[d] every owner, a mechanism created as part and parcel of the equitable servitude which burdens the estate of each owner, functioning to assure that each owner receives the benefits that the equitable servitude

101. *Cedric Kushner Promotions, Ltd. v. King*, 533 U.S. 158, 163 (2001) (referencing *U.S. v. Bestfoods*, 524 U.S. 51, 61-62 (1998); and *Burnet v. Clark*, 287 U.S. 410, 415 (1932)).

102. RESTATEMENT (SECOND) OF AGENCY § 14M, cmt. a (AM. L. INST. 1958); *see also*, Reporter’s Notes stating “the term ‘agent’ includes both natural persons [or a] corporation[.]”

103. *Bot v. Comm’r.*, 353 F.3d 595, 601 (8th Cir. 2003) (referencing generally MINN. ST. § 308A.201(1)).

104. *Neponsit Prop. Owners’ Ass’n v. Emigrant Indus. Sav. Bank*, 15 N.E.2d 793, 798 (N.Y. 1938) (quoting *In re City of New York*, 199 N.E. 5, 9 (N.Y. 1935)).

was intended to confer.¹⁰⁵

After finding that an HOA is representative of the community values of its members, a court in Washington held that “[t]he relationship between a homeowners’ association and a homeowner is akin to that of a principal and an agent.”¹⁰⁶

An individual homeowner can be found to have ratified, to have accepted, or to have authorized actions taken on their behalf by the HOA.¹⁰⁷ This authorization typically occurs when a homeowner signs the CC&Rs, thereby agreeing to the enforcement of community rules against all individual homeowners. For example, if a homeowner complains about a neighbor playing music too loudly, the HOA “has a duty to investigate the alleged violation.”¹⁰⁸ An agency relationship between homeowners and their HOA can be found when a homeowner intends to bring suit for a neighbor’s violation of the community guidelines. In California, HOAs have legal standing to sue on behalf of their members to enforce governing documents, for damage to common areas, and for damage to separate interest areas like front yards.¹⁰⁹ Considering that “it is unreasonable to join every nearby landowner who might conceivably be affected by the litigation,” the HOA represents the interests of the neighborhood as a whole.¹¹⁰ While some states explicitly label the individual homeowners as principals, some states that do not use the word “agency” still refer to the HOA as owing fiduciary duties to individual members as they enforce the neighborhood CC&Rs.

C. States Holding Fiduciary Duties Are owed to Individual Homeowners

Guided by the Restatement (Third) of Property: Servitudes, courts have held that the fiduciary duties that the HOA owes individual owners

105. *Beeter v. Tri-City Prop. Mgmt. Serv.’s (In re Beeter)*, 173 B.R. 108, 115 (Bankr. W.D. Tex. 1994); *See also In re Stone Creek Vill. Prop. Owners Ass’n*, No. 5BR 10-54343-C, 2011 WL 3236038, at *5 (Bankr. W.D. Tex. July 27, 2011).

106. *Brewer v. Lake Easton Homeowners Ass’n*, 413 P.3d 16, 20 (Wash. Ct. App. 2018).

107. *Id.*

108. Steven J. Tinnelly, Esq., *Addressing Neighbor-to-Neighbor Disputes*, TINNELLY L. GRP.: HOA LAW. BLOG (Feb. 10, 2021), <https://hoalaw.tinnellylaw.com/addressing-neighbor-to-neighbor-disputes/>.

109. CAL. CIV. CODE § 5980 (Deering 2012).

110. *Duffey v. Superior Court*, 4 Cal. Rptr. 2d 334 337-38, (Cal. Ct. App. 1992).

include:

(a) to use ordinary care and prudence in managing the property and financial affairs of the community that are subject to its control; (b) to treat members fairly; (c) to act reasonably in the exercise of its discretionary powers including rulemaking, enforcement, and design-control powers; [and] (d) to provide members reasonable access to information about the association, the common property, and the financial affairs of the association.¹¹¹

In the event of a breach of fiduciary duty by the HOA, the HOA is liable to the individual members of the association.¹¹² While some states do not explicitly hold that an agency relationship exists between the HOA and a homeowner, they do state that the HOA inherently owes fiduciary duties to the homeowner, implying an agency relationship exists.

Some states, such as California, view HOAs as owing fiduciary duties to individual members as shareholders,¹¹³ while New York has found HOAs liable to individuals for property violations such as trespassing by board members.¹¹⁴ Illinois has attempted to follow the Fair Housing Act by granting individual “homeowners a cause of action against their homeowners’ association . . . if its board breaches fiduciary duties.”¹¹⁵ While recognizing that a fiduciary relationship exists between HOAs and individual homeowners, Tennessee also granted immunity for individual board member actions, placing all liability on the HOA for a breach of duty.¹¹⁶ States supporting HOA fiduciary duties often reference the bylaws

111. RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 6.13; *see also* § 6.14, cmt. a. (explaining the HOA “is entrusted with the management of the common property and other affairs [in] the community” and that the HOA operates to “protect the interests of the members for whom they serve” including the maintenance of property values).

112. *Id.* § 6.14, cmt. c.

113. *Lamden v. La Jolla Shores Clubdominium Homeowners Ass’n*, 980 P.2d 940, 951 (Cal. 1999).

114. *See Giardina v. Parkview Ct. Homeowners Ass’n*, 680 N.Y.S.2d 354 (N.Y. App. Div. 4th Dep’t. 1998); The state of Georgia has similarly held an HOA liable for the trespass of its Board members, *see Plantation at Bay Creek Homeowners Ass’n v. Glasier*, 825 S.E.2d 542, 548-49 (Ga. Ct. App. 2019).

115. *Mehta v. Beaconridge Improvements Ass’n*, 432 F. App’x 614, 616 (7th Cir. 2011) (referencing 42 U.S.C. §§ 3604(b), 3617 (2012)); *Bd. of Dir. of 175 E. Del. Place Homeowners Ass’n v. Hinojosa*, 679 N.E.2d 407, 409-11 (Ill. App. Ct. 1997).

116. TENN. CODE. ANN. § 48-58-601(b)-(c) (2022).

and CC&Rs in which the HOA is obligated to perform for the homeowner.¹¹⁷ The contracts which surround HOA membership essentially create an expectation for the homeowner, and a duty within the particular HOA's governance.

D. States Holding Community Associations are Incapable of Owning Fiduciary Duties

By contrast, some states use the corporate-like structure of the HOA to dismiss any notion of fiduciary duties. “[I]t is widely understood that the organizations themselves *do not* owe such duties”¹¹⁸ because “[t]here is not, and could not conceptually be any authority . . . as an entity has a fiduciary duty to its shareholders.”¹¹⁹ Kentucky courts have gone on to hold that there is no authority insisting that a nonprofit community association has fiduciary duties, only that the board owes certain duties to the HOA.¹²⁰ Furthermore, Kentucky has no authority providing that the community association is vicariously liable for a director's breach of fiduciary duty that adversely affects the individual members.¹²¹ The notion that the HOA, as a whole, does not owe fiduciary duties to an individual has garnered support from other states. The District of Columbia,¹²²

117. *See* *Ostayan v. Nordhoff Townhomes Homeowners Ass'n*, 1 Cal. Rptr. 3d 528, 533 (Cal. Ct. App. 2003) (stating “[t]he duties and powers of a homeowners association are controlled both by statute and by the association's governing documents.”); *See also* *Tokarski v. Wildfange*, 496 P.3d 22, 26-27 (Or. Ct. App. 2020); *Tucciaron v. Hamlet on Olde Oyster Bay Homeowners Ass'n*, 62 N.Y.S.3d 492, 493-94 (N.Y. 2017); *Colo. Homes v. Loerch-Wilson*, 43 P.3d 718, 721-22 (Colo. App. 2001).

118. *Boomer Dev., LLC v. Nat'l Ass'n of Home Builders of the U.S.*, 258 F. Supp. 3d 1, 22 (D.D.C. 2017) (the Court continued on to state “[i]ndeed, numerous courts from across the country have rejected that proposition” referencing *Burcham v. Unison Bancorp Inc.*, 77 P.3d 130, 146 (Kan. 2003); *Arnold v. Soc'y for Sav. Bancorp, Inc.*, 678 A.2d 533, 539 (Del. 1996); *ULQ, LLC v. Meder*, 666 S.E.2d 713, 718 (Ga. Ct. App. 2008); *Ballard v. 1400 Willow Council of Co-Owners, Inc.*, 430 S.W.3d 229, 241 (Ky. 2013)).

119. *Radol v. Thomas*, 772 F.2d 244, 258 (6th Cir. 1985) (referencing *Jordan v. Glob. Nat. Res., Inc.*, 564 F. Supp. 59, 68 (S.D. Ohio 1983)).

120. *See Ballard*, 430 S.W.3d at 240-41 (referencing KY. REV. STAT. ANN. § 273.215 (2019)). This notion has been consistently supported within the state of Kentucky, *see e.g.*, *Thompson v. Lake Cumberland Resort Cmty. Ass'n*, No. 2016-CA-000145-MR, 2017 WL 4712520, at *3 (Ky. Ct. App. Oct. 20, 2017), *Brant v. Turpin*, No. 2018-CA-1074-MR, 2021 WL 1583152, at *5 (Ky. Ct. App. Apr. 23, 2021), *Jad Farhat Irrevocable GSST Trust #1 v. TTM Grp., LLC*, No. 2016-CA-001937-MR, 2018 WL 1980764, at *4-5 (Ky. Ct. App. Apr. 27, 2018).

121. *Ballard*, 430 S.W.3d at 241.

122. *See Boomer Dev., LLC*, 258 F. Supp. 3d at 22-23 (the District of Columbia holding

Colorado,¹²³ Florida,¹²⁴ and Hawaii¹²⁵ have also indicated community associations like HOAs do not owe fiduciary duties to its members. In holding that the HOA does not owe fiduciary duties, these states have foreclosed the idea that HOAs are agents of homeowners.

E. Homeowners Associations as ‘Quasi-Governmental’ Entities

As some individual homeowners seek out HOA communities for the convenience of local services, HOAs have increasingly been seen as a miniature government. “[I]n recognition of the increasingly important role played by private homeowners’ associations . . . the courts have recognized that such associations owe a fiduciary duty to their members.”¹²⁶ As previously mentioned, many homeowners become members because HOAs perform public services and have “increasingly ‘quasi-governmental’ responsibilities.”¹²⁷ Thus, the HOA owes duties to its members as a governmental body, not as an agent.

[U]pon analysis of the association’s functions, one clearly sees the association as a quasi-government entity paralleling in almost every case the powers, duties, and

community organizations do not owe duties and that there “no persuasive reason why nonprofit trade associations should be categorically held to occupy positions of special trust with respect to their members.”)

123. *Wolf v. Meadow Hills III Condo. Ass’n*, No. 1:20-cv-01524-RBJ, 2022 WL 814275, at *8-9 (D. Colo. Mar. 17, 2022) (Colorado holding nonprofit community associations owe no duties to their members because there is no “legal support for the notion that an Association as a whole can owe fiduciary duties . . .”).

124. *See Collado v. Baroukh*, 226 So. 3d 924, 928 (Fla. Dist. Ct. App. 2017) (referencing FLA. STAT. § 718.111(1) (2016) and stating “[the HOA] as a corporate entity, it does not have a [fiduciary] duty to its unit owners.”); *Mortola v. Lakeside at Seven Oaks Homeowners Ass’n*, No. 2016-CA-2826-CAAXES, 2020 Fla. Cir. LEXIS 3883, at *5-6 (Fla. 6th Cir. Ct. Sept. 3, 2020) (explaining that Florida statutes FLA. STAT. §§ 720.303(1); 617.0830; 617.0834 (2011) provide HOA’s do not owe fiduciary duties to individual members).

125. *DeRosa v. Ass’n of Apartment Owners of Golf Villas*, 185 F. Supp. 3d 1247, 1254 (D. Haw. 2016) (comparing the HOA-homeowner relationship to a borrower and lender where a fiduciary duty does not exist).

126. *Cohen v. Kite Hill Cmty. Ass’n*, 142 Cal. App. 3d 642, *650-51 (Cal. Ct. App. 4th Dist. 1983) (quoting Wayne S. Hyatt & James B. Rhoads, *Concepts of Liability in the Development and Administration of Condominium and Home Owners Associations*, 12 WAKE FOREST L. REV. 915, 921 (1976)).

127. *Id.* at *636; *See also Oakland Raiders v. Nat’l Football League*, 32 Cal. Rptr. 3d 266, *277 (Cal. Ct. App. 2005), *aff’d on other grounds*, 161 P.3d 151 (Cal. 2007).

responsibilities of a municipal government. As a “mini-government,” the association provides to its members, in almost every case, utility services, road maintenance, street and common area lighting, and refuse removal. In many cases, it also provides security services and various forms of communication within the community. There is, moreover, a clear analogy to the municipal police and public safety functions. All of these functions are financed through assessments or taxes levied upon the members of the community, *with powers vested in the board of directors* . . . clearly analogous to the governing body of a municipality.¹²⁸

The “quasi-governmental” role of the HOA may appear to support an agency relationship between the HOA and homeowners because local governments are a generalized version of agents. Due to the nature of governmental authority and the choice that citizens have in what laws they must abide by, local governments have “certain minimum duties to the general citizenry.”¹²⁹ As HOAs become increasingly popular, the rights of homeowners are further affected by HOA actions, and it might become necessary to identify and regulate HOAs as governmental entities.

V. WHY HOAS ARE NOT AGENTS AND CANNOT OWE FIDUCIARY DUTIES

A. The Failure to Meet the Legal Requirements of an Agency Relationship

The notion that the complex legal relationship between the HOA and homeowner is that of an agency is problematic from the moment the homebuyer first makes a contract with the HOA. When buying a home, a homeowner does not often have the option to not join. Homeowners also have little-to-no choice of which actions the HOA may take on their behalf, or, crucially, any actions taken by the HOA for any purpose. The homeowner has not only been left with no meaningful choice on

128. *Cohen*, 142 Cal. App. 3d at *650-55; *See also* *Chantiles v. Lake Forest II Master Homeowners Ass’n*, 45 Cal. Rptr. 2d 1, at **5 (4th Cal. Dist. App. 1995).

129. *U.S. v. Margiotta*, 688 F.2d 108, 123-124 (2d Cir. 1982); *See also* *U.S. v. Percoco*, 13 F.4th 180, 194 (2d Cir. 2021)).

membership, but also has had no say about the terms of their contract with the HOA, cannot control what their HOA does without going through an excessive amendment process, and is unable to terminate the relationship without selling their home. These problems are further compounded by the fact that the individual is not the only member that the HOA must serve.

1. A Lack of Mutual Assent

The requirement of mutual assent presents three fundamental problems with the argument that HOAs are agents of their members. First, many homeowners have not consented to an agency relationship. Buyers in the market for a new home commonly face this issue because the market is relatively small for non-HOA homes, and buyers lack negotiating power in an HOA contract. Second, when a homeowner does seek out HOA neighborhoods, the obligations of the HOA are predetermined, inflexible, and not affected by their membership. Third, an individual owner cannot withdraw their assent and terminate the relationship with the HOA, a power that is essential to all agency relationships.

While HOAs can be optional or mandatory for property owners to join, cities are increasingly requiring HOAs for residentially zoned properties.¹³⁰ Non-HOA homes are becoming few and far between, as 75% of new housing sold in 2020 was part of a community association, leaving buyers with few alternatives.¹³¹ With HOAs becoming so common that “[a]utomatic and mandatory homeowners associations are part of an

130. See e.g., *HOA Statistics*, iPropertyManagement, <https://ipropertymanagement.com/research/hoa-statistics> (last updated Apr. 23, 2022); LAS VEGAS, NEV. CODE §§ 20.08.370(K), 20.10.030 (requiring all surface drains to be maintained by community associations); BUCKINGHAM TWP., PA. § 405-B5(A), <https://www.buckinghampa.org/media/2736/zon-ord-final-as-amended-to-092221.pdf> (enacted Sept. 22, 2021) (requiring lots with 50% ‘open space’ to be owned, managed and maintained by an HOA); SAN ANTONIO, TEX. UNIFIED DEV. CODE § 35-344.01(i) (2009) (requiring property owners’ associations to represent the residences in the area provide maintenance for all common areas including streets and sidewalks for planned upcoming developments); LEXINGTON-FAYETTE CNTY., KY. ZONING ORDINANCE § 22A-6(o) (requiring an HOA or other similar mechanism for the maintenance operation of common areas like streets and parking); GILBERT, ARIZ. LAND DEV. CODE § 5.5.2, (effective Oct. 21, 2021), <https://www.gilbertaz.gov/home/showpublisheddocument/42419/637716250998330000> (requiring HOAs for the maintenance and operation of “all landscaping, open space, recreation facilities, private streets, private sidewalks, parking area, utilities, and/or other facilities held in common ownership”).

131. 2020-2021 *U.S. National and State Statistical Review*, *supra* note 2.

overall concept of residential property ownership,”¹³² some courts and scholars argue that HOA contracts are a form of adhesion contracts.¹³³ Adhesion contracts are exclusively pre-determined by a single party and are presented as “take it or leave it,” while the non-drafting party has no room to negotiate.¹³⁴ “If these contracts were actually negotiated by the owners themselves, they would vary greatly and they would change over time. Instead . . . [the] contracts [are] drawn up by the stronger party in a relationship and not subject to negotiation or change by the weaker party.”¹³⁵ While these types of contracts leave the homeowner without the ability to consent to the relationship, adhesion contracts also exemplify the homeowner’s complete lack of control in the relationship. The absence of bargaining power is especially worrisome during periods of high housing demand where supply shortages increase competition among buyers.

As the housing market continues to boom, so does membership in community associations. As of 2020, 25–27% of the U.S. population were members of a community association,¹³⁶ and membership is expected to grow by 5,000 members in 2020.¹³⁷ Those in search of a new home now face an increasingly competitive market, which for some buyers has made it nearly “impossible to access homeownership.”¹³⁸ In acts of desperation,

132. Ctr. for Cmty. Ass’n Volunteers, *An Introduction to Community Association Living* 4, 7, 17, CMTY. ASS’N INST. (2017), https://www.caionline.org/LearningCenter/Homeowner%20Education/Intro_to_CA_Living.pdf.

133. See *Grindstaff v. Oaks Owners’ Ass’n*, 2016 OK CIV APP 73, ¶¶ 20-29, 386 P.3d 1035, 1041-43 (holding that even though HOA contracts are non-negotiable, even adhesion contracts must be read according to their terms); Andrea J. Boyack, *Common Interest Community Covenants and the Freedom of Contract Myth*, 22 J.L. & POL’Y 767, 771 (2014); Symposium, *Homeowner Associations: Problems and Solutions Conference*, 5 RUTGERS J.L. & PUB. POL’Y 630, 637-80 (2008); *But see contra*, *McAdams v. Foxcliff Est.’s Cmty. Ass’n*, 92 N.E. 1144, 1150-51 (Ind. Ct. App. 2018) (holding HOA contracts are not a contract of adhesion because choosing a neighborhood is not a basic necessity of life); *Graziano v. Stock Farm Homeowners Ass’n*, 258 P.3d 999, 1004 (Mont. 2011) (holding that HOA contracts are not adhesive).

134. See *Grindstaff*, 2016 OK CIV APP 73, ¶¶ 20-27, 386 P.3d at 1041-42 (quoting *Max True Plastering Co. v. U.S. Fid. & Guar. Co.*, 912 P.2d 861, 864 (Okla. 1996)).

135. MCKENZIE, *supra* note 29, at 109-10 (referencing Evan McKenzie, *Reinventing Common Interest Developments: Reflections on a Policy Role for the Judiciary*, 31 J. MARSHALL L. REV. 397, 397-427 (1998)).

136. 2020-2021 U.S. National and State Statistical Review, *supra* note 2.

137. Found. Cmty. Ass’n Rsch., *Housing Experts Predict Modest Growth for U.S. Condominiums and Homeowners Associations in 2022*, FOUND. CMTY. ASS’N INST., <https://foundation.caionline.org/industry-data/> (last visited July 11, 2022).

138. Natalie Campisi & Rachel Witkowski, ‘We’re Facing a Housing Crisis,’ *Experts Say. What Homebuyers Can Do About It.*, FORBES (Mar. 11, 2022, 10:44 AM),

buyers resort to waiving inspections and buying homes for over the asking price.¹³⁹ Whether or not buyers realize the obligations they now owe to the HOA after signing their contracts, their signatures may legally count as mutual assent for the purposes of both contract and agency law. In fact, some courts infer the act of purchasing property as equivalent to the mutual assent required for an agency relationship.

Courts have held generally that [horizontal privity] . . . is met when one of the original contracting parties was a homeowners' association, even if the association did not have legal title in [the] land [E]ven if horizontal privity was lacking in form, "it was present in substance since the association was acting as the agent of all of the property owners."¹⁴⁰

HOAs have additionally placed clauses stating that the CC&Rs "shall run with the land and shall be binding" upon those with any interest in the property, ensuring contract obligations shall be upheld by any owner.¹⁴¹

This nonconsensual relationship with the HOA presents major obligations for those who inherit property and can't be said to have assented in any way. When property in an HOA is inherited, the executor of the decedent's estate is liable for all unpaid dues and the new owner inherits all other obligations.¹⁴² Even if the new owner does not live in or benefit from the HOA, they are obligated to pay all future fees and are bound to the CC&Rs.¹⁴³ The consequences of noncompliance with the CC&Rs are the same for the new owner as they were for the decedent,

<https://www.forbes.com/advisor/mortgages/housing-crisis-tips/>.

139. Haaris Mateen et al., *The Microstructure of the U.S. Housing Market: Evidence from Millions of Bargaining Interactions* 24-25 (last revised July 28, 2021), available at <https://ssrn.com/abstract=3727150> or <http://dx.doi.org/10.2139/ssrn.3727150>.

140. *Lake Arrowhead Cmty. Club v. Looney*, 770 P.2d 1046, 1050 (Wash. 1989) (quoting POWELL ON REAL PROPERTY § 60.06(2)(a) (Michael Allan Wolf, Desk ed. 1988)).

141. See e.g., *Spring Lake Farm, LLC v. Spring Lake Farm Homeowners Ass'n*, 841 S.E.2d 843 (N.C. App. 2020); *Elk Grove Dev. Co. v. Four Corners Cnty. Water & Sewer Dist.*, 469 P.3d 153 (Mont. 2020); *Klahanie Ass'n v. Sundance at Klahanie Condo. Ass'n*, 407 P.3d 1191 (Wash. App. 2017).

142. See *Homestead at Mansfield Homeowners Ass'n v. Estate of Lois Mount*, No. A-0836-13T1, 2014 WL 3055898 (N.J. Super. Ct. App. Div. July 8, 2014).

143. Cedar Management Group, *When An HOA Resident Dies, What Do You Do?*, <https://cedarmanagementgroup.com/what-to-do-if-a-hoa-resident-dies/> (last visited July 11, 2022).

meaning that the HOA can place a lien and foreclose on the property for unpaid dues among other consequences.¹⁴⁴ The new owner has not only been assigned a contract that they never agreed to, but the HOA is also restricting their newly acquired rights and holding them to obligations that the new owner was never a party to. While the new owner never agreed to the relationship at all, these inherited properties additionally reveal that the individual homeowner has no effect on the HOA's operation, despite the fact that the relationship would be considered terminated in agency law.

Additionally, these predetermined contracts made by the HOA leave the homeowner with no input regarding which rules their HOA will actually enforce. For example, a Virginia HOA revoked voting privileges, blocked access to neighborhood facilities, and filed a warrant in debt to recover unpaid fines against homeowners for their use of holiday lighting.¹⁴⁵ While the HOA had guidelines for holiday lighting, it failed to account for those celebrating several religious holidays throughout the year.¹⁴⁶ Although it was ultimately rejected by the court, the HOA attempted to justify their actions by arguing that it has a broad authority "to adopt such rules and regulations . . . as it may from time to time consider necessary or appropriate."¹⁴⁷ While agency law states a principal's manifestation of assent includes "assent to action by the agent with legal consequences for the principal,"¹⁴⁸ in an HOA it is reversed—homeowners must adhere to strict terms while the obligations of the HOA are nonspecific with no regard for the individual's legal consequences or purpose.

In an agency relationship, the manifestation of assent includes the power to terminate the relationship. As previously discussed, "[o]nce the principal becomes unable to terminate the relationship or to provide instructions to the agent, the principal's relationship with the agent is no longer the relationship presupposed by the common law of agency, even though . . . the principal consented initially."¹⁴⁹ In their agreement with the HOA, whether voluntarily or not, homeowners cannot opt out of their contract unless they sell their property. Even if the HOA were to dissolve,

144. *Id.*; See also Law Firm Carolinas, *Who's Responsible for HOA/Condo Assessments When a Homeowner Dies?* (Aug. 6, 2019), <https://lawfirmcarolinas.com/blog/whos-responsible-for-hoa-condo-assessments-when-a-homeowner-dies/>.

145. *Sainani v. Belmont Glen Homeowners Ass'n*, 831 S.E.2d 662, 721 (Va. 2019).

146. *Id.* at 720.

147. *Id.* at 728 (referencing the neighborhood specific 'HOA Handbook').

148. RESTATEMENT (THIRD) OF AGENCY § 3.01, cmt. b (AM. L. INST. 2006).

149. *Id.* § 1.01, cmt. d.

homeowners may be forced into a new relationship against their will. For example, a neighborhood HOA in Wyoming was administratively dissolved after it failed to pay state taxes.¹⁵⁰ As part of the dissolution, the HOA assigned its authority to a new HOA instead of distributing its assets to the members of the neighborhood.¹⁵¹ The members of the neighborhood received no notice that the original HOA had dissolved, that a second HOA had been formed, or that the members were now governed by a second HOA that they had no part in creating.¹⁵² Despite the members' lack of knowledge, the court held that the homeowners who remained in the neighborhood were now a part of the second HOA.¹⁵³ Individual members of the HOA were unable to withdraw their assent at any time in the relationship without the massive complication of selling their property and uprooting their families, while the original HOA dissolved and assigned its authority to a new HOA without the knowledge or consent of the homeowners.

Whereas individual homeowners are subject to fees and possible foreclosure of their homes for violations of the CC&Rs, the HOA is not held to the same standard. Members who sue their HOA often find the consequences of filing suit to be harsh. In the span of a decade, more than 530 complaints were filed with the Indiana Attorney General's office for "fraud, unprofessional conduct, billing disputes, and professional incompetence."¹⁵⁴ Despite the numerous grievances, the last actual lawsuit was initiated in 2016 because the state's ability to regulate HOAs "is constrained and confined by what the statutes say."¹⁵⁵ In addition to the lack of legal resources available, the homeowner must undergo the typically "expensive and time-consuming process" of a lawsuit and face negative social repercussions like threats of foreclosure and harassment from the HOA.¹⁵⁶ Homeowners not only struggle to take legal action

150. *Prancing Antelope I, LLC v. Saratoga Inn Overlook Homeowners Ass'n*, 2021 WY 3, ¶¶ 9-16, 478 P.3d 1171, 1177.

151. *Id.* at ¶¶ 27-48, 1180-83.

152. *Id.* at ¶¶ 38-48, 1182-83.

153. *Id.* at ¶¶ 43-48, 1183.

154. Kara Kenney, *State Limited in Enforcement Involving Homeowner's Associations*, WRTV ABC INDIANAPOLIS (last updated May 1, 2019, 6:03 PM), <https://www.wrtv.com/news/call-6-investigators/state-limited-in-enforcement-involving-homeowners-associations>.

155. *Id.*

156. See Jaclyn Allen, *In Colorado, Taking HOAs to Court Can be Costly, Time-Consuming*, THE DENVER CHANNEL (last updated Mar. 16, 2022, 7:56 AM), <https://www.thedenverchannel.com/news/contact-denver7/in-colorado-taking-hoas-to->

against their HOA, but they must also continue to pay their HOA's fees, which in part pay for the HOA's litigation expenses.¹⁵⁷

The impulse to deem the HOA an agent of the homeowner comes from the recognized fact that “relationships that are less than fully consensual and, therefore, not common-law agency relations [may] trigger legal consequences equivalent to those of agency.”¹⁵⁸ However, the lack of mutual assent is constant throughout the relationship with the HOA. At the beginning, the homeowner might not have agreed to a relationship with the HOA, and those who have agreed might not have a full understanding of the rules of the HOA. Those in an HOA cannot terminate their relationship with the HOA without relinquishing their property entirely. An agency relationship cannot exist where the obligations of an agent lack input from the principal—who faces legal consequences for their agent's actions—and where the principal cannot eliminate the agent's authority.

2. Who Does the Homeowners' Association Act On Behalf Of?

Certain aspects of a homeowner's relationship with their HOA are similar to an agency relationship, such as contracting with third parties for services. In fact, HOA contracts for maintenance are so common that Texas requires HOAs to solicit bids for service contracts over \$50,000.¹⁵⁹ While it is generally within the agent's authority to contract on behalf of their principal, HOA actions represent a collective rather than an individual principal. Because HOAs are formed to represent all members of the neighborhood, the individual homeowner is left guessing whether the HOA will decide to meet their needs over the competing needs of their neighbors.

As previously discussed, the representation of multiple parties is not unique to HOAs. However, unlike consensual dual agency relationships,

court-can-be-costly-time-consuming; Todd Ulrich, *'They Put me Through Hell': Homeowner Battles HOA, Gets Thousands in Settlement*, WFTV.COM (Feb. 16, 2021, 6:47 PM), <https://www.wftv.com/news/action9/they-put-me-through-hell-homeowner-battles-hoa-gets-thousands-settlement/YD26MECEZVBTTMX7E3HOS7JT2I/>.

157. Brittany Freeman, *They Faced Foreclosure not From Their Mortgage Lender, but From Their HOA*, PROPUBLICA & ROCKY MOUNTAIN PBS (Apr. 8, 2022, 2:00 PM), <https://www.propublica.org/article/they-faced-foreclosure-not-from-their-mortgage-lender-but-from-their-hoa>.

158. RESTATEMENT (THIRD) OF AGENCY § 1.01, cmt. d (AM. L. INST. 2006).

159. *New HOA Laws Go Into Effect Today*, TEXAS REALTORS (Sept. 1, 2021), <https://www.texasrealestate.com/members/posts/new-hoa-laws-go-into-effect-today/> (referencing TEX. S.B. 1588, 87th Leg., R.S. (2021)).

the individual homeowner can neither foresee nor consent to future conflicts of interest. For example, attorneys must not represent multiple clients whose interests conflict unless they obtain informed consent in writing from both parties.¹⁶⁰ Consent to waive future conflicts must include a client's reasonable understanding of material risks that may occur, and the understanding that a client may later revoke their consent.¹⁶¹ The American Bar Association also accounts for attorneys representing organizations, stating that lawyers should not act when there are material risks to their independent professional judgement.¹⁶² Unlike conflicts of interest for attorneys, homeowners signing a general waiver is impractical because the governing rules of the HOA, the circumstances of each homeowner, and the ownership of property in the neighborhood continually change. Whether the changing circumstances be a new neighbor, working from home, or typical neighbor disagreements, were the HOA an agent, it would be obligated to adapt to the needs of each homeowner.

The ambiguity surrounding whom the HOA must act on behalf of is further blurred by the fact that the HOA is employed to represent a collective whole. Like corporate-agency relationships where the corporation is an extension of its shareholders, the HOA acts as an extension of each individual homeowner. This is why some states grant HOAs standing to sue on behalf of individual homeowners; there is sufficient commonality of interests.¹⁶³ This presents a significant obstacle for HOAs when there are conflicts between neighbors who each expect the HOA to act on their behalf. In the event of a neighborly dispute, any disciplinary action taken against a neighbor is taken on behalf of the single complaining homeowner. While it is not essential for a principal to benefit from their agent's action on their behalf, principals can terminate the relationship if their agent were to act against them.

Conversely, individual homeowners lack the power to terminate the relationship if the HOA were to substantially affect the individual's interest.¹⁶⁴ For example, in *Inwood North Homeowners' Association v.*

160. MODEL CODE OF PRO. CONDUCT R. 1.7 (2020).

161. *Id.* at cmt. 21-22.

162. *Id.* at cmt. 35.

163. *Raven's Cove Townhomes, Inc. v. Knuppe Dev. Co.*, 114 Cal. App. 3d 783, 796 (Cal. Ct. App. 1981); *See also* *Mkt. Lofts Cmty. Ass'n v. 9th Street Mkt. Lofts, LLC*, 222 Cal. App. 4th 924, 934 (Cal. Ct. App. 2014); *Whitaker v. Maroney Farms Homeowners' Ass'n (In re Whitaker)*, 642 F. App'x 345, 346 (5th Cir. 2016).

164. RESTATEMENT (THIRD) OF AGENCY § 1.01, cmt. g (AM. L. INST. 2006).

Harris, the HOA suspended water services for seven homeowners after the bylaws were amended to grant the HOA such authority following the households' failure to pay water service fees to the HOA.¹⁶⁵ It is unlikely that the seven individual homeowners consented to such a substantial amendment to their previous agreement, as it would have negatively affected their interest. In this case, the HOA acted on behalf of some members to the detriment of other owners who placed a significant amount of trust and confidence in their HOA. While the HOA's actions may benefit one homeowner, they may adversely affect another homeowner. This is a classic violation of the duty of loyalty. The confusion surrounding who the HOA acts on behalf of is further muddled by the homeowner's lack of control, as the HOA cannot be an agent if the principal has no right to control the actions taken on their behalf.¹⁶⁶

3. The Homeowners' Lack of Control over Their Homeowners' Association

The individual homeowner's lack of control is the most persuasive rejection of an agency relationship. While a principal is not required to actually exert control over their agent's actions for the relationship to exist, the principal must have the ability to exercise control throughout the relationship.¹⁶⁷ However, a homeowner in an HOA has no mechanism to control the HOA because members of community associations generally have no effective control over the management of the HOA.¹⁶⁸ When buying a home in an HOA neighborhood, whether the homeowner sought HOA governance or not, the homeowner cannot define what the HOA shall and shall not do in any terms.¹⁶⁹ In reality, the HOA has predetermined the rules of the relationship through their bylaws and CC&Rs. In mandatory HOAs, the homeowner must accept the HOA's rules or they will not be able to purchase the property.

Remarkably, the individual homeowner also has little to no right to give interim instructions or directions. If a single homeowner wishes to change a neighborhood rule, they generally must go through a rigorous

165. *Inwood N. Homeowners' Ass'n v. Harris*, 736 S.W.2d 632, 633 (Tex. 1987).

166. RESTATEMENT (THIRD) OF AGENCY § 1.01, cmt. f(1) (AM. L. INST. 2006).

167. *See id.*, cmt. c & f(1).

168. *Frances T. v. Village Green Owners Assn.*, 723 P.2d 573, 577 (Cal. 1986) (referencing *White v. Cox*, 95 Cal. Rptr. 259 (Cal. Ct. App. 1971) and *O'Connor v. Village Green Owners Ass'n*, 191 Cal. Rptr. 320 (Cal. 1983)).

169. RESTATEMENT (THIRD) OF AGENCY § 1.01, cmt. f(1) (AM. L. INST. 2006).

amendment process. Typically, the amendment process includes: (1) a proposal of amendment submitted to the HOA, (2) the board's discussion of the amendment in a meeting open to all members, (3) a vote among the board to accept or reject the amendment and, (4) if approved, the changes must be recorded in the county recorder's office. All proposed amendments are presented to each individual homeowner in the neighborhood.¹⁷⁰ Due to the open presentation of a change, an individual has little control over whether the amendment will be accepted or denied. The desire to change a rule is thus subject to scrutiny by other homeowners in the neighborhood. Since the homeowner owns the real property, they may use their property in any way they would like as long as they are not injuring the rights of another.¹⁷¹ Despite the homeowner's desire, they may be limited by the HOA rules and regulations. The homeowner must begin an amendment process, which may include campaigning to other homeowners and the board members and may be futile since the HOA could reject any change the homeowner seeks to make.

The right to control is constant throughout an agency relationship and includes the ability of a principal to terminate the agency relationship by revoking the agent's authority, however, HOAs hide behind contracts granting the HOA broad and unwieldy authority.¹⁷² Although it is not unusual for an agency relationship to bind parties via contract, many homeowners do not have the option to join the HOA or control what the HOA does. HOAs use these contracts as a basis for their decision making because courts often presume the homeowners have a full understanding of their HOA's obligations, because they have the duty to examine their contract for real property,¹⁷³ even though there are rarely guidelines as to what the HOA must perform. The typical HOA contract is overly generalized and broad, with terms often allowing the HOA to "manage, control and restrict the use of the Common Areas," leaving an individual to wonder what duties that involves.¹⁷⁴ Whereas specific performance is not an available remedy for a principal terminating the agency relationship

170. *Frances T.*, 723 P.2d at 590, 594.

171. *Hoover v. Horton*, 209 S.W.2d 646, 649 (Tex. Civ. App. 1948).

172. RESTATEMENT (THIRD) OF AGENCY § 1.01, cmt. c (AM. L. INST. 2006).

173. *Four Seasons Homeowners Ass'n v. Sellers*, 302 S.E.2d 848, 853 (N.C. Ct. App. 1983) (citing *Lamica v. Gerdes*, 153 S.E.2d 814 (N.C. 1967) and *Turner v. Glenn*, 18 S.E.2d 197 (N.C. 1942)).

174. *Sample Association Bylaws*, HOMEOWNERS PROT. BUREAU, LLC (HOPB), <https://www.hopb.co/sample-hoa-bylaws#general> (last visited July 11, 2022).

in breach of a contract,¹⁷⁵ some states allow specific performance—like injunctions—against homeowners seeking to leave their HOA.¹⁷⁶ In other words, a homeowner cannot choose to terminate the relationship at all, despite their lack of control over the HOA, and must face the legal consequences of their HOA’s actions.

B. In Practice, the Homeowners’ Association Does Not Act as an Agent

1. Failure to Uphold Fiduciary Responsibilities

While the HOA–homeowner relationship fails to meet the requirements of an agency, the complications arising with fiduciary responsibilities further illustrate that the HOA cannot be an agent of an individual homeowner. As previously noted, the central fiduciary duties in an agency relationship are the duty of care and the duty of loyalty. Both the duty of care and the duty of loyalty are designed to benefit the principal. In the petroleum company example previously discussed, the company expects their employee to follow its instructions with care, not divulge the company’s plans for expansion to competitors and disclose any potential conflicts of interests the individual may have. These duties may “vary depending on the parties’ agreement and the scope of the parties’ relationship.”¹⁷⁷ Considering the substantial degree of trust placed in the HOA and the nature of the HOA’s extensive authority, courts have held that “[t]hese duties take on a greater magnitude in view of the mandatory association membership required of the homeowner.”¹⁷⁸ If an agency relationship was present, the HOA would constantly struggle to uphold its duty of care and loyalty to the individual homeowner.

a. Instability in the Duty of Care

The duty of care is rooted in the actions an agent must take to achieve

175. RESTATEMENT (THIRD) OF AGENCY § 3.10, cmt. b (AM. L. INST. 2006).

176. See Gregory S. Cagle, *Texas Homeowners Association Law: The Essential Guide For Texas Homeowners Associations and Homeowners* § 9.6 (2nd ed. 2019) (excerpt available at <https://texashoalaw.com/excerpts/enforcement-of-restrictive-covenants-by-judicial-proceeding/>); *If an Arizona Homeowner Violates their HOA’s CC&Rs can they be Taken to Court?*, GOODMAN HOLMGREN LAW GRP., <https://goodlaw.legal/can-arizona-hoa-take-homeowner-court-violates-ccrs/> (last visited July 11, 2022).

177. RESTATEMENT (THIRD) OF AGENCY § 8.01, cmt. c (AM. L. INST. 2006).

178. *Raven’s Cove Townhomes, Inc.*, 114 Cal. App. 3d at 800.

the principal's end objective.¹⁷⁹ Typically the principal's ability to control is related to the agent's duty of care, because ultimately every action by the agent is taken to accomplish the principal's end objective. For example, if the petroleum company sent the negotiator to Texas to negotiate a lease and the negotiator did not know anything about the plot of land or acted without regard to the price set by the company, the individual would be liable to the company for breaching their duty of care. Conversely, HOAs have eliminated the homeowner's control by providing pre-written contracts which also relieve the HOAs of the duty of care. Courts in Kentucky, Michigan and Nebraska have stated "[it is] well settled in most jurisdictions that the [HOA's] right to enforce a restrictive covenant may be lost by waiver or abandonment."¹⁸⁰ In other words, at least in those states, HOAs face no consequences for the failure to uphold the duty of care, even though HOAs define their own duties in non-negotiable contracts with homeowners. Instead, HOAs merely waive or abandon their right to enforce a single covenant—yet the involved homeowner is left without remedy or the ability to end the relationship with their HOA. Thus, the HOA has limited its own duty of care without the input of the individual, and thus has the freedom to breach its duties without the liability an agent would typically have.

The weak duty of care for an HOA is further diluted in states such as Wyoming, where HOAs are not required to strictly adhere to their CC&Rs. In *Sullivan v. Eaglestone Ranch, Inc.*, an oral resolution was made during a Wyoming neighborhood HOA meeting to allow outdoor storage of hay covered by brown tarp—an act the original CC&Rs prohibited.¹⁸¹ According to the community CC&Rs, the HOA had to obtain written consent from at least 75% of the neighborhood and file the amendment in the county land records.¹⁸² While the plaintiff relied on the original CC&Rs, which required that hay be stored in a barn or other storage building, other homeowners stored their hay in compliance with the oral

179. *Carrier*, 693 A.2d at 78.

180. *Bagby v. Stewart's Ex'r*, 265 S.W.2d 75, 77 (Ky. Ct. App. 1954). *See also* Eng. Station Cmty. Ass'n v. Gaddie, No. 2014-CA-001170-MR, 2018 WL 1136472, at *3, (Ky. Ct. App. 2018); *Bigham v. Winnick*, 286 N.W. 102, 103 (Mich. 1939); *Rofe v. Robinson*, 336 N.W.2d 778, 780 (Mich. Ct. App. 1983); *Farmington Woods Homeowners Ass'n v. Wolf*, 817 N.W.2d 758, 765 (Neb. 2012).

181. *Sullivan v. Eaglestone Ranch, Inc.*, No. 16-cv-290-MLC, 2017 WL 11673879, at *1 (D. Wyo. Aug. 9, 2017).

182. *Id.*

amendment rather than the previously-agreed-upon CC&Rs.¹⁸³ Despite the HOA's failure to enforce the original community agreement, the HOA was relieved of liability because the court held that the enforcement of CC&Rs is flexible and does not "require that the HOA . . . strictly enforce each and every alleged violation of the covenants."¹⁸⁴ Since the HOA was given unbridled discretion, whereas the homeowner could have been penalized if they were not in strict compliance with the CC&Rs if the HOA so chose, the HOA was relieved of the duty of care an agent customarily has.

Even when an HOA strictly enforces community covenants, some states allow the HOA to overrule a supermajority vote of its members in spite of the CC&R requirements. In 2019, a California court allowed a neighborhood HOA to petition "to reduce the approval percentage[s] to amend the CC&Rs despite the participation of the vast majority of members in the voting process."¹⁸⁵ Thus, while the HOA can alter its standard of care over the protest of both the individual and the majority, the individual must resort to a rigorous amendment process that is subjected to the input of others. Consequently, the homeowner has no control over what obligations the HOA has, and the HOA can willingly fail to enforce the rules without any legal recourse for the homeowners.

For homeowners seeking to join an HOA for certain quasi-governmental services, the HOA's actions may ultimately be burdensome and unrelated to the homeowner's end objective. This was the case for a homeowner in Denver who joined their HOA for "[the maintenance] of bushes, shoveling, ice mitigation, [and] functioning mailboxes."¹⁸⁶ Instead of performing the services promised in the community bylaws, the HOA spent funds on holiday lighting.¹⁸⁷ This exemplifies that fact that there is often no relation between the homeowner's end objective, the community CC&Rs, and the HOA's discretion over its duty of care. The duty of care essential to an agency relationship does not exist in the HOA-homeowner relationship because the HOA determines its own duties, has the flexibility to decide when to adhere to the duty of care, and faces no consequences

183. *Id.*

184. *Id.* at *4-6.

185. *Homeowners' Association Can Petition Court to Approve an Amendment to CC&Rs Without Showing Voter Apathy*, PORTER SIMON L. OFF.'S (Feb. 11, 2020), <https://portersimon.com/homeowners-association-can-petition-court-to-approve-an-amendment-to-ccrs-without-showing-voter-apathy/> (referencing *Orchard Est. Homes, Inc. v. The Orchard Homeowner All.*, 244 Cal. Rptr. 3d 23 (Cal. Ct. App. 2019)).

186. Allen, *supra* note 156.

187. *Id.*

for a breach of fiduciary duties. While the duty of care is necessary for the accomplishment of a principal's primary goal in an agency relationship, the HOA is not bound to act in accordance with a duty of care to its members.

b. Where Does the Duty of Loyalty Reside: Conflicts Of Interest and Dual Agency Issues

The duty of loyalty presents a substantial obstacle to the support of an agency relationship because there is an inherent conflict of interest for the HOA. As HOAs represent the entire neighborhood in lawsuits, HOAs not only act “in a representative capacity but also . . . [as a somewhat unorthodox] class action.”¹⁸⁸ The conflict surrounding attorneys' fiduciary duties is similar to the HOA in that “the typical pathology of class action [representation] . . . is riven with conflicts of interest.”¹⁸⁹ Likewise, corporate-HOAs may find it “difficult, or even impossible, to classify . . . the nature of interest of the membership corporation and its members in the land. The corporate entity cannot be disregarded, nor can the separate interests of the members of the corporation.”¹⁹⁰ When an agent must represent a group, they may find “[i]ndividuals often have multiple and conflicting interests,” making it difficult for the agent to adhere to their fiduciary duties.¹⁹¹ While conflicts of interest present an obstacle for attorneys in a class action suit, the attorney acts to ultimately get justice for the entire class; the American Bar Association requires informed consent in writing and requires recusal when the attorney's judgement is at risk.¹⁹² By contrast, the actions of an HOA are constantly to the detriment of at least one homeowner's interests, the HOA is not given guidance for these conflicts, and the HOA does not face the consequence of losing a license to practice like an attorney would.

Friction between homeowners and HOAs is so common that many homeowners have claimed that there is “selective enforcement” of HOA rules. “Selective enforcement is when the homeowners' association enforces a particular rule against only one homeowner, or possibly against

188. Raven's Cove Townhomes, Inc., 114 Cal. App. at 795.

189. Mirfasihi v. Fleet Mortg. Corp., 551 F.3d 682, 686 (7th Cir. 2008).

190. Neponsit, 15 N.E.2d at 798 (quoting *In re City of New York*, 199 N.E. at 9).

191. Paula J. Dalley, *To Whom It May Concern: Fiduciary Duties & Business Associations*, 26 DEL. J. CORP. L. 515, 551 (2001).

192. MODEL CODE OF PRO. CONDUCT R. 1.7 (2020) & cmt. 35.

a small group of homeowners, but does not enforce that same rule against the entire community.”¹⁹³ Even though selectively enforcing rules against certain homeowners and not others would be a breach of the duty of loyalty, some states like Kentucky have allowed the HOA to retain enforcement authority. These courts have held the “[a]rbitrary [enforcement of [covenants does not necessarily render [them] unenforceable . . . [only when it] has resulted in a fundamental change in the character of [the] neighborhood.”¹⁹⁴ Thus, while the HOA’s authority to enforce CC&Rs expands, its duty of loyalty is reduced at individual member’s detriment.

Selective enforcement claims are especially common among minority homeowners facing suits brought by their HOA. For example, a Florida homeowner of Brazilian descent was cited for his fence being in violation of the neighborhood covenants, while no citations were given to the adjacent non-minority homeowners.¹⁹⁵ When the homeowner was subjected to multiple HOA hearings regarding the fence, officers of the HOA made disparaging comments about the homeowner’s ethnicity and ultimately brought suit against the homeowner to enforce the citation.¹⁹⁶ Another minority homeowner in Colorado faced similar issues with her HOA after being cited for an unapproved deck, while her white neighbor constructed a similar deck without HOA approval and was not cited.¹⁹⁷ There is little recourse for these individuals because the HOA may technically be upholding its duty of loyalty to the entire neighborhood at the expense of some individual members.

Despite both agency and corporate law allowing a principal to consent to a dual agency, obtaining informed consent is implausible in the context of an HOA. Both the Restatement (Second) of Agency and the Model Business Corporations Act permit a dual agent to act adversely against their principals, as long as the principal provides informed consent and the

193. Tamra Ferguson, Esq., *Facts About Selective Enforcement By An HOA*, HOMEOWNERS PROT. BUREAU, LLC (HOPB), <https://www.hopb.co/blog/facts-about-selective-enforcement-by-an-hoa> (last visited July 11, 2022).

194. *See* Colliver v. Stonewall Equestrian Est. Ass’n, 139 S.W.3d 521, 525 (Ky. Ct. App. 2003).

195. *Simoes v. Wintermere Pointe Homeowners Ass’n, Inc.*, No. 6:08-cv-01384-LSC, 2008 WL 4790720, at *1 (M.D. Fla. Oct. 28, 2008).

196. *Id.*

197. *Weatherspoon v. Provincetowne Master Owners Ass’n, Inc.*, No. 08-cv-02754-MSK-KLM, 2010 WL 3522559, at *1, *3 (D. Colo. Sept. 2, 2010).

agent discloses the conflict.¹⁹⁸ While a principal may consent to their agent's conflict of interest, it is nearly impossible to foresee what conflicts may arise. For example, in *Rapoport v. Martin*, Martin sought to extend their deck into a common area while the Rapoports petitioned their HOA to remove the deck extension from the common area.¹⁹⁹ While both parties, as members of the HOA, acknowledged that the HOA may act against them individually, they could not foresee this action and would not have given their consent. Without the knowledge of the Rapoports, Martin had already received approval from the HOA to build their deck.²⁰⁰ The court held the CC&Rs did not limit the HOA's authority to make future decisions, and the HOA did not need to obtain written consent from all homeowners for neighborhood changes.²⁰¹ These homeowners have placed a substantial amount of trust and confidence in their HOA to enforce the rules, believing their HOA would uphold the promises stated in the neighborhood CC&Rs, yet courts have consistently relieved the HOA of any liability for actions that would normally be considered a breach of loyalty in the context of agency. Whereas agency law requires the principal's consent for any conflicts of interest, an HOA has the sole discretion to act adversely against an individual homeowner without their knowledge.

The fundamental duty of loyalty cannot be entirely waived in an agency relationship.²⁰² While the corporate opportunity doctrine allows corporate agents to compete in only *specific* business opportunities,²⁰³ courts have refused to permit a general waiver of the duty of loyalty since it is indispensable in an agency relationship.²⁰⁴ The nonwaivable nature of the duty of loyalty may be attributed to the trust and confidence placed in the relationship, the legal authority delegated to someone else, and the ability to maintain control of another acting on behalf of the principal or corporation. When an individual signs their HOA contract, both corporate

198. See RESTATEMENT (SECOND) OF AGENCY §§ 390, 392 (AM. L. INST. 1958); Mod. Bus. Corp. Act §§ 8.60, 8.62(a) (AM. BAR. ASS'N 2016).

199. *Rapoport v. Martin*, 432 P.3d 772, 773 (Utah App. 2018).

200. *Id.*

201. *Id.* at 774-75.

202. See *Estate of Eller v. Bartron*, 31 A.3d 895, 898-99 (Del. 2011); *Wartski v. Bedford*, 926 F.2d 11, 20 (1st Cir. 1991).

203. DEL. CODE ANN. tit. 8, § 122(17) (2003) (allowing corporations to waive the duty of loyalty only for specific business opportunities or specific classes of business opportunities).

204. *Paramount Commc'n, Inc. v. QVC Network, Inc.*, 637 A.2d 34, 51 (Del. 1994).

and agency law forbid a general waiver of the inherent conflicts of interest that arise throughout the relationship. For states supporting the HOA–agent relationship, the nature of the relationship gives rise to conflicts of interest so often that CC&Rs consistently favor the HOA. States such as Kentucky, Colorado, Florida, and Hawaii have held HOAs are unable to owe fiduciary duties at all.²⁰⁵ This lack of fiduciary duty and the inability of the duty of loyalty to be waived suggests an HOA is incapable of being an agent.

2. The Fictional Purpose of a Homeowners’ Association

Beyond legal technicalities, modern HOAs are unable to satisfy the most important aspect of an agency relationship: the homeowner’s purpose of joining the HOA. The Community Association Institute recently reported 71% of individuals believed their community association rules “protect and enhance property values.”²⁰⁶ While this belief may have been true in 2005,²⁰⁷ more recent research indicates otherwise. A 2010 study found that “presidents of both homeowner and neighborhood associations cite the preservation and improvement of property values as . . . their association’s main goal[.]”²⁰⁸ However, the study found that “[p]roperties located in HOAs do not appreciate faster, on average, than properties not located in any type of neighborhood government.”²⁰⁹ Most notably, a 2021 study conducted by former Yale Professor Leon S. Robertson found that “[c]urrent sales price[s] [are] related to property characteristics and local market conditions[,]” and that “sales prices do not reflect the efficacy of homeowners associations to protect property

205. See sources cited *supra* note 120-25 (states holding HOA’s do not owe a fiduciary duty at all).

206. *Community Associations Remain Preferred Places to Call Home: 2020 Homeowner Satisfaction Survey*, at 2, FOUND. CMTY. ASS’N INST. (July 22, 2020), https://foundation.caionline.org/wp-content/uploads/2020/07/2020HomeSatisfactionSurveyResults07.22.20final.pdf?utm_source=Real%20Magnet&utm_medium=bridget@cai-rmc.org&utm_content=FCAR%3A%20Statistical%20Review&utm_campaign=172646053.

207. Amanda Agan & Alexander Tabarrok, *What Are Private Governments Worth*, REG’L, GEO. MASON U. 15 (Fall 2005), available at <https://www.cato.org/sites/cato.org/files/serials/files/regulation/2005/9/v28n3-2.pdf>.

208. Daniel S. Scheller, *Neighborhood Governments and their Role in Property Values*, URB. AFF.’S REV. 1, 1 (2010), available at <https://foundation.caionline.org/wp-content/uploads/2017/06/Scheller.pdf>.

209. *Id.* at 22.

values.”²¹⁰ As hypothesized by Robertson, the “causal relation of lower financial appreciation of homes in [HOA’s]” could be a result of the payment of HOA fees, widespread knowledge of HOA disputes, or people who value their personal autonomy avoiding restrictive HOA rules.²¹¹ In closing, Robertson remarked that “[s]tate and local laws that sanction homeowners associations and allow their coercive practices based on the premise of property value preservation are ill founded.”²¹² If research supports the premise that HOAs have no effect on property values, then a homeowner’s primary purpose for joining the HOA would be moot. As previously discussed, the primary reason a principal seeks out an agent is to employ another to achieve the principal’s end objective. If the end objective of an individual is the maintenance of their property values, then what purpose would the HOA serve as an agent if it has no ability to preserve property values and accomplish the homeowner’s end objective? Under the view that the HOA fails to further the homeowner’s primary reason for joining, the HOA would fail to qualify as an agent of the homeowner.

Other previously discussed reasons cited by homeowners in favor of HOA membership are the services provided by the HOA and the perks of living in a like-minded community. However, many homeowners later discover their HOA is incapable of delivering on these promises. For example, a neighborhood HOA in Colorado found their HOA had suspended trash and lawn care services despite the homeowners paying their substantial dues on time.²¹³ Other neighborhoods across the country have also discovered their HOA neighborhood may not be as “family oriented” as they previously believed. In Florida, a neighborhood HOA proposed to ban children playing outside.²¹⁴ Other neighborhoods across California have sought similar community rules that effectively regulate children in the neighborhood, whether it be banning children playing

210. Leon S. Robertson, *Correlation of Homeowners Associations and Inferior Property Value Appreciation*, 6 CRITICAL HOUS. ANALYSIS 1, 42-50 (2019), (<http://dx.doi.org/10.13060/23362839.2019.6.1.455>).

211. *Id.*

212. *Id.*

213. Eric Ross, *Homeowners Demand Answers About HOA Money Following Suspension of Trash and Lawn Services*, KOAA NEWS (updated June 27, 2021, 9:58 PM), <https://www.koaa.com/news/news5-investigates/homeowners-demand-answers-about-hoa-money-following-suspension-of-trash-and-lawn-services>.

214. *Florida Homeowners Association Proposes ban on Children Playing Outside*, FOX NEWS (Jan. 13, 2015, 1:44 PM), <https://www.foxnews.com/us/florida-homeowners-association-proposes-ban-on-children-playing-outside>.

outside or prohibiting children from trick-or-treating.²¹⁵ Ultimately, any reason an individual may join their neighborhood HOA is irrelevant to the HOA itself, and promises in the CC&Rs are subject to arbitrary changes without the individual's involvement. Therefore, a homeowner's purpose in joining an HOA is not furthered by the HOA, dismissing the possibility of an agency relationship between the HOA and the homeowner.

VI. CONCLUSION

Guidelines and regulations regarding homeowners' associations vary across the country, leaving homeowners unsure of what they should expect from their HOA. While state laws regarding the HOA as an agent are conflicting, legislatures should seek to refine the parameters of the relationship. As this Note explains, an agency relationship cannot exist between an individual and their respective HOA. States should therefore pass legislation to make HOAs part of local government, founded in democratic ideals, and with regulation by the state or municipality. Legislation regarding the HOA as a form of local government may decrease the number of legal cases arising from homeowner disputes, because homeowners will no longer view their HOA as an agent, but as owing broad fiduciary duties like that of their local government. The nature and purpose of the HOA are so closely linked to that of local government that "[t]he business and governmental aspects . . . and the association's relationship to its members clearly give rise to a special sense of responsibility This special responsibility is manifested in the

215. See Jan Hickenbottom, *Ban on Children Under 18 is Illegal*, L.A. TIMES (July 15, 1990, 12:00 AM), <https://www.latimes.com/archives/la-xpm-1990-07-15-re-67-story.html> (Los Angeles community association member discussing their associations ban on kids playing outside); *Fremont Condo That Didn't Allow Kids To Play Outside Must Rescind Rule, Pay Tenants \$800k*, CBS NEWS BAY AREA (Nov. 20, 2018, 11:44 PM), <https://www.cbsnews.com/sanfrancisco/news/fremont-condo-kids-play-outside-pay-tenants-800k/> (HOA in Fremont, CA banned kids playing outside *Couple Files Lawsuit Against HOA After Kids' Banned From 'Playing or Trick-or-Treating'*, NBC NEWS BAY AREA (updated Nov. 8, 2013, 6:18 PM), <https://www.nbcbayarea.com/news/local/couple-files-lawsuit-against-hoa-after-kids-banned-from-playing-or-trick-or-treating/1958752/> (San Francisco HOA prohibited children from playing outside or celebrating Halloween by trick-or-treating); Adam Racusin, *Families Say Homeowners Association Drove Them Out*, ABC NEWS SAN DIEGO (updated Feb. 13, 2018, 7:29 AM), <https://www.10news.com/news/families-say-homeowners-association-drove-them-out> (Carlsbad, CA families moving out of their neighborhood after they realized their HOA was not as kid friendly as it presented itself).

requirements of fiduciary duties and the requirements of due process, equal protection, and fair dealing.”²¹⁶ The gravity of the need for guidance is exemplified by the infamous town of Ave Maria, Florida. Pursuant to the teachings of the Catholic Church, Tom Monaghan, the founder of Domino’s Pizza, created the town of Ave Maria “[t]o get as many people into heaven as possible.”²¹⁷ The HOA-like structure of Ave Maria includes a Master Association as the primary governing entity²¹⁸ with five smaller associations tailored to specific groups.²¹⁹ The town sought to prohibit pornography, contraceptives, and maintain control over all cable television in the town.²²⁰ Although Monaghan “backed down” from his ideal regulations after the ACLU threatened suit,²²¹ Ave Maria continues to use the HOA structure and its lack of regulations to maintain a town where fundamental rights are excessively restricted.

The severity of the risks associated with the substantial overreach by HOAs is further shown by actions depriving individuals of their basic rights. In 2019, a disabled veteran living in a Tennessee neighborhood was threatened with a lawsuit by his HOA because his wheelchair ramp was “unsightly,” even though the ramp was approved by the Department of Veterans Affairs.²²² Additionally, many homeowners are often surprised to learn that their HOA has the ability to foreclose on their home.²²³ From

216. Cohen, *supra* note 126, at 651 (quoting Hyatt & Rhoads, *Liability in the Development and Administration of Condominium and Home Owners Associations*, 12 WAKE FOREST L. REV. 915, 921 (1976)); *See also* Chantiles, 45 Cal. Rptr. at *5.

217. Naomi Schaefer Riley, *Domino’s Illuminatio Mea*, WALL ST. J., Aug. 19, 2006 (internal quotations marks omitted), <https://www.wsj.com/articles/SB115594010017939822>.

218. *Welcome*, AVE MARIA MASTER ASS’N, <https://www.avemariamasterassociation.com/page/37146~692799> (last visited July 11, 2022).

219. *Site Plan*, AVE MARIA MASTERS ASS’N, <https://www.avemaria.com/community/site-plan/> (last visited July 11, 2022); *See also Associations*, AVE MARIA MASTERS ASS’N, <https://www.avemariamasterassociation.com/page/37146~1063089> (last visited July 11, 2022) (showing the different sub-associations within one larger homeowners association).

220. Riley, *supra* note 217.

221. *Id.*

222. *See Disabled Veteran Fighting HOA to Keep His Wheelchair Ramp*, KFOR NEWS (Mar. 2, 2019, 1:03 PM), <https://kfor.com/news/disabled-veteran-fighting-hoa-to-keep-his-wheelchair-ramp/>; Kelsey Gibbs, *Disabled Veteran Fighting HOA to Keep His Wheelchair Ramp*, ABC NEWS (Mar. 5, 2019, 11:55 AM), <https://www.kxxv.com/story/40057037/disabled-veteran-fighting-hoa-to-keep-his-wheelchair-ramp> (Tennessee resident gained national headlines after his HOA threatened him with a lawsuit for his wheelchair ramp).

223. Freeman, *supra* note 157 (quoting a homeowner stating “I had no idea that an HOA

early 2018 through February 2022, Colorado HOAs have filed more than 2,400 foreclosures on residents' homes without "any oversight from regulatory agencies."²²⁴

The lack of checks and balances on HOA actions is a national problem and homeowners are often left with no remedy for violations of their rights. The premise that homeowners' associations are working for the individual is based on the false belief that HOAs owe fiduciary duties to individual members. The need for regulation of HOA activities, and further federal protections for individuals, is especially apparent given the amount of newly built homes required to be in a HOA. As individuals search for their new home, they must keep in mind HOAs are not their agent and owe them no fiduciary duties. Rather, homeowners should urge their local government to increase regulations on HOAs to protect their fundamental rights as Americans.

could foreclose on you.”).

224. *Id.*

Term Sheet for RCC

1. Alatus will construct the RCC Project in compliance with City adopted goals and official controls and the Alatus development proposal related to building types, location, minimum valuation and construction timing/phasing. Future revisions to the development plans will be subject to review and approval upon application by Alatus through the JDA process. Alatus and the City will enter into a development agreement based on the November 18, 2018 draft Master Development Agreement consistent with the updated Alatus development proposal and this term sheet.
2. Alatus will construct all required infrastructure (exclusive of County infrastructure improvements) included within the site, including a new water tower and related infrastructure, public works maintenance/storage facility consistent with City design specifications to be completed no later than the end of Phase I, and the first application of seal coating and striping for city streets within the Project. These costs are currently estimated to be approximately \$13.225 million in principal amount, with final amounts to be agreed to between the City and Alatus. Alatus will finance and construct the infrastructure at no direct cost to the City. The City will credit Alatus these principal financing costs against corresponding customary city imposed fees (including trunk utility or fee in lieu of park dedication) in sufficient amounts to reimburse Alatus for the full principal and carrying costs or, if additional amounts are required to reimburse Alatus, by mutual agreement through fees or special assessments imposed against property or sub-developers.
3. Alatus will reimburse the City for planning area expenses in the amount of \$1.0 million, \$500,000 will be paid within 18 months of the initial plat. A fee will be imposed on sub-developers as upon execution of a secondary development agreement to reimburse up to a maximum of \$1.0 million.
4. Alatus will escrow the estimated City expenditures projected to be incurred over the first five years of development. Upon issuance by the City of an occupancy permit for a building in the first phase of Town Center, Alatus may escrow the full amount of the anticipated costs or a lesser amount agreed to by the City in an evergreen escrow account based upon a schedule of costs in the Development Agreement, and the City will submit documentation to Alatus for the expenditures, tax receipts and draws against the security.
5. Alatus will abide by the TRC and City goals for housing, constructing 1,460 dwelling units on the site, with 880 dwelling units in the downtown area. All the affordable units shall be constructed to the same standard of quality similar to the market rate dwelling units within the Project and area, and must be affordable for various family need levels in compliance with City adopted goals. A total of 326 units of the 1,460 units will be affordable, with 180 (125 LIHTC deeply affordable units, and 55 units at the 4D tax credit level) located in the Town Center area and the other units dispersed throughout RCC. A minimum of 20% of the affordable units shall be owner-occupied. The City agrees to participate as the "responsible governmental unit" on all grant applications or similar affordable housing program applications to meet these targets, and will pass-through the corresponding funding to Alatus.
6. In order to meet the goal of creating a first-class destination and to eliminate virtually all of the surface parking within the residential and commercial Town Center, a district parking solution for the 880 downtown dwelling units and commercial properties will be created and financed through tax increment financing based on Alatus project commitments related to minimum market value of improvements. Subject to and consistent with statutory requirements and standard practices, the City will issue one or more pay-as-you-go TIF Notes in the principal amount of \$17 million to provide funding for district parking. The City will also assist in the creation of a special service

district, as requested by Alatus, to provide funding for extraordinary amenities or services related to the Town Center area that exceed standard City service standards.

7. At initial plat approval, Alatus will transfer to the City the City Center site previously identified in the Memorandum of Understanding without any reversionary interest, but with a restrictive covenant identifying the types of City uses allowed on the site. Should the City have an approved use on the site then Alatus, at no-cost to the City, will construct the utility connections for the City Center Site and any associated underground pedestrian and vehicular access to the adjacent building. Alatus and the City may pursue a joint development agreement for that site and will evaluate the potential for using additional qualified costs, under the Minnesota Tax Increment Act, within the Project area to provide tax increment financing for those other qualified costs in an amount equal to the cost of the portion of any structure, for which Alatus would develop at no additional cost to the City.
8. In lieu of park dedication fees, Alatus will build Project parks and support facilities in accordance with the executed Memorandum of Understanding dated 12.12.2016. Alatus will form an HOA and BOA to pay for amenities, operations and maintenance costs for the Project area, including natural resource areas owned by Alatus. The HOA and BOA will be responsible for any amenity or service that exceed City standard amenity, service and maintenance practices. Revenues from a special service district may be utilized, in accordance with state law, for payment of a portion of these additional costs.

These terms are agreed to, subject to a definitive Redevelopment Agreement, as of May 9, 2022 by the City of Arden Hills and Alatus Arden Hills LLC.

CITY OF ARDEN HILLS, MINNESOTA

ALATUS ARDEN HILLS LLC

By: David Grant
Its: Mayor

By: Robert Z
Its: CEO

By: David Penaw
Its: City Administrator

The nature of the relationship needs to be defined.

Renters have a lease. HOA Homeowners have bylaws.

Renters	Homeowners
Renters have a lease which functions as a contract between the tenant and the landlord	HOA homeowners are required to be given a copy of the bylaws upon purchase, but bylaws are not viewed by the state as a contract.
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There are required standards for the contents of the lease	There are no required standards for the content of the bylaws
It is legally enforceable.	It is not legally enforceable. Minnesota law does not require them to be updated or followed.
Tenants must be notified if/when there are any changes to the lease	There is no legal requirement to notify homeowners if the bylaws are updated or changed.
Court action is necessary for an eviction.	Court action is not necessary to force a foreclosure, even when the mortgage is current.
Landlords need a legally justifiable reason for charging additional fees	Associations don't need a legally justifiable reason or even to declare a reason for assessing a property for any amount at any time.
Mediation is available for resolving disputes between landlord and tenant.	Mediation is not available for resolving disputes between association and/or management company and homeowner.
Minnesota law has a process to address retaliation by a landlord	Minnesota law has no protections for homeowners against retaliation by an association.
Minnesota law allows for the building to enforceable be put into receivership for the protection of the tenants.	There is no process to allow a mismanaged association to be put into receivership for the protection of the homeowners.
If there are liens or fines against the property, the landlord is responsible for resolving it and must provide evidence to a legal authority that the issue is resolved.	An association can assess homeowners for any amount at any time to make up for shortcomings in their business practices, and there is no requirement for them to provide evidence to anyone that the issue has been solved.

Minnesota law allows associations to incorporate as a nonprofit organization, but enforceable does not hold them to the same standards of conduct or business practices as those incorporated for the purpose of being a public charity.

The business practices required by Minnesota law are there to protect the integrity of the organization and to ensure it is operating appropriately. Minnesota law does not have any similar requirements for associations.

Public Charity	Association
Minnesota law requires the board of directors to have a duty of loyalty to the organization.	Minnesota law does not require the board of directors for a HOA to have a duty of loyalty to the homeowners..
If an organization has an income threshold of \$750,000 or more, the state requires them to have an audited financial statement submitted to the attorney general's office.	There is no requirement for the association to have an audited financial statement, regardless of the income threshold.
Public charities are required to file an annual report with the attorney general's office.	There are no reporting requirements of any kind to anyone for an association.
Board members can be held personally liable for financial misconduct.	There is nothing in Minnesota law that makes it illegal for board members to use association money for their own personal purposes. If the board member does steal from the association, the association can recoup the losses from the homeowners without a court action by issuing an assessment on their properties..
Business decisions are supposed to be for the benefit of the organization.	There are no standards of conduct for how a HOA is supposed to be run.
Minnesota attorney general has regulatory authority over organizations operating as a public charity, regardless of the size.	Minnesota attorney general has no regulatory authority over HOA's.
If the organization chooses to apply for federal status, federal law requires there to be a written conflict of interest policy for the board of directors	Most associations do not have the federal designation. However, Minnesota law does not require any type of governing documents that are legally binding.

Other business practices that are missing from Minnesota law:

Issue	Proposed Solution
<p>We have had several major expenditures in the past two years, but we have never been provided with complete and truthful information about why or how they arrived at the conclusion to resolve it in that manner.</p>	<p>Have a third party review contracts, bids, etc., and have that third party provide homeowners of a summary before any contracts are signed by the board of directors, otherwise the contracts are not legally enforceable.</p>
<p>We have a management company that treats us like crap, but we can't get rid of them because their contract is signed by the board of directors they have appointed.</p> <p>We don't usually get a copy of the contract, but the one I was able to get shows they have included multiple ways they financially take advantage of us,</p>	<p>Minnesota law says management companies are supposed to be "neutral" third parties. Give us a way to enforce this, as well as a way for the homeowners to choose the management company.</p> <p>The third party review of contracts should help resolve much of this.</p>
<p>We pay for an attorney who always benefits the management company in her responses.</p> <p>She will often quote law in her responses, but rarely quotes the complete law. For example, in her letter about charging interest on an assessment, she made it seem as though Minnesota law required interest to be charged, when in reality Minnesota law allows it to be charged, but doesn't require it. The other part she left out is that any interest they collect goes to the management company.</p>	<p>Minnesota law says that attorneys are not supposed to represent two related parties without some sort of declaration about it, as well as not use one organization to benefit the other.</p> <p>Have that third party review anything that is sent out for completeness and accuracy and give us a way to deal with it when it is not.</p>
<p>We are supposed to have \$1M in reserves, but none of our board members are signers on the accounts. The money is in a bank in Iowa and only the management company is a signer on the account. "The board" who the management company appointed and refuses to name, wants it that way, according to the management company.</p>	<p>If the board is unwilling to fulfill their fiduciary duty to the homeowners, then let us be put into a receivership of some kind for court monitoring. Given that there is no auditing requirement or reporting requirement, we don't even know for sure that the money exists or how much of it exists.</p> <p>The court monitoring thing could also work in instances such as the association in Minneapolis where they assessed owners \$7,000 to make up for a shortfall in their budget, but refused to say way or if the issue was being addressed for the long term.</p>
<p>We don't know who our board of directors are. We have voted, but the management company refuses to honor the vote and has appointed the board. They never sign any public information and are always referred to as "the board" by the management company.</p>	<p>Regardless of what kind of business they are, all businesses are required to file an annual renewal with the secretary of state's office. In the very least, if they are a nonprofit or an association, naming the board who is in place at the time of the filing should be required.</p>
<p>Assessments can be made for any reason and for any amount.</p>	<p>Require mediation for anything over \$100 and make the board declare how the rest of the community will benefit from the action.</p>