

## GREEN BUILDING RED-LIGHTED BY HOMEOWNERS' ASSOCIATIONS

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### INTRODUCTION

Americans built a model home in Moscow during the summer of 1959 in order to demonstrate labor-saving techniques.<sup>1</sup> The trip was, in essence, Design Diplomacy.<sup>2</sup> While touring the kitchen, Soviet Premier Nikita Khrushchev suggested that Russian technology focused on things that matter while America's progress was misguided and luxury-centric.<sup>3</sup> "Don't you have a machine that puts food into the mouth and pushes it down?" Khrushchev asked then-Vice President Richard Nixon during the infamous and impromptu "Kitchen Debate" of 1959.<sup>4</sup>

Nixon argued that America's technological advancements were not just luxuries, but that they were something that defines the American dream—a way of improving communities, pushing out production frontiers, and ultimately a vessel of innovation and progress.<sup>5</sup> "The American system," Nixon said, "is designed to take advantage of new inventions and new techniques."<sup>6</sup>

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<sup>1</sup> *The Two Worlds: A Day Long Debate*, N.Y. TIMES, July 25, 1959, at 1 [hereinafter *The Two Worlds*].

<sup>2</sup> See Fred A. Bernstein, *Design Diplomacy: U.S. Rejoins World's Fairs*, N.Y. TIMES, Nov. 4, 2004, at F1, available at <http://www.nytimes.com/2004/11/04/garden/04FAIR.html>; cf. David A. DeVoss, *Ping Pong Diplomacy*, SMITHSONIAN, Apr. 2002, <http://www.smithsonianmag.com/history-archaeology/pingpong.html> (discussing how table tennis engagement between the United States and China in the 1970s paved the way for broader diplomatic talks).

<sup>3</sup> *The Two Worlds*, *supra* note 1.

<sup>4</sup> *Id.*; Larry May, *Introduction to RECASTING AMERICA: CULTURE AND POLITICS IN THE AGE OF COLD WAR* 1, 5 (Larry May ed. 1989).

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

Now, nearly half a century later, energy costs have been setting all-time highs<sup>7</sup> and global warming is a topic of heated debate.<sup>8</sup> Homeowners are looking to make their property more energy efficient as the public grows increasingly aware of the impact an individual's carbon consumption can have on climate change.<sup>9</sup> As a result, green building architecture is quickly gaining approval by American homeowners;<sup>10</sup> however, existing covenants, conditions, and restrictions ("CCR") have made it extremely difficult for many Americans to make their homes more energy efficient.<sup>11</sup>

This note will explore common-interest developments ("CIDs") and associations that create impediments for green buildings and energy efficient homes. A large percentage of the American population live in communities that are under the governance of private association rules designed to protect community property values.<sup>12</sup> In order to change these rules, homeowners usually must get a supermajority of owners, who are often absent, to participate in their inefficient neighborhood governments.<sup>13</sup>

Furthermore, the board members of these private governments are trained to be relentless in their enforcement of these often-outdated rules, making it difficult to adapt to the needs of contemporary homeowners.<sup>14</sup> Following rulings such as *Nahrstedt v. Lakeside Village*

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<sup>7</sup> *Supply Concerns Lift Oil Prices Further*, THE ASSOCIATED PRESS, July 1, 2008, available at <http://www.iht.com/articles/2008/07/01/business/01oilclose.php>.

<sup>8</sup> Jessica Holzer, *Global Warming Becomes Hot Topic on Capitol Hill*, THE HILL, Jan. 18, 2007, available at <http://thehill.com/the-executive/global-warming-becomes-hot-topic-on-capitol-hill-2007-01-18.html>.

<sup>9</sup> See ENERGYSAVERS.GOV, U.S. DEP'T OF ENERGY, THE ENERGY SAVERS CAMPAIGN, <http://www.energysavers.gov/pdfs/winterization-fs-campaign.pdf> (last visited Mar. 27, 2009).

<sup>10</sup> Robin Goldwyn Blumenthal, *Dreams of Green*, BARRON'S, Nov. 12, 2007, available at [http://online.barrons.com/article/SB119465904587388811.html?mod=googlenews\\_barrons](http://online.barrons.com/article/SB119465904587388811.html?mod=googlenews_barrons) ("More and more home buyers are thinking like this. The green-building market is expected to grow from \$7.6 billion in 2005 to as much as \$39 billion in 2010.").

<sup>11</sup> See, e.g., Linda Baker, *The Complexities of Keeping It Small and Simple*, N.Y. TIMES, Nov. 9, 2007, available at <http://www.nytimes.com/2007/11/09/travel/escapes/09away.html> ("The property itself had been on the market for three years and included a creek requiring a 100-foot buffer zone. It came with a deed restriction requiring the house to be at least 1,400 square feet and include a two-car garage.").

<sup>12</sup> EVAN MCKENZIE, *PRIVATOPIA: HOMEOWNER ASSOCIATIONS AND THE RISE OF RESIDENTIAL PRIVATE GOVERNMENT* 11 (1994) (citing COMMUNITY ASSOCIATIONS INSTITUTE, *COMMUNITY ASSOCIATIONS FACTBOOK* (1993)); see also Community Associations Institute, *Industry Data*, <http://www.caionline.org/info/research/Pages/default.aspx> (last visited Apr. 12, 2009) (estimating there were over fifty-nine million residents in association-governed communities in 2008).

<sup>13</sup> MCKENZIE, *supra* note 12, at 147.

<sup>14</sup> *Id.* at 131.

*Condominium Ass'n*, homeowners are forced to live with restrictions that they may wish to change to be congruous with optimal public policy, but do not currently have economical methods for adaptation.<sup>15</sup>

The rise in private government communities, namely CIDs, has created institutionalized impediments for homeowners who wish to make energy efficient changes to their property. These obstacles against green building advancements could potentially be remedied through combinations of the following: a liberalized interpretation of homeowners' rights; an effective application of the Efficient Breach Theory; a revived sense of civic duty and democratic participation in CIDs; and local, state, and federal legislative action.

Part I of this note will describe rising energy costs and provide contemporary analysis and concerns about these increased expenses. It will also discuss how the average household will be affected by the rise in energy prices. Furthermore, Part I will present the developing tensions that exist between homeowners looking to make energy efficient changes to their homes and the CCRs they are contractually obligated to follow if they belong to most homeowners' associations ("HOA").

Part II of this note will provide a historical background of CIDs and CCRs. By chronicling the rapid rise of these associations, this section of the note helps to establish the magnitude and relevance of this growing problem for many homeowners. Further, this section provides a basic explanation and critique of the property rights afforded to most homeowners living in CIDs.

Next, Part III offers analysis on homeowners' ability to make energy efficient changes to their property. First, the argument for increased First Amendment rights is discounted due to the strength of the freedom to contract. Second, the note proposes that the best approach is to determine ways to satisfy or amend the contracts while providing homeowners the ability to make the needed changes to their homes.

Finally, Part IV offers solutions to the aforementioned issues. First, the Efficient Breach Theory is proposed as a viable solution with Pareto optimal outcomes. Next, the note details the amendment process for CCRs in common-interest communities. Lastly, the note discusses legislative relief through local, state, and federal rulemaking as well as tax-based incentives to help enact "fundamental public policy changes."

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<sup>15</sup> *Nahrstedt v. Lakeside Vill. Condominium Ass'n*, 878 P.2d 1275 (Cal. 1994); see *infra* Part IV.C.

I. BACKGROUND: RISING ENERGY COSTS, HOMEOWNERS, AND WHAT CAN BE DONE

A. *Drastic Increase in Energy for Average Household*

Energy is getting more expensive for American families.<sup>16</sup> In 2007, the average household energy expenses were estimated to be \$4468, representing an approximately 50% increase in expenditures since 1997.<sup>17</sup> In the winter of 2007-2008 alone, forecasters from the Energy Information Administration ("EIA") predicted American households would spend an average of \$977 to heat their homes, a jump of 10% from the previous year.<sup>18</sup> Kateri Callahan, president of the Alliance to Save Energy, a consumer advocacy group in Washington, D.C., said, "The overall trend for the past seven seasons has been up. This is not a good trend for consumers' pocketbooks."<sup>19</sup> Echoing the sentiments of many Americans, Callahan added that consumers are being "whiplashed" by the sudden increase in energy costs.<sup>20</sup>

Furthermore, economists have estimated that every time oil prices rise 10% for a sustained period of time, approximately 150,000 Americans lose their jobs,<sup>21</sup> thereby demonstrating that energy prices have a very tangible impact on the American household. The rising costs of energy make it increasingly important for property owners to be able to take simple, effective steps to lower energy consumption.

Further, researchers predict that energy is not getting cheaper any time soon. Analysts from the EIA predict that energy usage will

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<sup>16</sup> Ben Casselman, *Heating Bills Stay High, Frustrating Homeowners*, WALL ST. J., Jan. 3, 2009, at A3, available at <http://online.wsj.com/article/SB123093865371150145.html>.

<sup>17</sup> EUGENE M. TRISKO, AMERICANS FOR BALANCED ENERGY CHOICES, ENERGY COST IMPACTS ON AMERICAN FAMILIES, 1997-2007 2 (2007), available at <http://www.balancedenergy.org/docs/ABEC%20Media%20Room%20Docs/ABEC%20Energy%20Costs%201997%20to%202007%20507-2.pdf> (citing U.S. DEPT OF ENERGY, ENERGY INFO. ADMIN., 1997 AND 2001 SURVEYS OF RESIDENTIAL ENERGY CONSUMPTION (RECS), available at <http://www.eia.doe.gov/emeu/recs/contents.html>).

<sup>18</sup> Jad Mouawad, *Oil Heat, With 22% Rise, Leads Forecasts for an Expensive Winter*, N.Y. TIMES, Oct. 10, 2007, at C1.

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> DEMOCRATIC POLICY COMMITTEE, THE BUSH REPUBLICAN RECORD ON ENERGY INDEPENDENCE: MISPLACED PRIORITIES, SHORT-SIGHTED POLICIES INCREASE AMERICA'S INSECURITY (2006) (citing Alan A. Carruth, Mark A. Hooker & Andrew J. Oswald, *Unemployment Equilibria and Input Prices: Theory and Evidence from the United States*, 80 REV. ECON. AND STAT. 621 (1998)).

increase at an average rate of 1.1% per year.<sup>22</sup> Moreover, even the conservative estimates from the EIA acknowledged that many analysts predict continued scarcity of petroleum.<sup>23</sup> Despite this increase in energy usage and the resulting supply shortage, the analysts from EIA did not forecast a rapid increase in energy prices because they predicted a corresponding rapid development of new energy technology.<sup>24</sup> Surprisingly, the analysts at the EIA did not take into account the fact that the development of new energy technology does not necessarily translate to its implementation, which is precisely the problem that this note addresses.<sup>25</sup>

*B. Steps for Energy Efficiency vs. Covenants, Conditions, and Restrictions*

There are certain steps that homeowners can take to make their households energy efficient, and in the process, save money on their bills.<sup>26</sup> However, many of the recommended home improvements could directly conflict with HOAs' CCRs.

To highlight this tension between growing energy prices and CCRs, consider a hypothetical family in Williamsburg, Virginia, faced with growing economic troubles due to the aforementioned drastic rise in energy costs.<sup>27</sup> The family has decided to make some home improvements to save on their heating bills. Inspired by a visit to the Department of Energy's Solar Decathlon on the National Mall,<sup>28</sup> the family researched how to make their home more energy efficient using the Energy Star Website.<sup>29</sup>

On the Web site, the family discovered several federal tax credits available for homeowners who wish to make their property more energy

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<sup>22</sup> ENERGY INFO. ADMIN., ANNUAL ENERGY OUTLOOK 2007 6 (2007).

<sup>23</sup> *Id.* at 4.

<sup>24</sup> *Id.* at 2, 3.

<sup>25</sup> *See generally id.*

<sup>26</sup> *See, e.g.*, U.S. Env'tl Prot. Agency & U.S. Dep't of Energy, Energy Star, <http://www.energystar.gov> (last visited Mar. 27, 2009).

<sup>27</sup> *See supra* notes 7, 16 and accompanying text.

<sup>28</sup> U.S. Dep't of Energy, Solar Decathlon, <http://www.solardecathlon.org> (last visited Mar. 27, 2009); *see also* Pogue's Post Blog, <http://pogue.blogs.nytimes.com/2007/11/01/the-future-of-solar-powered-homes> (Nov. 1, 2007, 12:10 EST). The author of this note attended the Decathlon for the second time in 2007 and felt moved much in the same way a previous generation was inspired at the 1939 and 1964 New York World's Fairs, or from watching episodes of *The Jetsons*.

<sup>29</sup> U.S. ENVT'L. PROT. AGENCY & U.S. DEP'T OF ENERGY, FEDERAL TAX CREDITS FOR ENERGY EFFICIENCY (2009), [http://www.energystar.gov/index.cfm?c=products.pr\\_tax\\_credits#s4](http://www.energystar.gov/index.cfm?c=products.pr_tax_credits#s4).

efficient. The tax credits were a direct result of the Energy Policy Act of 2005, signed into law by President George W. Bush on August 8, 2005.<sup>30</sup>

With this new information, the family decided to install solar panels on their roof to offset a portion of their heating bill. Through a commercial solar panel Web site, the family was able to calculate that by installing a medium-sized three kilowatt solar panel system on their roof, generating 3710 kWh annually, the family would save \$294 annually on their bill, in addition to \$454 in tax rebates, thus reducing their bill by nearly ten percent.<sup>31</sup> The system would cost \$27,000 initially, but with the tax credit from the Energy Policy Act of 2005, the cost would be reduced by over \$8000.<sup>32</sup> Undeterred by the rather large up-front investment, the family rationalized that over the course of their mortgage they would easily earn back their investment and change the home's resale value.

When it came time to start construction on the solar panel system, the hypothetical family was thwarted when their HOA approached them with a copy of their house's covenant, which said, "Solar panels and solar collectors are prohibited."<sup>33</sup> Sure enough, when they had moved into the home in 1997, they agreed to the covenant. A decade earlier, they were paying an average of \$2401 a year on their energy bills and could not have fathomed the rapid rise in energy costs.<sup>34</sup> Now, they have to either hassle with an unrelenting HOA, or drop the issue and think of another solution to their energy cost problem.

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<sup>30</sup> Energy Policy Act of 2005, Pub. L. No. 109-058, 119 Stat. 594 (2005).

<sup>31</sup> BP Solar, Solar Savings Estimator, <http://www.bp.com/solarsavings.do?categoryId=8052> (last visited Mar. 27, 2009) (plugging in 3kw to the calculator for the zip code 23185).

<sup>32</sup> *Id.*; see also INTERNAL REVENUE SERVICE, FORM 5695, RESIDENTIAL ENERGY EFFICIENT PROPERTY CREDIT (2008), available at <http://www.irs.gov/pub/irs-pdf/f5695.pdf>; see also James Murray, *Solar Panel Prices To Fall By Up To 40 Percent By Year End*, BUSINESS GREEN, Feb. 23, 2009, <http://www.businessgreen.com/business-green/news/2236953/solar-panel-prices-fall-per> (predicting the bullish outlook resulting from President Obama's stimulus package could help make new energy technology even more affordable for homeowners).

<sup>33</sup> Stan Cox, *The Property Cops: Homeowner Associations Ban Eco-Friendly Practices*, ALTERNET, Apr. 26, 2007, <http://www.alternet.org/environment/51001> (quoting an actual HOA from a subdivision in Sterling, Virginia).

<sup>34</sup> TRISKO, *supra* note 17, at 2 ("Most of this increase is due to higher costs for gasoline, which will increase from \$1,143 per family in 1997 to an estimated \$2,654 in 2007. These estimates may be conservative if gas prices continue their steady escalation above \$3 per gallon.").

## II. BACKGROUND: THE HISTORICAL FOUNDATION OF CID HOMES AND CCRS

### A. *Common-Interest Communities in America*

The concept of common-interest communities is not a recent development.<sup>35</sup> The legal model of common-interest communities originated in feudal old-world Europe.<sup>36</sup> In medieval England, land was distributed to peasants for cultivation purposes, and promises were made to not use the soil in ways that were harmful to the collective, thus creating a system of interdependent values.<sup>37</sup>

The homeowners' association and common-interest community in America date back to the 1830s, when the concept was imported from London.<sup>38</sup> The communities were established with the stated purpose to protect residents with restrictive covenants such as ones that prohibited certain religious activities, dictated racial makeup, and prescribed the way in which the land could be used.<sup>39</sup>

The practice of establishing CIDs continued through post-World War II America, as suburbs flourished and troops returned from serving in the armed forces to start their own families.<sup>40</sup> Included in the CIDs were often lists of restrictive uses that prevented racial minorities from owning property in exclusive neighborhoods.<sup>41</sup> Nowadays, the key characteristic of a CID is defined by the Restatement (Third) of Property as, "the obligation that binds the owners of individual lots or units to contribute to the support of common property, or other facilities, or to support the

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<sup>35</sup> JESSE DUKEMINIER ET AL., PROPERTY 668-69 (6th ed. 2006).

<sup>36</sup> *Id.*

<sup>37</sup> MCKENZIE, *supra* note 12, at 30. In exchange, the peasants had access to common areas and could take "*profits à prendre*." DUKEMINIER ET AL., *supra* note 35, at 669.

<sup>38</sup> Dana Young, *Common Interest Developments: An Historical Overview of CID Development* (University of California Hastings College of the Law Public Law Research Institute Working Papers Series, Fall 1996-02), available at <http://w3.uchastings.edu/plri/96-97tex/cid.htm>.

<sup>39</sup> *Id.* New York's Gramercy Park (1831), Boston's Louisburg Square (1844), and San Francisco's South Park (1852) utilized this type of covenant, and some did so with goals like prohibiting residents from developing drinking habits. *Id.* at n.5.

<sup>40</sup> See MCKENZIE, *supra* note 12, at 10 ("The developers also began efforts to standardize and institutionalize this form of housing in 1944 when the Urban Land Institute formed a Community Builders' Council headed by Jesse Clyde Nichols . . . one of the most influential proponents of CIDs and homeowner associations.").

<sup>41</sup> See *id.* at 70.

activities of an association, whether or not the owner uses the common property or facilities, or agrees to join the association.”<sup>42</sup>

In the mid-1970's, there was a meteoric rise in the number of HOAs as numbers grew from 10,000 in 1970 to 55,000 by 1980.<sup>43</sup> At the time, financially strapped local governments found CID housing appealing because of the promises the CIDs made for private infrastructure for their new residents.<sup>44</sup> Oil companies also injected funding into the new privately-governed neighborhoods as they saw it as a lucrative investment opportunity,<sup>45</sup> an early indication that the business interests of developers trumped the non-economic interests of a functioning community association.<sup>46</sup>

Furthermore, official government policy encouraged the formation of CIDs.<sup>47</sup> The Federal Housing Administration, in conjunction with the Urban Land Institute, issued documents that detailed the process of establishing CIDs.<sup>48</sup> In addition to the explosive growth from 1970 to 1980, the FHA's documents continued to be successful after 1980, as evidenced by the fact that there were 130,000 association-governed communities by 1990.<sup>49</sup>

More recently, in 2008, there were 300,800 association-governed communities, with a combined total of 24.1 million housing units and an estimated 59.5 million residents.<sup>50</sup> The total annual operating revenue for all community associations is more than \$41 billion.<sup>51</sup> The estimated real estate value of all homes in community associations is nearly \$4 trillion, or approximately twenty percent of all U.S. residential real estate.<sup>52</sup> All these numbers suggest that the policies of CIDs impact a large number of American homeowners.

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<sup>42</sup> RESTATEMENT (THIRD) OF PROP.: SERVITUDES §6.2 cmt. a (2000), *quoted in* DUKEMINIER ET AL., *supra* note 35, at 798.

<sup>43</sup> MCKENZIE, *supra* note 12, at 11.

<sup>44</sup> *Id.* (discussing the benefits of adding property-tax payers without the burden of the new population on infrastructure, thus providing a much lower public cost to the city).

<sup>45</sup> *Id.* (citing Theodore Roszak, *Life in the Instant Cities*, THE NATION, Mar. 13, 1967, at 336-40).

<sup>46</sup> David C. Drewes, *Putting the "Community" Back in Common Interest Communities: A Proposal for Participation-Enhancing Procedural Review*, 101 COLUM. L. REV. 314, 328 n.71 (2001) (citing Wayne S. Hyatt, *Common Interest Communities: Evolution and Reinvention*, 31 J. MARSHALL L. REV. 303, 328 (1998)).

<sup>47</sup> See URBAN LAND INSTITUTE, THE HOMES ASSOCIATION HANDBOOK vi (1964), *cited in* MCKENZIE, *supra* note 12, at 201 n.38.

<sup>48</sup> *Id.*

<sup>49</sup> Community Associations Institute, *supra* note 12.

<sup>50</sup> *Id.*

<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

*B. Property Rights of CID Residents*

In order to demonstrate the difficulty for homeowners to make energy efficient changes to their property, it is helpful to review the property rights of homeowners in CIDs. The governing documents of most CIDs were created with heavy influence from the Federal Housing Authority, which put forth a sustained effort to convince the public that submitting to neighborhood governance by amateurs applying developers' rules is advantageous.<sup>53</sup> The language in the governing documents signed by new residents to CIDs dictates the enforcement of the rules.<sup>54</sup> Most CCRs are formed expressly, through a declaration, and all subsequent land purchasers are subject to the recorded rules.<sup>55</sup>

In an expressed CCR, there are typically sections that address a number of issues that residents in CIDs may need to confront with their neighbors if a future problem arises. In a sample CCR culled from a popular Community Association Law textbook, there are six major parts to a CCR declaration.<sup>56</sup> First, the community must establish their purpose and recognize the paper as valid governing documents.<sup>57</sup> Second, it is recommended a CCR create community standards, including architectural review, liability, maintenance, and repair.<sup>58</sup> The third section of a sample CCR covers the governance and administration, discussing the association voting structure, powers, as well as finances.<sup>59</sup> Next, community development is included in the CCR, where issues concerning expansions, easements, and common areas are articulated.<sup>60</sup> The fifth part of the CCR concerns relationships outside of the CID, and lays out proper protocol for disputes, amenities, and mortgages.<sup>61</sup> Finally, the CCR articulates methods to amend the CCR and allow for other large changes in the CID.<sup>62</sup>

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<sup>53</sup> MCKENZIE, *supra* note 12, at 82. Many new residents were convinced that they were signing up to join new communities created under the guiding vision of Ebenezer Howard and his utopian neighborhood visions. *Id.*

<sup>54</sup> WAYNE S. HYATT, *CONDOMINIUM AND HOMEOWNER ASSOCIATION PRACTICE: COMMUNITY ASSOCIATION LAW* 153 (3d ed. 2000).

<sup>55</sup> *See* MCKENZIE, *supra* note 12, at 20-21.

<sup>56</sup> HYATT, *supra* note 54, at 291-94.

<sup>57</sup> *Id.* at 291.

<sup>58</sup> *Id.*

<sup>59</sup> *Id.* at 291-92.

<sup>60</sup> *Id.* at 292-93.

<sup>61</sup> *Id.* at 293.

<sup>62</sup> HYATT, *supra* note 54, at 293-94.

A rudimentary Internet search reveals that many HOAs in America follow similar CCRs on their Web sites.<sup>63</sup> Although many of the HOAs make certain to localize their CCRs to accommodate for concerns specific to their neighborhoods,<sup>64</sup> the overall objective is to guarantee uniformity in order to preserve stability, and, ultimately, property value.<sup>65</sup>

When there is a dispute, the governing documents have laid out a clear and concise strategy for the HOA to confront a property owner.<sup>66</sup> Parties to a common declaration have standing to enforce restrictive covenants and the judicial process usually results in the outcome of an injunction, specific performance, or damages.<sup>67</sup>

### C. Critique: Problems with CIDs

Alexander Lee is a lawyer and a clothesline activist.<sup>68</sup> He founded Project Laundry List, a nonprofit organization that advocates hanging your pants out to dry the old-fashioned way—on a clothesline.<sup>69</sup>

Unfortunately for Lee, and other Luddite launderers, most HOAs strictly prohibit clotheslines and property owners' so-called "right to dry." The HOAs claim that clotheslines decrease property values by being a visual nuisance.<sup>70</sup> However, experts say that if the eighty-eight million

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<sup>63</sup> See, e.g., Cat Mountain Homeowner's Association Declaration of CCR, <http://www.catmountainhoa.com/pdf/CMHOA-Declaration-of-CCR.pdf>; Meadowpark Homeowner's Association Declaration of Protective Covenants, Conditions and Restrictions, <http://www.meadowparkhomeownersassociation.com/PDFs/LegalDocuments/CCRs.pdf>; Declaration of Covenants, Conditions and Restrictions for Creekshire, <http://creekshire.org/documents/covenants.pdf>.

<sup>64</sup> See, e.g., Cat Mountain Homeowner's Association Declaration of CCR, *supra* note 63, at 11 ("The Common Area shall be used for park, recreational, social, access, utility easement and other purposes directly related to the private single family residential use authorized hereunder, except that Declarant shall have the right to an office for its own exclusive use in any clubhouse until Declarant has sold all of the Lots.").

<sup>65</sup> See MARLENE M. COLEMAN & WILLIAM HUSS, WORKING WITH YOUR HOMEOWNERS ASSOCIATION: A GUIDE TO EFFECTIVE COMMUNITY LIVING 89 (2003) ("Very quickly that part of the community began to look like an inner city ghetto—with property values adjusting appropriately downward.").

<sup>66</sup> See HYATT, *supra* note 54, at 291-94.

<sup>67</sup> *Id.* at 155.

<sup>68</sup> Kathleen A. Hughes, *To Fight Global Warming, Some Hang a Clothesline*, N.Y. TIMES, Apr. 12, 2007, available at <http://www.nytimes.com/2007/04/12/garden/12clothesline.html>.

<sup>69</sup> *Id.*; Project Laundry List, <http://laundrylist.org> ("We must all hang together, or most assuredly we will all hang separately.") (quoting Benjamin Franklin).

<sup>70</sup> See Alexander Lee, *Clotheslines: A Simple Option*, 7 ALB. L. ENVTL. OUTLOOK 27, 32 (2002); see also Smart Communities Network, New Pattonsburg Declaration of

dryer owners in America hung their clothes on a line for just half the year, it would decrease residential carbon dioxide output by 3.3%, and help an average household save over \$100 per year on their energy bill.<sup>71</sup>

In 2007, Zogby International conducted a poll asking respondents, “Should community associations, as private organizations, be forced by government to allow individual residents to hang their laundry on clotheslines that are visible to their neighbors?”<sup>72</sup> While 18% said yes, 74% expressed that they did not want such a directive from the government.<sup>73</sup>

Similarly, Zogby International asked the same respondents, “Should community associations, as private organizations, have the right to control the scope and placement of solar panels on individual homes to maintain architectural standards?”<sup>74</sup> On this question, 59% of respondents felt that private organizations should retain that right, while 35% disagreed.<sup>75</sup>

These poll questions, proposed by Zogby International on behalf of the Foundation for Community Association Research, provide excellent insight into how CID residents view environmental issues.<sup>76</sup> It should be noted that the survey was the exact same as one Zogby International conducted in 2005, except for the aforementioned environmentally-focused questions about clotheslines and solar panels, which were added for the 2007 version.<sup>77</sup> The fact that these questions were even added to the

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Community Responsibilities, Covenants and Restrictions, *available at* <http://www.smartcommunities.ncat.org/codes/nwpatdec.shtml> (“No clothes lines . . . shall be installed or placed outside of any building on a Lot, nor shall any clothes or other wash be placed or allowed to remain outside of any building, except in an area or manner that is adequately screened from view of other Lots.”).

<sup>71</sup> Hughes, *supra* note 68 (statistic courtesy of Association of Home Appliance Manufacturers); Orrin Cook, *Energy Tip #4: Get Yourself a Clothesline*, THE TERRA PASS FOOTPRINT, July 24, 2006, *available at* <http://www.terrapass.com/blog/posts/how-to-finance-2>.

<sup>72</sup> ZOGBY INTERNATIONAL, FOUNDATION FOR COMMUNITY ASSOCIATION RESEARCH TRACKING POLL 19 (2007), *available at* <http://www.cairf.org/research/zogby.pdf>.

<sup>73</sup> *Id.* (“Those aged 50-64 (21%) and 30-49 (19%) are more likely than seniors (10%) to say that the government should force community associations to allow clothes lines, as are singles (22%) compared to married people (17%); parents of children under 17 (23%) vs. those who are not (16%); and Westerners (21%), Easterners (21%), and those in the Central/Great Lakes region (20%) compared to Southerners (13%).”).

<sup>74</sup> *Id.*

<sup>75</sup> *Id.* (“Those aged 30-49 (42%) are more likely than seniors (36%) and 50-64 year-olds (26%) to say that community associations do not have the right to control the placement of solar panels on homes, as are residents of small cities (40%), large cities (37%), and rural areas (37%) compared to suburbanites (28%); and Easterners (44%) and Westerners (41%) vs. Southerners (28%) and those in the Central/Great Lakes region (30%).”).

<sup>76</sup> *Id.*

<sup>77</sup> Community Associations Institute, 2007 National Homeowner Survey Data, <http://www.caionline.org/info/research/Pages/SurveyData.aspx> (“With just a few exceptions, the 2005

survey is a testament to the growing tension in CIDs and the relevancy of this issue to property owners and community associations.

Though the focus of this note has been on how the restrictive covenants of CIDs are making it difficult for homeowners to make energy efficient changes to their property, not all sections of the CCRs are directly related to property rights that impact energy efficiency. A large percentage of HOAs will not allow basketball hoops, boats, satellite dishes, pink plastic flamingos, and a number of other perceived property value decreasing elements.<sup>78</sup> Recently, a woman living in a gated community was told by her condominium owners association that she needed to remove a religious statue of the Virgin Mary from the front of her home.<sup>79</sup>

Although HOAs might seem like picky authoritarian neighborhood organizations run by ex-high school vice principals,<sup>80</sup> there are very legitimate reasons for CIDs. Residents enjoy the protection that HOAs provide for property value,<sup>81</sup> as well as the enhanced private infrastructure, like well-kept roads and landscaping.<sup>82</sup> Furthermore, people want to live around "responsible neighbors" with common values, and usually voluntarily sign up to live in a neighborhood governed by HOAs.<sup>83</sup>

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and 2007 data are within the 3.8 percent margin of error. This affirms the validity of the Zogby research as an effective measure of how residents perceive their community associations. In addition to the questions asked in 2005, the latest survey sought to quantify how community association residents view government regulation of clotheslines and solar panels.").

<sup>78</sup> See e.g., sources cited *supra* note 63.

<sup>79</sup> Jonathan Starkey, *Condo Owners Told to Remove Religious Statues*, NEWSDAY, Oct. 8, 2007, available at <http://www.freerepublic.com/focus/f-news/1909162/posts>.

<sup>80</sup> MCKENZIE, *supra* note 12, at 17 ("One homeowner asked, 'Who are these little Hitlers making these rules?'" (citing Marie McCullough, *It's a Swing Set! There Goes the Neighborhood*, PHILA. INQUIRER, Oct. 9, 1991, at p. 1)).

<sup>81</sup> ZOGBY INTERNATIONAL, *supra* note 72, at 14 ("Three quarters (74%) say that the rules in their community protect and enhance property values, while nearly a quarter (22%) say it makes no difference. Married people (76%) are more likely than singles (66%) or those who are divorced/widowed/separated (70%) to say that their community rules protect and enhance property values, as are suburbanites (78%), rural residents (75%) and residents of small cities (75%) compared to residents of large cities (68%), and Southerners (76%) and those in the Central/Great Lakes region (77%) vs. Easterners (70%) and Westerners (70%).").

<sup>82</sup> Jeff Collins, *Educating HOA's*, ORANGE COUNTY REG., Nov. 12, 2006, available at [http://www.ocregister.com/ocregister/money/homepage/article\\_1351300.php](http://www.ocregister.com/ocregister/money/homepage/article_1351300.php).

<sup>83</sup> ZOGBY INTERNATIONAL, *supra* note 72, at 15. When asked, "What is the single best thing about living in a community association?", responses, from highest to lowest, were as follows: clean/attractive neighborhood, maintenance free, property values, safe neighborhood, responsible neighbors, amenities like swimming pools and tennis courts, nothing good, quiet neighborhood, you have a say in the rules, everybody knows the rules, other/not sure. *Id.* See also Young, *supra* note 38.

However, there are instances where people who belong to CIDs did not necessarily intend on committing themselves to the circumstances dictated by the CCRs.<sup>84</sup> Primarily, the largest problem is that nearly 12% of people surveyed in 2007 indicated that they were not told they were moving in to an area controlled by the rules of a community association.<sup>85</sup> Furthermore, more than 60% of those surveyed indicated that knowing that their current home was part of a CID made no impact on their decision to buy or rent.<sup>86</sup>

In light of the rapid and unpredictable increase in energy costs,<sup>87</sup> maintaining the homogenized aesthetic of a CID might be difficult for homeowners looking to make simple architectural changes to their property in order to alleviate the pressure of mounting energy bills.<sup>88</sup> The fact that many of these residents either did not know the property they decided to rent or own were part of CIDs,<sup>89</sup> or did not believe it impacted their decision<sup>90</sup> demonstrates the large potential for conflicts between the rigid rules of CIDs and the uninformed homeowner.

Homeowners that make energy efficient changes to their property that are against the will of their CID are potentially creating an actionable nuisance.<sup>91</sup> And, more than likely, community associations will win in court if the family agreed to rules when joining a community.<sup>92</sup> Accordingly, there is a growing divide between homeowners and neighborhood governance, and the term "common-interest" might prove to be a misnomer if workable solutions are not identified.

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<sup>84</sup> Andrea Coombes, *Your Home as the Group's Castle*, MARKETWATCH, Sept. 30, 2007, available at <http://online.wsj.com/article/SB119110575098643836.html> ("Many people have trouble accepting the fact that decisions will be made by others.") (quoting Mark Pearlstein, a partner with Levenfeld Pearlstein, a Chicago-based law firm that often represents associations). The article also adds that "[t]wo common homeowner complaints [are] unexpected increases in dues and unwelcome rule changes." *Id.*

<sup>85</sup> ZOGBY INTERNATIONAL, *supra* note 72, at 17. In 2007, 12% were not told the property they were considering to purchase or rent was part of a community association. Compare to 2005 poll, where only 10% were not told. *Id.*

<sup>86</sup> *Id.*

<sup>87</sup> Casselman, *supra* note 16.

<sup>88</sup> See James Charles Smith, *The Law of Yards*, 33 *ECOLOGY L.Q.* 203, 214-19 (2006) (discussing the "aesthetic nuisance doctrine").

<sup>89</sup> See ZOGBY INTERNATIONAL, *supra* note 72, at 17.

<sup>90</sup> *Id.*

<sup>91</sup> Smith, *supra* note 88, at 215 (citing JACQUELINE P. HAND & JAMES CHARLES SMITH, *NEIGHBORING PROPERTY OWNERS* 14-17 (1988)).

<sup>92</sup> See Carl B. Kress, *Beyond Nahrstedt: Reviewing Restrictions Governing Life in a Property Owner Association*, 42 *UCLA L. REV.* 837, 857 (1995).

### III. ANALYSIS

#### A. *Architecture as First Amendment Right*

One constitutional argument against restrictive CCRs is that the aesthetic nuisance claims abridge residents' First Amendment rights.<sup>93</sup> This argument essentially asserts that when a neighbor chooses not to cut their grass, or installs solar panels, or hangs a clothesline, they are exercising their First Amendment rights and are using their lawn and their property as a vehicle for that expression. While the HOA would interpret an unkempt lawn as a violation of a CCR as well as mere laziness, the property owner might be rebelling against the "industrial lawn."<sup>94</sup>

Framing homeowners' actions in terms of symbolic conduct gives the court an opportunity to apply the rules developed in *United States v. O'Brien*.<sup>95</sup> The test presented in *O'Brien* focuses on whether the government's regulation is narrowly tailored to achieve its interest.<sup>96</sup> The interest stated thus far has been the preservation of property values.

The conflict between architectural design and the prescribed norms of review boards in a community results in serious tension for homeowners seeking to modernize their property as a reaction to rising energy costs. According to the famous architect Charles Gwathmay, "[R]eview boards tend to equate 'good' with traditional and 'bad' with modern architecture. . . . When a new building comes before a board . . . there is a presumption of guilt."<sup>97</sup>

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<sup>93</sup> Smith, *supra* note 88, at 227.

<sup>94</sup> *Id.* at 230-31 (stating that both landowners would be in violation of clear ordinances, but the lazy one would be required to make changes, while the one making a political statement would not be required to cut their lawn, and proposing that the Supreme Court apply balancing rules for symbolic speech).

<sup>95</sup> *United States v. O'Brien*, 391 U.S. 367 (1968).

<sup>96</sup> *Id.* at 377 ("Whatever imprecision inheres in these terms, we think it clear that a government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.").

<sup>97</sup> Kevin G. Gill, *Freedom of Speech and the Language of Architecture*, 30 HASTINGS CONST. L.Q. 395, 406 (quoting Constance Epton Beaumont, *Making Design Review Boards Work*, ARCHITECTURAL RECORD, Jan. 1992, at 34).

Most courts have found that regulation of architectural aesthetics is a reasonable exercise by localities to protect real estate value.<sup>98</sup> In *Village of Hudson v. Albrecht, Inc.*, for example, the Supreme Court of Ohio found that “there is a legitimate government interest in maintaining the aesthetics of a community.”<sup>99</sup> However, Justice Clifford Brown’s dissent noted the “superficial” link between an aesthetic review and the stated goal of preserving real estate values.<sup>100</sup> Justice Brown further noted the potential for abuse if architectural review boards can promote their own subjective brand of an aesthetic merely to protect the ambiguous criteria of property value:

If a zoning code regulation or restriction devoted solely to aesthetic considerations, as in this case, can be bootstrapped to the status of lawfulness by merely adding a provision somewhere in the zoning code that the purpose of the zoning regulation is to protect real estate “from impairment or destruction of value,” then any zoning code provision, no matter how absurd, unreasonable or confiscatory can be given the aura of lawfulness.<sup>101</sup>

In the record of *Village of Hudson*, there was simply no evidence that showed that Albrecht’s proposed building changes would harm the value of neighboring property.<sup>102</sup> In dissent, Justice Brown argued further against the court applying aesthetic controls: “This does not mean one individual is right and the other is wrong; rather, it merely means their tastes differ and governmental bodies should be very cautious about imposing the personal taste of one individual on another.”<sup>103</sup> Nevertheless, the court found for the municipality as its interests in aesthetics related closely enough to “citizens’ happiness, comfort and general well-being” and “reflects a concern for the monetary interests of protecting real estate from impairment and destruction of value.”<sup>104</sup>

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<sup>98</sup> *Id.* at 403.

<sup>99</sup> *Village of Hudson v. Albrecht, Inc.*, 458 N.E. 2d 852, 856 (Ohio 1984).

<sup>100</sup> *Id.* at 858 (Brown, J., dissenting).

<sup>101</sup> *Id.* at 859 (Brown, J., dissenting).

<sup>102</sup> *Id.* at 858 (“In the present case the actions of appellants in no way impacted on the surrounding property values. Acme Store Number 4 is located in a shopping center. The changing of glass panels to aggregate panels does not affect the surrounding neighborhood.”).

<sup>103</sup> *Id.* at 858 (Brown, J., dissenting).

<sup>104</sup> *Id.* at 856-57.

If the court's decision against property owners hinges on the fulcrum of a legitimate government interest, the issue of protecting property values becomes somewhat muddled in the absence of a municipal actor. Instead, CIDs replace the government actor, and the contractually agreed upon CCRs replace governmental interests with the wishes of the private parties.

The California Supreme Court has held that a restrictive covenant is presumed reasonable unless it violates fundamental public policy, along with several other factors.<sup>105</sup> Specifically, the California Supreme Court stated:

[C]ourts will enforce an equitable servitude unless it violates a fundamental public policy, it bears no rational relationship to the protection, preservation, operation or purpose of the affected land, or its harmful effects on land use are otherwise so disproportionate to its benefits to affected homeowners that it should not be enforced.<sup>106</sup>

These factors tend to favor municipalities and government actors in a First Amendment approach, and the argument that restrictive covenants in CIDs are non-enforceable will likely find great resistance in court because of the contractual agreements between private parties.

### *B. Contractual Difficulties*

Due to the often irrational belief that the restrictive rules of CCRs will only serve to benefit a homeowner and limit neighbors' behaviors, many people will voluntarily sign-up and even pay a premium to live in a CID.<sup>107</sup> An additional complication in these contractual settings is that some potential homeowners are simply not aware of the restrictive CCRs when they decide to move into a new neighborhood or buy their first condominium.<sup>108</sup>

Some scholars have argued that the "present self" generally has an inability to adequately represent the "future self" in these CID contractual agreements.<sup>109</sup> However, correcting these contracts by allowing

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<sup>105</sup> *Nahrstedt v. Lakeside Vill. Condominium Ass'n*, 878 P.2d 1275, 1289-90 (Cal. 1994).

<sup>106</sup> *Id.* at 1289.

<sup>107</sup> *Drewes*, *supra* note 46, at 329 n.73 (citing Stewart E. Sterk, *Foresight and the Law of Servitudes*, 73 CORNELL L. REV. 956, 960-61 (1988)).

<sup>108</sup> ZOGBY INTERNATIONAL, *supra* note 72, at 17.

<sup>109</sup> *Drewes*, *supra* note 46.

homeowners to disavow their previous agreements through a removal mechanism could be legally untenable and could severely complicate longstanding land use doctrine rules.<sup>110</sup>

Covenants serve the useful contractual purpose of allowing large pluralities to contract with each other indirectly through a common party, which is usually the developer.<sup>111</sup> In the case of CIDs, the covenants are created through a private party contracting directly with the HOA or other such organization. The transactional costs are kept relatively low through this efficient contractual relationship, and developers can promise future buyers that the “basic network of covenants” will remain in tact and homeowners will continue to abide by the CCRs.<sup>112</sup>

If the covenants are determined to be valid—which they will be if the courts continue to subscribe to the freedom of contract theory—it is important to address how to deal with parties that intend to break their contracts. Furthermore, it would be helpful to explore manners in which CIDs could amend their CCRs. And, finally, if contract breaches and HOA amendment procedures do not provide adequate relief for those living in CIDs who wish to implement green building architecture, perhaps there is relief in legislative bodies.

#### IV. SOLUTIONS

##### A. *CID Contracts: Efficient Breach*

If a homeowner stands to benefit more from making energy efficient adaptations to their property in violation of a CCR, an application of the Efficient Breach Theory would suggest that they do so.<sup>113</sup> However, the homeowner should do so only as long as they compensate other property owners in their CID so that they are in as good of a position as they would have been had they followed through with the CCR promise.<sup>114</sup> The Efficient Breach Theory runs into complications

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<sup>110</sup> Sterk, *supra* note 107, at 957 (citing Richard A. Epstein, *Covenants and Constitutions*, 73 CORNELL L. REV. 906 (1988)).

<sup>111</sup> Epstein, *supra* note 110, at 914.

<sup>112</sup> *Id.* at 915-16.

<sup>113</sup> See generally Charles J. Goetz & Robert E. Scott, *Liquidated Damages, Penalties, and the Just Compensation Principle: Some Notes on an Enforcement Model and A Theory of Efficient Breach*, 77 COLUM. L. REV. 554 (1977) (examining and assessing the viability of a theory of efficient breach).

<sup>114</sup> See generally *Lake River Corp. v. Carborundum Co.*, 769 F.2d 1284 (7th Cir. 1985) (applying efficient breach theory to find a contract breach penalty clause invalid where it provided for damages in excess of actual costs incurred).

when the discussion revolves around restrictive covenants made with a plurality, such as a large common party, and involves punitive and penal damages in the form of fines.<sup>115</sup>

In many cases involving an actionable nuisance claim, such as physical modifications that provide for energy efficiency and happen to also offend a CID's CCR, the Court will issue an injunction, providing for specific performance and requiring that the green homeowner revert their property to its previous state.<sup>116</sup> Even though specific performance is currently the preferred remedy, courts do have the option of only requiring liquidated damages, as the Efficient Breach Theory would suggest as the solution that is Pareto optimal.<sup>117</sup>

The complication in foregoing specific performance and selecting liquidated damages as the preferred remedy is that in most cases it will be extremely difficult to develop an accurate economic model that truly encapsulates the damages supposedly produced by the nuisances of energy efficient home modifications.<sup>118</sup> Currently, most HOAs assess excessive fines for homeowners that violate the restrictive CCRs, which should not be classified as part of the liquidated damages, but as a punitive mechanism.<sup>119</sup> There is little correlation between the amount of fines most CIDs collect from homeowners and the violation they commit, and this suggests that the fines are more of a preventive measure than an

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<sup>115</sup> *Id.*

<sup>116</sup> Epstein, *supra* note 110, at 920 ("For the most part, however, the ability of private parties to 'take and pay' is sharply limited, for even in the nuisance cases injunctions are still the dominant judicial remedy as courts are concerned with what has been called the 'private use of the eminent domain power.'").

<sup>117</sup> *Id.* at 920 n.34 (citing William Bishop, *The Choice of Remedy for Breach of Contract*, 14 J. LEGAL STUD. 299 (1985); Anthony T. Kronman, *Specific Performance*, 45 U. CHI. L. REV. 351 (1978); Alan Schwartz, *The Case for Specific Performance*, 89 YALE. L.J. 271 (1979)).

<sup>118</sup> See *Village of Hudson v. Albrecht, Inc.* 458 N.E.2d 852, 858 (Brown, J., dissenting) ("Nowhere in the record in this case is there any evidence that the prohibited act of the defendant, namely, replacing a long row of plate glass windows from a store building with solid stone aggregate panels, causes an 'impairment or destruction' of value of real estate within the municipality.").

<sup>119</sup> See Steve Stoler, *Plano Man Told to Remove Solar Lights*, WFAA (Dallas/Ft. Worth), Aug. 28, 2007, available at [http://www.wfaa.com/sharedcontent/dws/news/localnews/tv/stories/wfaa070828\\_lj\\_stoler.7b2ad197.html](http://www.wfaa.com/sharedcontent/dws/news/localnews/tv/stories/wfaa070828_lj_stoler.7b2ad197.html) ("Eli Barron didn't ask his homeowners' association for permission to install seven solar lights. He didn't know he had to until he received a letter. The association threatened to fine him \$200 a day until he removed the energy-conserving lights."); see also Carol Sowers, *Light Bulb Feud Sparks \$80,000 in Fines, Fees*, ARIZONA REPUBLIC, Feb. 6, 2008, available at <http://www.azcentral.com/community/scottsdale/articles/0206sr-feud0207-ON.html>.

actual liquidated damage.<sup>120</sup> As a result, courts could find that these fines are penalty clauses in the contracts, and therefore invalid under common law rule.<sup>121</sup>

If a court were then put in the position of having to determine the actual liquidated damages of a homeowner's energy-efficient modifications to their property, the economics would become quite complicated. Due to the positive externalities inherent in these environmentally friendly and energy efficient modifications, it is entirely possible that the benefit to the common parties in a CID could be greater than the supposed property value losses.

For example, assume that it costs a homeowner \$100 to install solar panels, and this decreases all of his neighbors' property values by a total of \$50. However, the solar panels provide hypothetical energy savings of \$200 per year for the homeowner. If we apply Efficient Breach Theory economics, it would be completely rational for the homeowner to breach the CCR and install the energy efficient solar panels.<sup>122</sup> As energy-efficient technology becomes cheaper and more advanced, and as energy costs rise,<sup>123</sup> this hypothetical situation will become a reality with increasing frequency. Because of this, courts should look beyond specific performance as the chosen remedy, view the excessive HOA fines as penalty clauses, and allow homeowners to efficiently breach their CCR contracts.

### B. *Amending CIDs Rules*

Just as the United States Constitution allows for an amendment process so that future generations may modify its terms as situations warrant, most CIDs have outlined requirements that allow changes to their own structures.<sup>124</sup> As explored in Richard A. Epstein's article, *Covenants and Constitutions*, "more than alliteration unites them."<sup>125</sup> Epstein suggests that, similar to Constitutional law, the argument about

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<sup>120</sup> See generally *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408 (2003).

<sup>121</sup> See Paul H. Rubin, *Unenforceable Contracts: Penalty Clauses and Specific Performance*, 10 J. LEGAL. STUD. 237, 241 (1981).

<sup>122</sup> See generally Goetz & Scott, *supra* note 113.

<sup>123</sup> See ENERGY INFO. ADMIN., *supra* note 22; see also Murray, *supra* note 32.

<sup>124</sup> See MCKENZIE, *supra* note 12, at 21; URBAN LAND INSTITUTE, *supra* note 47, at 392. For guidance on the process of amending "stock" use restrictions see Amy Bray, *How to Create a Green Community*, The Practical Real Estate Lawyer, July 2008, available at [http://www.abanet.org/rpte/publications/ereport/2009/1/RP\\_Bray.pdf](http://www.abanet.org/rpte/publications/ereport/2009/1/RP_Bray.pdf).

<sup>125</sup> Epstein, *supra* note 110.

changing the document “turns on *who* can make the best decision about whether to change or enforce covenants.”<sup>126</sup>

In the instance of CIDs, Epstein argues that the residents themselves likely have the best information required to make a change to the existing covenants.<sup>127</sup> Instead of looking to outside forces, such as judicial decisions and public legislative bodies to amend their covenants, Epstein argues that CIDs are often well-equipped to internally change their covenants through majority protocol.<sup>128</sup>

However, the confidence that Epstein places on CIDs to function efficiently because of monetary interests in protecting property values inadequately accounts for the lack of participation in modern CIDs.<sup>129</sup> A number of legal scholars have pointed out that although CIDs were envisioned as a utopic solution to community involvement and private government, in reality participation in CIDs is extremely low and collective governance is failing.<sup>130</sup> According to David Drewes, “Rather than encouraging board members to proceed as public servants acting in the true common interest of their neighbors, the corporate model too often conditions them to slip into the role of ‘suburban gestapo.’”<sup>131</sup>

Statistical evidence suggests that at least three out of ten members have never attended a community association board meeting.<sup>132</sup> Further, empirical evidence indicates that a large number of residents living in CIDs have lost faith in their private government structures due

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<sup>126</sup> *Id.* at 924.

<sup>127</sup> *Id.*

<sup>128</sup> *Id.* at 925.

<sup>129</sup> Compare Drewes, *supra* note 46, at 350 (“Rather, by highlighting the importance of participation to the creation of community and by communicating this connection to the public through their opinions, the courts may energize CIC residents and get them to think about community association membership in a different light.”), with Epstein, *supra* note 110, at 925 (“[P]ublic officials are often more worried about re-election than they are about long-term preservation of property or wealth; unlike private owners, they are not disciplined by the knowledge that the value of their own holdings drops when they pay insufficient attention to future gains and losses—be they in routine maintenance or governance structures.”).

<sup>130</sup> See Drewes *supra* note 46, at 334-35.

<sup>131</sup> *Id.* at 334 (citing Lawrence W. Cheek, *Control Thy Neighbor*, SEATTLE WKLY., May 7, 1998, at 22).

<sup>132</sup> ZOGBY INTERNATIONAL, *supra* note 72, at 8. Furthermore, on the topic of community managers, the Zogby poll found that “one in five (21%) say their managers do not provide value and support, which is up eight percentage points from the previous survey (13%).” *Id.* at 11.

to the prevalence of a “corporate institutional model”<sup>133</sup> and, because of this loss of confidence, the residents will likely not consider amending CCRs through the CIDs because they do not feel empowered.<sup>134</sup>

### C. *Relief Through Legislative Bodies*

In the most popular recently publicized CCR conflict case, *Nahrstedt v. Lakeside Village Condominium Ass’n*, condominium owner Natore Nahrstedt was required to get rid of her beloved cats.<sup>135</sup> The Plaintiff argued that her cats, Boo-Boo, Dockers, and Tulip<sup>136</sup> did not bother anybody, and that pet ownership had scientifically proven benefits.<sup>137</sup> Furthermore, the plaintiff argued that, as a matter of public policy, the Court should recognize her right to keep her cats.<sup>138</sup>

Though the companionship of household pets like Boo-Boo was not found to be fundamental public policy in *Nahrstedt*,<sup>139</sup> perhaps the Court would take a different approach when the topic is energy efficiency. Environmental issues are at the forefront of many local, state, and federal legislative initiatives.<sup>140</sup> Accordingly, courts could find that CCRs preventing the proliferation of green building architecture violate a fundamental public policy if legislative bodies led the way through local ordinances or statutes.<sup>141</sup>

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<sup>133</sup> See Drewes, *supra* note 46, at 333.

<sup>134</sup> *Id.* at 336 (citing STEPHEN E. BARTON & CAROL J. SILVERMAN, COMMON INTEREST HOMEOWNERS’ ASSOCIATIONS MANAGEMENT STUDY 13-16 (1987) (“Getting the membership interested in governing the association is one of the most difficult tasks facing CIDs.”)).

<sup>135</sup> *Nahrstedt v. Lakeside Vill. Condominium Ass’n*, 878 P.2d 1275 (Cal. 1994).

<sup>136</sup> See Kress, *supra* note 92, at 853 n.80.

<sup>137</sup> *Nahrstedt*, 878 P.2d at 1278.

<sup>138</sup> *Id.* at 1277-78.

<sup>139</sup> *Id.* at 1292.

<sup>140</sup> See Felicity Barringer, *In Many Communities, It’s Not Easy Going Green*, N.Y. TIMES, Feb. 7, 2008, available at <http://www.nytimes.com/2008/02/07/us/07green.html>.

<sup>141</sup> Darren A. Prum, *Creating State Incentives for Commercial Green Buildings: Did the Nevada Experience Set an Example or Alter the Approach of Other Jurisdictions?*, Presentation at the William and Mary Environmental Law and Policy Review Symposium: “It’s Not Easy Building Green” (Jan. 31, 2009); see also, e.g., FLA. STAT. §163.04 (2006) (“No deed restrictions, covenants, or similar binding agreements running with the land shall prohibit or have the effect of prohibiting solar collectors, clotheslines, or other energy devices based on renewable resources from being installed on buildings erected on the lots or parcels covered by the deed restrictions, covenants, or binding agreements.”).

In fact, at least two states have already declared that restrictive covenants preventing solar panel installations are against the law.<sup>142</sup> But, some scholars see these governing bodies as interfering with the right of private owners to freely contract.<sup>143</sup> These scholars, perhaps opposed to the gray area of banning existing restrictive covenants as they could resemble a government taking, suggest taxation as an adequate alternative.<sup>144</sup> Alternatively, providing tax breaks or subsidies to communities that adopt or adapt existing CCRs to be friendlier to energy efficient home modifications could be another solution that sidesteps any discussion of a government taking by providing incentives to the private actors.<sup>145</sup>

However, the preferences of CID residents strongly indicate that they are opposed to government intervention and environmental regulations on their property.<sup>146</sup> Two-thirds of CID residents believe that the elected board of their community associations should be allowed to determine the best way to address environmental issues.<sup>147</sup> The poll also indicates that 20% believe that the local government should handle environmental issues, while only 5% would entrust the state government, and 3% would give the responsibility to the federal government.<sup>148</sup>

The logic here is that the best practices for a ranch house in Arizona may differ drastically from a condominium in Vermont and, accordingly, local officials will be able to respond promptly to local concerns.<sup>149</sup> Therefore, it appears that action on a local or state level would be preferable to federal legislation with regards to promoting certain energy-efficient technology.<sup>150</sup>

<sup>142</sup> Barringer, *supra* note 140.

<sup>143</sup> See Epstein, *supra* note 110, at 925 (“Even if some public intervention were desirable, it is highly doubtful that it should come in the form of a sporadic interference with private governance arrangements.”).

<sup>144</sup> *Id.* (“Instead, some shift in the general laws of taxation applicable to both ordinary residences and homeowners’ associations would seem preferable.”).

<sup>145</sup> See *generally* Database of State Incentives for Renewables & Efficiency, <http://www.dsireusa.org>; see also THOMAS STARRS, LES NELSON & FRED ZELCMAN, BRING SOLAR ENERGY TO THE PLANNED COMMUNITY: A HANDBOOK ON ROOFTOP SOLAR SYSTEMS AND PRIVATE LAND USE RESTRICTIONS 7 (2001).

<sup>146</sup> ZOGBY INTERNATIONAL, *supra* note 72, at 20.

<sup>147</sup> *Id.*

<sup>148</sup> *Id.*

<sup>149</sup> *Id.* (“Seniors (72%) and those in the Central/Great Lakes region (71%) are the most likely to say that association homeowners should prioritize and address environmental issues through their elected board, while parents of children under 17 (61%) and residents of small cities (61%) are the least likely.”). See *generally* Shari Shapiro, Who Should Regulate?: Federalism and Conflict in Regulation of Green Buildings, William and Mary Environmental Law and Policy Review Symposium: “It’s Not Easy Building Green” (Jan. 31, 2009).

<sup>150</sup> *Id.*

## CONCLUSION

At the Kitchen Debate in Moscow, Khrushchev told Nixon that American homes were built with the understanding that American homeowners would want a new house in twenty years. In sum, Khrushchev was implying that things in America were not built to last like they were under the red control of the Soviet Union. Khrushchev said, “We build firmly. We build for our children and grandchildren.”<sup>151</sup> Nixon disagreed and stated that things in America were built to last, but that people’s tastes change and things become obsolete.<sup>152</sup> The American system is built to adapt and flourish—ripe and green.

This debate occurred in 1959, around the same time that CIDs were beginning to expand in American suburbs. At the time, the CCRs many homeowners signed up for accurately reflected their preferences. A half-century later, things have changed and so have the needs of Americans. However, many of the CCRs remain environmentally unfriendly and neighborhoods look nothing like the World’s Fair expos. American neighborhoods have not adapted.

With energy costs at an all-time high, we are faced with increasing tensions between homeowners who have difficulty paying their bills, mortgages, HOA fees, and CIDs enforcing CCRs with hefty fines. Though First Amendment analysis is a possibility, the tests for symbolic conduct make it unlikely that green architecture will meet the burdens of scrutiny for free speech. The Efficient Breach Theory presents a novel solution to this problem, but the legal system will likely be slow in adopting a new policy. Due to the difficulty in inspiring civic participation in CIDs, it is unlikely that supermajorities will gather to amend their documents. Ultimately, local legislation that protects homeowners from being penalized for their green building initiatives will be the path of least resistance, and thereby the most energy efficient solution.

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<sup>151</sup> *The Two Worlds*, *supra* note 1.

<sup>152</sup> *Id.*