The Reasonable Pet: An Examination of the Enforcement of Restrictions in California Common Interest Developments After Nahrstedt v. Lakeside Village Condominium Ass'n, Inc.

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THE REASONABLE PET: AN EXAMINATION OF THE ENFORCEMENT OF RESTRICTIONS IN CALIFORNIA COMMON INTEREST DEVELOPMENTS AFTER NAHRSTEDT V. LAKESIDE VILLAGE CONDOMINIUM ASS’N, INC.

I. INTRODUCTION

Thirty-two million Americans live in common interest developments (CIDs); this amounts to one out of eight U.S. residents. Of those thirty-two million, nearly one-fifth are in California, representing a full twenty percent of the state’s population. Further, given the popularity of such developments and their rapid rate of growth, it is projected that CIDs will house between twenty-five and thirty percent of all U.S. residents by the year 2000. Nearly half of this rapidly growing segment of the housing market are condominiums.

Though popular in Europe for many years, the condominium was virtually unheard of in the United States until the 1960’s. The subsequent boom in popularity has been attributed to a number of factors, including the increased cost of single family housing, the availability of amenities at a real.

3. Barbara Steuart, Cat Fight over Condo Rights, RECORDER, June 8, 1994, at 1 (indicating that 6 million Californians live in CIDs).
4. Id.
5. Id. Locally, in 1993, sales of units in CIDs comprised 30% of all new home sales statewide, and that figure increased to 55% in San Francisco. Id.
7. EVAN MCKENZIE, PRIVATOPIA 11 (1994).
9. Id.
sonable price,\textsuperscript{10} the substantial tax advantages of homeowner status,\textsuperscript{11} and the availability of mortgage insurance.\textsuperscript{12} Whatever the reasons for this dramatic increase in popularity, condominium growth has been explosive in the United States and shows little sign of slowing.\textsuperscript{13} As a result, present day developments are often so large that they resemble independent municipalities, providing such services as street repair, street lighting, and utilities.\textsuperscript{14}

One of the central reasons for the tremendous popularity of CIDs is the unique framework of rights, restrictions, and use rights they offer buyers.\textsuperscript{15} These are comprised of various covenants, easements, and servitudes included in the master deed or declaration.\textsuperscript{16} These covenants, conditions, and restrictions (CC&Rs), though often desirable, can impose stiff restrictions on homeowners.\textsuperscript{17} The CC&Rs can control the height of hedges, the style of home exteriors, open garage doors, the displaying of the American flag,\textsuperscript{18} types of vehicles driven by residents,\textsuperscript{19} spouses below a certain age, signs, or even a goodnight kiss on the front steps.\textsuperscript{20} However, it is the

\textsuperscript{10} Id. These amenities may include swimming pools, recreation rooms, tennis courts, etc. Id.

\textsuperscript{11} Id. (noting the deductibility of mortgage interest and property taxes).

\textsuperscript{12} Id. The National Housing Act of 1961 made mortgage insurance available to condominium buyers. 15A AM. JUR. 2d Condominiums and Co-operative Apartments § 7 (1976).

\textsuperscript{13} McKenzie, supra note 7, at 11. Including single-family planned developments and cooperative housing, the number of homeowner associations has grown from fewer than 500 in 1964, to 150,000 in 1992. Id. Condominiums represent over 40% of those numbers. Id. It is projected that there will be some 225,000 homeowners associations by 2000. Id.

\textsuperscript{14} Duffey v. Superior Ct., 4 Cal. Rptr. 2d 334, 340 (Ct. App. 1992). An examination of CIDs as quasi-governmental entities which lack the accountability of an actual government body has recently been published. See generally McKenzie, supra note 7.

\textsuperscript{15} 4B RICHARD R. POWELL, POWELL ON REAL PROPERTY § 631, at 54-7 to 54-8 (1995).

\textsuperscript{16} Robert G. Natelson, Consent, Coercion, and "Reasonableness" in Private Law: The Special Case of the Property Owners Association, 51 OHIO ST. L.J. 41, 47 (1990). This declaration must be prepared prior to the time of the first sale of land and is created by the CID's developer. Id.

\textsuperscript{17} McKenzie, supra note 7, at 15-18. The book details some of the more capricious restrictions imposed by CIDs. Id.


\textsuperscript{19} See Bernardo Villas Mgmt. Corp. v. Black, 235 Cal. Rptr. 509 (Ct. App. 1987) (holding that a homeowners association can appropriately regulate the type of vehicle parked on the property).

\textsuperscript{20} McKenzie, supra note 6, at A23.
ability to restrict pets that led to the recent California Supreme Court case, Nahrstedt v. Lakeside Village Condominium Ass'n.\(^{21}\)

*Nahrstedt* involved the violation of a restriction in the declaration that limited pet ownership to "domestic fish and birds."\(^{22}\) Natore Nahrstedt owned three cats in violation of this restriction.\(^{23}\) When the homeowners association fined her, she challenged the restriction as unreasonable because her cats were "noiseless" and "created no nuisance."\(^{24}\) The California Supreme Court overturned the appellate court holding, which had found that Nahrstedt had stated a cause of action, because the restriction was potentially unreasonable.\(^{25}\) The supreme court decision established a new and higher standard for judicial review of challenges to CID restrictions by preventing the examination of any particular facts and instead limiting judicial review to an examination of the restriction on its face.\(^{26}\) In its holding, the court relied on the need for both preservation of the social fabric of the CID and judicial efficiency.\(^{27}\)

This comment examines the holdings and rationales of *Nahrstedt* and its underlying policy considerations of judicial and financial efficiency.\(^{28}\) Though the efficiency concerns of the court are well founded, this comment attempts to show how these concerns might be addressed without unnecessarily blocking CID owners from the reasonable enjoyment of their units.\(^{29}\) This comment will also explore how present practices in CID restriction enforcement result in inefficiency and contributed to the result in the *Nahrstedt* case.\(^{30}\)

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24. *Id.*
27. *Id.* at 1292.
28. See supra part III.B.3.
29. See supra part IV.
30. See supra part III.B.
This comment proposes that the decisions of a CID association should be subject to substantial evidence review under a writ of administrative mandamus in accordance with California Civil Procedure Code section 1094.5.31 Under such a system, the CID association would have to show that there is substantial evidence of a provable harm resulting from the violation of the restriction.32 This would protect the property interests of the other unit owners while curtailing the sometimes tyrannical enforcement of CID associations.

II. BACKGROUND

A. An Overview of Condominium Law in California

1. Legislative History

California first began to regulate condominiums in 1963 with the enactment of the Condominium Act.33 This Act clarified and standardized several aspects of the law but left many others in the hands of private agreements.34 Notably, the Act was voluntary, applying only if a specific condominium plan had been recorded.35

This Act was substantially altered by the Davis-Stirling Common Interest Development Act of 1985.36 The Davis-Stirling Act centralized the laws governing all CIDs, whether condominiums, community apartments, stock cooperatives, or planned developments.37 It changed the law in several respects.

For example, a separate interest in a condominium no longer had to be enclosed by walls.38 It established procedures for amending existing regulations of the homeowners association.39 It also placed limits on the homeowners association assessment increases40 and standardized procedures for placing liens on the units of delinquent payers of homeowners association fees.41

32. See supra part IV.B.
33. 4 WITKIN, supra note 1, § 314.
34. Id.
35. Id.
37. Id. § 1351(c).
38. Id. § 1351(f)(1).
39. Id. § 1356.
40. Id. § 1366(b).
41. Id. § 1367.
After the implementation of the Davis-Stirling Act, the process for the creation of a CID was also substantially changed.\(^\text{42}\) Whereas the previous law had allowed the creation of the CID to be voluntary, the Davis-Stirling Act applies "whenever a separate interest coupled with an interest in the common area . . . is or has been conveyed."\(^\text{43}\) The code further provides that one must record the condominium map (if one exists), the final or parcel map, and the declaration.\(^\text{44}\)

The declaration is essentially the "master plan" for the CID.\(^\text{45}\) Under the Davis-Stirling Act, the declaration must contain a legal description of the CID, the type of CID to be built, the name of the homeowners association that will govern the CID, and all restrictions on the use or enjoyment of any portion of the CID that are intended to be enforced as equitable servitudes.\(^\text{46}\) This declaration forms the basis for the governing documents under which the CID will operate.\(^\text{47}\) However, it is only incorporated equitable servitudes that are within the scope of this comment.

2. California Case Law Prior to Nahrstedt

The two cases that deal most directly with the enforcement and reasonableness of CID restrictions prior to Nahrstedt are Bernardo Villas Management Corp. v. Black\(^\text{48}\) and Portola Hills Community Ass'n v. James.\(^\text{49}\)

In Bernardo Villas, the plaintiff had purchased a new pickup truck that he parked in the condominium carport, in violation of a regulation which prohibited the parking of any "truck, camper, trailer, [or] boat of any kind."\(^\text{50}\) The association sued to enjoin him from parking the pickup and to recover $2060 in fines which it had levied against him.\(^\text{51}\) The

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\(^{43}\) CAL. CIV. CODE § 1352 (West Supp. 1996).

\(^{44}\) Id.

\(^{45}\) 4 WITKIN, supra note 1, § 316(3)(a)-(c).

\(^{46}\) CAL. CIV. CODE § 1353(a) (West Supp. 1996).

\(^{47}\) Id. § 1351(g).


\(^{50}\) Bernardo Villas Mgmt. Corp., 235 Cal. Rptr. at 510.

\(^{51}\) Id.
trial court found for the resident, and the association appealed. 52

In affirming the trial court's ruling, the court of appeal found that the restriction was unreasonable as applied to "clean noncommercial pickup trucks." 53 Finding that the pickup truck was for personal transportation and did not interfere with the other unit owners' "use and enjoyment of their property," the restriction was found unreasonable. 54 The court concluded by stating that "[o]ne person's Bronco II is another's Rolls-Royce." 55

*Bernardo Villas* essentially stands for the proposition that a restriction is unreasonable if the particular violation of that restriction does not interfere with the other homeowners' use and enjoyment of their property. 56

The other major case relevant to this discussion is *Portola Hills Community Ass'n v. James.* 57 In *Portola Hills*, the defendant proposed a backyard landscaping plan that included a satellite dish. 58 The association's CC&Rs prohibited the installation of a satellite dish, and the association approved his plan, with the exception of the dish. 59 Nevertheless, the defendant installed a dish, and the association sued for a permanent injunction, attorneys fees, and damages. 60

At trial, it was found that the dish was not visible to other residents or to the public. 61 The appellate court, in affirming the trial court's judgment for the defendant, applied de novo review regarding the question of the reasonableness of the restriction. 62 In finding the restriction unreasonable, the court noted that "[w]hether an amendment is reasonable depends on the circumstances of the particular case." 63 Given that the defendant's dish was not visible to the public, the court questioned whether the restriction "promote[d] any

52. Id. at 509.
53. Id. at 510.
54. Id.
55. *Bernardo Villas Mgmt. Corp.*, 235 Cal. Rptr. at 510.
56. Id.
57. 5 Cal. Rptr. 2d 580 (Ct. App. 1992).
58. *Portola Hills Community Ass'n*, 5 Cal. Rptr. 2d at 581.
59. Id.
60. Id. at 581-82.
61. Id. at 583.
62. Id.
63. *Portola Hills Community Ass'n*, 5 Cal. Rptr. 2d at 582 (quoting Ritchey v. Villa Nueva Condo. Ass'n, 146 Cal. Rptr. 695 (Ct. App. 1978)).
legitimate goal of the association." The court found that the restriction promoted no legitimate goal, and it further questioned whether an invisible satellite dish even fell within the restriction.

In both of the above cases, the reasonableness of the restriction was judged on a particularized, case-by-case basis. This is the framework of appellate case law that existed prior to Nahrstedt.

B. Nahrstedt v. Lakeside Village

1. Facts of Nahrstedt

The conflict began when Natore Nahrstedt considered purchasing a unit at Lakeside Village. Lakeside Village was a large condominium complex in Culver City with over 530 units sharing lobbies, hallways, laundry, and trash facilities. Nahrstedt owned three cats. Despite the development's prohibition against cats, she said she saw cats in several of the condominium windows, and her broker assured her that the restriction was rarely enforced.

However, shortly after she moved in, an association board member spotted one of her three cats sunning in the window. The homeowners association sent a letter to Nahrstedt demanding that she give up the cats. When Nahrstedt was willing to spend $50,000 in legal fees and endure four years of litigation because she considered her cats, "like my children." The court noted that "the association's only legitimate concern is with 'exterior' structures which are defined in the CC&Rs as those 'which [are] visible to others in the [p]roject and/or the public.'" In other words, the court questions whether a satellite dish is really an exterior structure if no one sees it.

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64. Id. at 583.
65. Id. The court noted that "the association's only legitimate concern is with 'exterior' structures which are defined in the CC&Rs as those 'which [are] visible to others in the [p]roject and/or the public.'" Id. (quoting Declaration, art. IX, § 2). In other words, the court questions whether a satellite dish is really an exterior structure if no one sees it. Id.
66. See supra text accompanying notes 53-63.
69. Id. The court of appeals' reference to them as "Fluffin, Muffin, and Ruf-fin" was entirely fanciful. Nahrstedt v. Lakeside Village Condo. Ass'n, 11 Cal. Rptr. 299, 308 (Ct. App. 1992). Her three cats were in fact named Boo-Boo, Dockers, and Tulip. Maura Dolan, Court Upholds Right to Ban Pets in Condos, L.A. TIMES, Sept. 3, 1994, at A1. Nahrstedt was willing to spend $50,000 in legal fees and endure four years of litigation because she considered her cats, "like my children." Id. To demonstrate her strong affection for them she made them cakes on their birthdays and turkey on Thanksgiving and Christmas. Id.
70. Hirabayashi, supra note 67, at J1.
71. Id.
72. Id.
stedt refused, the homeowners association began assessing fines of $25 a month, which grew over the next two years to $500 a month. Nahrstedt refused to pay, and filed suit in 1990, alleging that the restriction was unreasonable because her cats were always kept indoors, were "noiseless," and created "no nuisance."

2. Judicial History

Nahrstedt's original suit named the homeowners association, its officers, and two of its employees as defendants. She asked that the court void the assessments, enjoin future assessments, award damages for violation of privacy when the association "peered" into her window, and award damages for negligent and intentional infliction of emotional distress. She further asked the court to declare the pet restriction unreasonable when applied to indoor cats such as hers. The association demurred, arguing that the restriction furthered the "health, happiness, and peace of mind" of its residents and was therefore reasonable as a matter of law. The trial court sustained the demurrer as to all causes of action and dismissed. Nahrstedt appealed.

A divided court of appeal reversed and remanded on Nahrstedt's causes of action for invasion of privacy and negligent infliction of emotional distress, finding that each should have survived a demurrer. It further found that the association had no authority to levy fines against Nahrstedt because its authority was limited to fines for behavior involving the common areas. More relevant to this inquiry, the

73. Steuart, supra note 3, at 1. Nahrstedt in fact did more than merely refuse; more exactly, she reportedly responded by saying, "Don't you f__ with my cats." Id.
74. Id.
76. Id. at 1279.
77. Id.
78. Id.
79. Id.
80. Nahrstedt, 878 P.2d at 1279.
81. Id.
83. Id. at 308.
84. Id. at 309.
85. Id. at 311.
court found that Nahrstedt had stated a cause of action for declaratory relief regarding the reasonableness of the pet restriction.\textsuperscript{86}

After brief reviews of both \textit{Portola Hills} and \textit{Bernardo Villas}, the court noted that "whether the pet restriction at issue in the case before us is an enforceable equitable servitude . . . is a mixed issue of law and fact which can only be resolved in the context of the particular circumstances."\textsuperscript{87}

Having established the context in which reasonableness is to be decided, the court went on to find that the standard to be applied in deciding reasonableness was contained in California Civil Code section 1354(a).\textsuperscript{88}

In the court's view, this statute should be construed to mean that restrictions are reasonable when "they prohibit conduct which, while otherwise lawful, in fact interferes with, or has a reasonable likelihood of interfering with, the rights of other condominium owners to the peaceful and quiet enjoyment of their property."\textsuperscript{89} Based on this standard, the court remanded, finding that, because Nahrstedt's cats did not interfere with the peaceful enjoyment of other owners, the restriction was potentially unreasonable.\textsuperscript{90}

Dissenting, Justice Hinz argued that the restriction should be enforced "unless there are constitutional principals at stake, enforcement is arbitrary, or the association fails to follow its own procedures."\textsuperscript{91} In support of his position, Justice Hinz cited the need to limit freedoms in a high-density living space and the health problems associated with cats.\textsuperscript{92}

He also noted that the plaintiff consented to the restriction by signing her housing contract and should therefore abide by it.\textsuperscript{93} Finally, he chastised the majority for its fanciful crea-

\textsuperscript{86} \textit{Id.} at 305.
\textsuperscript{87} \textit{Nahrstedt}, 11 Cal. Rptr. 2d at 307.
\textsuperscript{88} \textit{Id.} at 306. California Civil Code § 1354(a) states:

\begin{quote}
The covenants and restrictions in the declaration shall be enforceable equitable servitudes, unless unreasonable, and shall inure to the benefit of and bind all owners of separate interests in the development. Unless the declaration states otherwise, these servitudes may be enforced by any owner of a separate interest or by the association, or by both.
\end{quote}

\textit{CAL. CIV. CODE} § 1354(a) (West Supp. 1996).
\textsuperscript{89} \textit{Nahrstedt}, 11 Cal. Rptr. 2d at 307.
\textsuperscript{90} \textit{Id.} at 308, 311.
\textsuperscript{91} \textit{Id.} at 312 (Hinz, J., dissenting).
\textsuperscript{92} \textit{Id.} at 314-15 (Hinz, J., dissenting).
\textsuperscript{93} \textit{Id.} at 315 (Hinz, J., dissenting). Justice Hinz' sentiment echoes that of law and economics proponent Professor Epstein, who has said in this area,
tion of names for the three cats involved.\textsuperscript{94} Nahrstedt appealed and the California Supreme Court granted hearing on November 19, 1992.\textsuperscript{95}

3. Holdings of Nahrstedt

   a. The Majority Ruling

   The California Supreme Court reversed and remanded.\textsuperscript{96} In its central holding, the majority found that the appellate court had erred when it determined the reasonableness of the restriction on a particularized, case-by-case basis.\textsuperscript{97} Based on an examination of the legislative intent of California Civil Code section 1354, the court instead concluded that the determination of reasonableness must be made by looking at the property development as a whole.\textsuperscript{98} Because the legislature characterized condominium CC&Rs as equitable servitudes, the court found that the CC&Rs must be viewed and enforced in the context of equitable servitude law.\textsuperscript{99} Therefore, the court found that viewing the restriction in this context limited its inquiry to the broad scheme of the CID, rather than a particular owner's circumstances.\textsuperscript{100}

   Under the law of equitable servitudes, a restriction will be upheld "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."\textsuperscript{101} In establishing this standard, the court disapproved both Bernardo Villas and Portola Hills as having inappropriately considered specific circumstances.\textsuperscript{102}

\textsuperscript{94} Nahrstedt, 11 Cal. Rptr. 2d at 315.
\textsuperscript{96} Nahrstedt v. Lakeside Village Condo. Ass'n, 878 P.2d 1275, 1292 (Cal. 1994).
\textsuperscript{97} Id. at 1278.
\textsuperscript{98} Id.
\textsuperscript{99} Id. at 1285-86.
\textsuperscript{100} Id. at 1290.
\textsuperscript{101} Nahrstedt, 878 P.2d at 1289.
\textsuperscript{102} Id.
In support of its position, the court cited two out-of-state appellate decisions: *Hidden Harbour Estates v. Basso*¹⁰³ and *Noble v. Murphy.*¹⁰⁴ In *Hidden Harbour,* the Florida court found that CID restrictions, such as the one at issue in *Nahrstedt,* should be enforced unless they are arbitrary, violate public policy, or infringe on some fundamental constitutional right.¹⁰⁵ In *Noble,* the Massachusetts court determined that such restrictions could only be overturned on constitutional or public policy grounds.¹⁰⁶ The *Noble* court also decided that such a standard spares the courts "the burden and expense of highly particularized and lengthy litigation."¹⁰⁷

This second factor of efficiency stated in *Noble* seems to have weighed heavily with the *Nahrstedt* court.¹⁰⁸ Its decision noted that predictability and stability are increased when a prospective buyer of a CID unit can rely on the CC&Rs to remain unchanged.¹⁰⁹ It further found that present owners would be protected from sudden increases in association fees due to the expense of a defense to a court challenge of a recorded CC&R.¹¹⁰ *Nahrstedt* finally decided that the social fabric of a CID would be harmed not only by nonenforcement of a covenant, but also through enforcement delayed by litigation.¹¹¹

Having established a new standard for judicial review of the reasonableness of the CC&Rs in a condominium complex,¹¹² the court found that Nahrstedt's complaint stated no facts to support a finding that the burden of the restriction was unreasonable.¹¹³ It determined that there was nothing that could "support a finding that the burden of the restriction on the affected property is so disproportionate to its benefit that the restriction is unreasonable."¹¹⁴ This sentence

¹⁰⁵. *Nahrstedt,* 878 P.2d at 1283-84.
¹⁰⁶. *Id.* at 1284.
¹⁰⁷. *Id.* (quoting *Noble,* 612 N.E.2d at 271).
¹⁰⁸. *Id.* at 1287-89. The court engaged in a lengthy discussion of the advantages of this new and higher standard in promoting financial and judicial efficiency. *Id.*
¹⁰⁹. *Id.* at 1288.
¹¹⁰. *Nahrstedt,* 878 P.2d at 1288.
¹¹¹. *Id.* at 1289.
¹¹². *Id.* at 1290.
¹¹³. *Id.*
¹¹⁴. *Id.*
represents the entirety of the court’s balancing under the new standard. The court noted that the complaint centered on the particular circumstances of Nahrstedt, her cats, and the lack of any burden on her neighbors, rather than on the effect on the complex as a whole. The court seemingly ignored the fact that a complaint filed prior to their decision did not need to include facts relevant to the entire complex. Despite this, the court did not allow Nahrstedt to amend her complaint.

Based on the grounds of judicial and financial efficiency, and a strong presumption of validity that the restriction was not unreasonable, the majority found that Nahrstedt had not stated a cause of action for declaratory relief.

b. The Dissent

Justice Arabian dissented. He did not contend that the majority's standard was fundamentally flawed, but asserted that they failed to properly balance the benefit and burden of the pet restriction. In his view, the restriction was unreasonable.

In examining the reasonableness of the restriction, he first looked to the burden imposed by a pet restriction. He noted examples of the deep and abiding tradition of human-animal companionship, citing numerous examples of prominent persons who have owned household pets. Perhaps more importantly, Justice Arabian noted the well-documented benefits to one's emotional and physical well-being that are derived from pet ownership, especially by the elderly, children, and those who live alone. He found that a categorical ban on pet ownership denies a CID owner of these substantial benefits. In essence, he re-characterized the bur-

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115. Nahrstedt, 878 P.2d at 1290.
116. Id.
117. See supra part II.A.2.
119. Id. at 1292 (Arabian, J., dissenting).
120. Id. (Arabian, J., dissenting).
121. Id. (Arabian, J., dissenting).
122. Id. (Arabian, J., dissenting).
124. Id. at 1294-95 & n.10 (Arabian, J., dissenting).
125. Id. at 1294 (Arabian, J., dissenting).
den imposed by elaborating on the benefits to be derived from pet ownership.\textsuperscript{126}

In comparing the burden of being denied pet ownership to the benefit of the restriction, Justice Arabian found that this particular ban was unreasonable.\textsuperscript{127} He noted that, to the extent such animals are not seen, heard, or smelled, there is no actual benefit conferred on the other unit owners by the restriction.\textsuperscript{128} He contended that the lack of any perceived benefit makes the restriction unreasonable as a matter of law.\textsuperscript{129} He also asserted that the restriction should be struck down on the grounds that it was arbitrary.\textsuperscript{130} It was, he thought, inherently unsound and arbitrary because, while it banned cats, it allowed birds, which raise all of the same noise and sanitation concerns as a cat.\textsuperscript{131} Pointing out that the majority was supposedly concerned for the “health, sanitation and noise concerns” of the other unit owners, Justice Arabian saw this inconsistency as underscoring the unreasonableness of the restriction.\textsuperscript{132}

Justice Arabian raised several valid points as to the majority’s truncated analysis and severe standard. The question then arises: What motivated the court’s decision, and why was its benefit/burden analysis of the restriction so cursory?

### III. Analysis

Indeed, the majority’s opinion seems unnecessarily harsh and a sacrifice of access to judicial review for the sake of judicial efficiency. The new standard approaches preclusion of judicial review. Despite the new and more deferential standard, Justice Arabian rightly noted, “deference is not abdication.”\textsuperscript{133}

#### A. Coercive Elements in CID's

One cannot criticize the \textit{Nahrstedt} majority if it is assumed that the contractual relationship between the CID and

\begin{itemize}
  \item \textsuperscript{126} \textit{Id.} (Arabian, J., dissenting).
  \item \textsuperscript{127} \textit{Id.} (Arabian, J., dissenting).
  \item \textsuperscript{128} \textit{Nahrstedt}, 878 P.2d at 1295 (Arabian, J., dissenting).
  \item \textsuperscript{129} \textit{Id.} (Arabian, J., dissenting).
  \item \textsuperscript{130} \textit{Id.} at 1295 (Arabian, J., dissenting).
  \item \textsuperscript{131} \textit{Id.} (Arabian, J., dissenting).
  \item \textsuperscript{132} \textit{Id.} (Arabian, J., dissenting).
  \item \textsuperscript{133} \textit{Nahrstedt}, 878 P.2d at 1296 (Arabian, J., dissenting) (quoting People v. McDonald, 690 P.2d 709 (Cal. 1984)).
\end{itemize}
its residents is entirely consensual.\textsuperscript{134} Generally, once there is true consent, freedom of contract should control.\textsuperscript{135} Yet there is evidence to show that there are elements of coercion in this particular type of contractual relationship.\textsuperscript{136}

There are several factors which indicate coercion in the purchase of a CID unit. First, the absence or presence of certain restrictions can lead to the pervasive belief by buyers that there is no CID which offers their particular set of preferences.\textsuperscript{137} Those buyers therefore do not operate in a market that they perceive as allowing them complete free choice. This problem is related to an effect referred to as "bundling."\textsuperscript{138}

"Bundling" occurs where the development is presented as a package, and the buyer does not have the ability to bargain about individual terms within the package.\textsuperscript{139} Therefore, it can arguably be asserted that consent in the CID market is imperfect because the buyers are not unfettered in their decision-making process.

The purity of the buyer's consent is also mitigated by the discretionary power a CID has over the decision of whether to enforce a particular restriction.\textsuperscript{140} Buyers may well undervalue the impact of this discretionary power because of its unpredictability.\textsuperscript{141} Objection to this discretion after consent is undermined by the unequal bargaining positions of the buyer and the CID.\textsuperscript{142} CIDs are frequently run by large corporations which have the resources and skill to litigate, whereas the buyer will generally be less sophisticated and possess fewer resources.\textsuperscript{143}

The buyer's awareness of the various restrictions is also less than perfect.\textsuperscript{144} The operative documents controlling the CID must be obtained from the association, a title company,

\begin{itemize}
\item 134. Natelson, \textit{supra} note 16, at 44.
\item 135. \textit{Id}.
\item 136. \textit{See generally id}.
\item 138. \textit{Id}.
\item 139. \textit{Id} at 895.
\item 140. \textit{Id} at 900.
\item 141. \textit{Id}.
\item 142. \textit{Id}.
\item 143. \textit{Id}.
\item 144. Natelson, \textit{supra} note 16, at 59.
\end{itemize}
or a lawyer. These documents are often not provided "as promptly as would be ideal." This presents a problem in that the buyer may have already made the decision to purchase without having seen the specific documentation listing its controlling restrictions.

Price is the final factor vitiating the consent of the CID buyer. CIDs are often the most affordable housing available. More importantly, they are often the only housing many individuals can afford. Again, this factor runs counter to the idea of true consent.

Most of the arguments above are derived from liberal legal scholarship. Nonetheless, the problem of true consent in CID ownership is viewed as substantial even by law and economics scholars. One law and economics commentator has noted that "empirical research and case fact patterns strongly suggest that [CID] decisionmaking can be coercive as well as consensual."

Despite repeated attempts, the courts have had difficulty in applying transplanted standards to CIDs. This is because CIDs are sui generis. Nothing else in the legal landscape resembles their structure or mimics their characteristics. One cannot make the usual assumptions about the CID buyer's consent. Though the relationship is largely consensual, the factors noted above make an absolute transplant and application of contractual consent inappropriate in an analysis of CID ownership. This vitiated consent must be weighed when examining enforcement, because it is upon this consent that the enforcement is based.

145. Id.
146. Id.
147. Id.
148. McKenzie, supra note 6, at A23.
149. Id.
150. Id.
152. See generally Natelson, supra note 16.
153. Id. at 87.
154. Id. at 55.
155. Id.
156. Id.
B. The Trend Toward a Judicial Barricade

The practical effect of *Nahrstedt* on the possibility of a successful judicial challenge to a recorded restriction is clear: any such challenge will fail unless it is arbitrary, violates public policy, abrogates a fundamental constitutional right, or "imposes burdens on the use of the affected property that substantially outweigh the restriction's benefits." Though the last factor listed above might seem to imply a judicial inquiry into the relative reasonableness of the restriction, *Nahrstedt* explicitly stated that the new standard "grant[s] no unbridled license to question the wisdom of the restriction." To fully appreciate how severe and obstructive the new standard is, it is useful to re-visit *Bernardo Villas* and *Portola Hills* and examine how those cases would have fared under the new standard.

In order to apply the new standard, one must dispense with all of the specific details of the cases and examine whether restrictions against satellite dishes and pickup trucks are unreasonable on their face. Under the new standard, it would be of no consequence that the satellite dish was not visible, nor would it be relevant that pickup trucks are now considered a common and acceptable passenger vehicle. The only allowable inquiry after *Nahrstedt* is whether the burden is unreasonable using a broad, facial benefit/burden analysis.

As applied to *Bernardo Villas*, the restriction would be upheld because even though that particular pickup truck was inoffensive, another might be the sort of worn work truck

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158. *Id.*
159. *See supra* part II.B.
162. *Nahrstedt v. Lakeside Village Condo. Ass'n*, 878 P.2d 1275, 1290 (Cal. 1994) (stating that "the focus is on the project as a whole, not on the individual homeowner").
163. *Id.*
which the restriction was designed to prohibit. Similarity, in Portola Hills, the fact that this particular satellite dish was not visible would be barred from consideration. The restriction itself, the general prohibition against satellite dishes, would be upheld as reasonable because it is not arbitrary, a violation of public policy or constitutional rights, nor is the burden of being denied satellite access unreasonable given the aesthetic benefit.

Nonetheless, these hypothetical results under the new standard seem contrary to the fundamental idea of basic fairness. What factors are driving the Nahrstedt court to this result which, in application, seems so unreasonable?

The Nahrstedt court rested much of its reasoning on the proper interpretation of the law of equitable servitudes. However, a closer reading reveals substantial court concerns with the problem of judicial, social, and financial burdens resulting from the detailed factual determinations necessary under the previous, fact-specific standard. The central out-of-state case that Nahrstedt cited (and the only one that involved a pet restriction), Noble v. Murphy, placed emphasis on the fact that the higher standard spares the courts "the burden and expense of highly particularized and lengthy litigation." The Nahrstedt court itself emphasized that the new rule will be "clear, simple, and not subject to exceptions based on the peculiar circumstances or hardships of individ-

164. Bernardo Villas Mgmt. Corp., 235 Cal. Rptr. 2d at 510. The truck in this case was a clean, new, passenger-oriented truck. Id. Under the Nahrstedt standard, none of those facts would be admissible. Nahrstedt, 878 P.2d at 1290.
165. Nahrstedt, 878 P.2d at 1278.
167. Nahrstedt, 878 P.2d at 1290 (finding that, so long as the restriction is "rationally related" to a legitimate concern of the CID, the restriction is enforceable).
168. Id. at 1278.
169. Id. at 1289. The court discusses the strain on the social fabric of a CID if it is forced to make these fact-intensive determinations. Id. The court also notes that, under the new standard, there will be fewer lawsuits brought, and those which are brought will be dispensed with quickly. Id. at 1288.
171. Noble, 612 N.E.2d at 271.
ual residents." This standard results in a sacrifice of fairness to "the tyranny of the 'commonality.'" 

Yet, given the large number and rapid growth of CIDs, the court's efficiency concerns must be addressed. To accomplish this, it is necessary to examine the present norms in the enforcement of the recorded restrictive covenants in CIDs.

C. The Causes of Preemptive Enforcement

In all of the cases above — Nahrstedt, Bernardo Villas, and Portola Hills — the homeowners associations enforced the restrictions before any harm had actually occurred or any neighbor had actually complained. This seems counterproductive and inefficient. The association has little to gain from enforcement where there is no complaint, yet they must expend time, energy, and money to enforce the restriction. Certainly where the enforcement becomes litigious, the association must draw substantially from funds raised through homeowners fees, and possibly increase those monthly fees, to address a problem which no homeowner has complained about. There are three central reasons for this preemptive enforcement.

The first is the advice given to association board members that they will be held liable for actions they take in their board member capacity. In most states, board members are protected by the business judgment rule, which protects them from liability so long as they act prudently and in good faith. 

173. Id. at 1297 (Arabian, J., dissenting).
174. See supra part I.
176. Nahrstedt, 878 P.2d at 1288 (noting its concern with increases in association fees as a result of protracted litigation).
177. McKenzie, supra note 7, at 130.
faith.\textsuperscript{178} One way to protect themselves under this rule is to seek expert advice.\textsuperscript{179}

In the enforcement of restrictions, this expert advice will generally come from lawyers and property managers.\textsuperscript{180} However, the conventional wisdom in this area is that all restrictions must be enforced harshly to avoid allegations of arbitrary enforcement.\textsuperscript{181} Perhaps this general attitude is best exemplified by one past president of the Community Association Institute who said that "[r]ules must be enforced uniformly, promptly, and firmly by the board. Delays can result in waivers and allow the violator a defense that he or she may otherwise not have had. Other homeowners may violate the rule and eventually you have a general disregard of the rules."\textsuperscript{182} Also, board members are often advised that if they fail to enforce a rule, they may be held personally liable for a breach of fiduciary duty to the CID's members.\textsuperscript{183}

There is also serious doubt about the impartiality of such advice.\textsuperscript{184} Often, those giving the advice are lawyers who have built a practice on the enforcement of restrictions and so have a personal financial interest in seeing a legal conflict arise.\textsuperscript{185} Thus, it is not surprising that they often recommend harsh, legal enforcement.\textsuperscript{186}

The second factor that contributes to this harsh enforcement is less concrete. This factor is the character of those who volunteer to serve on association boards.\textsuperscript{187} Though they give up evenings and weekends to these responsibilities, they are not paid for their services.\textsuperscript{188} Certainly this attracts those who are keenly interested and active in their communities, but it also attracts those with an authoritarian bent who enjoy the perceived power of being an association board mem-

\textsuperscript{178} Id. For a discussion of the business judgment rule in this context, see generally Jeffrey A. Goldberg, Note, \textit{Community Association Use Restrictions: Applying the Business Judgment Doctrine}, 64 CHI.-KENT L. REV. 653 (1988).

\textsuperscript{179} McKENZIE, supra note 7, at 130.

\textsuperscript{180} Id. at 131.

\textsuperscript{181} Id.

\textsuperscript{182} Id. (quoting F. Scott Jackson, \textit{The Buck Stops with the Board}, COMMON GROUND, Nov.-Dec. 1992, at 34).

\textsuperscript{183} Id.

\textsuperscript{184} Id.

\textsuperscript{185} Id. at 132.

\textsuperscript{186} Id. at 131.

\textsuperscript{187} Id.

\textsuperscript{188} Id.
Those of an authoritarian character are only encouraged by the stern enforcement urged by lawyers in the field.\textsuperscript{190}

The final factor that results in enforcement without harm, and one that only exacerbates the first, is that board members have been sued under California law for negligence and breach of fiduciary duty.\textsuperscript{191}

One of the leading cases in breach of fiduciary duty is \textit{Posey v. Levitt}.\textsuperscript{192} There, the homeowners association was found to have breached its fiduciary duty and forced to pay $30,000 in damages to the complaining resident because the association failed to enforce its own restrictions.\textsuperscript{193}

Similarly, \textit{Raven's Cove Townhomes v. Knuppe Development}\textsuperscript{194} held that an association's board members may be sued individually for breach of fiduciary duty where the board financially harmed the association through mismanagement and therefore affected the value of the shareholders.\textsuperscript{195}

A negligence action was similarly upheld in \textit{Francis T. v. Village Green Owners Ass'n}.\textsuperscript{196} In \textit{Francis T.}, the plaintiff brought suit where the association negligently failed to maintain sufficient exterior lighting during a "crimewave" in the area.\textsuperscript{197} When her unit was robbed, she installed exterior lighting of her own.\textsuperscript{198} The association demanded she remove it; she complied and was raped and robbed in her home that same night.\textsuperscript{199} The California Court of Appeals upheld her action for negligence against both the association as a whole and its members as individuals.\textsuperscript{200}

The caution caused by decisions like those above is easily seen in \textit{Duffey v. Superior Court}.\textsuperscript{201} In \textit{Duffey}, the association itself brought an action for declaratory judgment on whether

\textsuperscript{189} Id.
\textsuperscript{190} Id.
\textsuperscript{192} 280 Cal. Rptr. 568 (Ct. App. 1991).
\textsuperscript{193} \textit{Posey}, 280 Cal. Rptr. at 570.
\textsuperscript{194} 171 Cal. Rptr. 334 (Ct. App. 1981).
\textsuperscript{195} \textit{Raven's Cove Townhomes}, 171 Cal. Rptr. at 334.
\textsuperscript{196} 229 Cal. Rptr. 456 (Ct. App. 1986).
\textsuperscript{197} \textit{Francis T.}, 229 Cal. Rptr. at 458.
\textsuperscript{198} Id. at 459.
\textsuperscript{199} Id.
\textsuperscript{200} Id.
\textsuperscript{201} 4 Cal. Rptr. 2d 334 (Ct. App. 1992).
a proposed homeowner addition was barred by its own CC&Rs.202 Here, the association was essentially asking the court to determine whether or not it should make a particular decision.203 This is exactly the sort of judicial micro-management that the Nahrstedt court sought to avoid.204 Duffey only serves to highlight the gross inefficiency inherent in the present system of CID restriction enforcement.

D. The Inherent Inefficiency of the Present System

The fundamental problem posed by preemptive enforcement of CID restrictions is that it incurs costs on the association to address a problem that has not yet had any ill effects on other residents.205 In these situations, there has been no actual effect on the property rights of other residents, but merely a violation of the restriction in the abstract sense.206

The association's essential function is to protect the property interests of all of the respective homeowners. When no one has incurred a harm through a violation of a restriction, the association is expending resources prematurely.207 This preemptive enforcement short circuits the social norms which are normally used between neighbors.208 A recent book by noted property commentator Robert Ellickson examined the relative efficiency of social and legal controls in tightly knit groups.209

1. Robert Ellickson's Order Without Law

Noting the growth of language, cities, and economic markets as examples, Ellickson asserts that order often occurs spontaneously and outside of the shadow of the law.210 As evidence that people often ignore the law in favor of social norms, he notes that, despite a Supreme Court ruling allowing flag burning, those who afterward attempted that

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202. Duffey, 4 Cal. Rptr. 2d at 335.
203. Id.
204. See supra part II.B.
206. See supra note 175.
207. See supra note 175.
208. See supra text accompanying notes 210-28.
209. ROBERT ELLICKSON, ORDER WITHOUT LAW (1991). Ellickson conducted an examination of cattlemen and ranchers in Shasta County to analyze how these individuals handled disputes. Id. at 2-3.
210. Id. at 5.
very act were forcefully reminded by bystanders that the social rules had not changed with the legal rules.\textsuperscript{211}

One of the book's central themes is an alteration of the Coase Theorem.\textsuperscript{212} The Coase Theorem is one of the fundamental tenets of law and economics theory.\textsuperscript{213} This theorem asserts that people will bargain to their mutual advantage from whatever starting points the legal system has bestowed upon them.\textsuperscript{214} In the book's study of farmers and ranchers, Ellickson discovers that this bargaining is instead done through social norms which "trump formal legal entitlement."\textsuperscript{215}

In this study of neighbor disputes in rural Shasta County, norms of "neighborliness" played the most important role in their resolution.\textsuperscript{216} The residents of that area used a number of tactics to resolve disputes, and few of those tactics involved the legal system.\textsuperscript{217} In fact, it was found that use of the legal system to file an attorney-assisted claim for compensation was a last resort.\textsuperscript{218} It was regarded as the most severe and extreme measure that one could take in resolving a dispute.\textsuperscript{219} Legal action was generally shunned as inappropriate and even deviant behavior.\textsuperscript{220} This is in sharp contrast to the situation in CIDs, where legal action is the first and only action taken.\textsuperscript{221}

There are two central reasons why the Shasta County neighbors avoided legal action: money and long-term residency.\textsuperscript{222} The Shasta residents believed, and rightly so, that legal recourse was the most expensive dispute resolution op-

\begin{itemize}
\item \textsuperscript{211} Id. at 6.
\item \textsuperscript{212} Id. at vii.
\item \textsuperscript{213} Id.
\item \textsuperscript{214} Id.
\item \textsuperscript{215} Id. at 4.
\item \textsuperscript{216} Id.
\item \textsuperscript{217} Id. at 52. Ellickson noted that "live-and-let-live" attitudes, mental accounting of inter-neighbor debts, and self-help (including gossip about the offender) are all used prior to any legal involvement. Id. at 52-57.
\item \textsuperscript{218} Id. at 60.
\item \textsuperscript{219} Id.
\item \textsuperscript{220} Id. Various residents were quoted saying that "[b]eing good neighbors means no lawsuits" and that it causes "bad feelings." Id.
\item \textsuperscript{221} See supra part III.C.
\item \textsuperscript{222} ELLICKSON, supra note 209, at 54.
\end{itemize}
A typical resident reaction to legal proceedings was that "[t]he only one who makes money . . . is the lawyer." This supports the central theme of Ellickson's book, that social norms are a more efficient means of dispute resolution than the legal system.

The second force motivating the Shasta county neighbors is the long-term residency of the individuals. Because their interactions are continuing, they tend to exercise a self-restraint and cooperation not present in "single-shot" interactions.

2. Application of Ellickson's Proposals to CIDs

Based on observation of these social norms, Ellickson proposes and predicts that these same norms would apply to suburban or urban neighbors. Though it is generally supposed that urban or suburban dwellers have weaker social ties than rural dwellers, their relationships nonetheless contain many of the same qualities as rural dwellers. They must cooperate on any number of issues including fencing, trees, drainage, noise, and street parking. They also share the same need to avoid legal fees and promote long-term relationships.

However, the CID precludes the operation of these more efficient social norms through its legalistic structure. Although a CID contains the elements necessary to allow the operation of social controls including close-knit communities, long-term residency, and the universal desire to avoid legal fees, all of these elements are rendered moot by the homeowners association and its functions.

223. Id. at 281. Where the unrealistic element of zero transaction cost is removed from the Coase Theorem, the function of the theorem becomes more problematic. Id.
224. Id. at 61.
225. Id. at 55.
226. Id.
227. Id. These continuing relationships are referred to as "iterated" in game-theory terms. Id.
228. Id. at 270.
229. Id.
230. Id. at 270-71.
231. Id.
232. Id. at 271.
233. See supra part II.A.1-2.
234. ELICKSON, supra note 209, at 271.
First, the costs inherent in legal dispute resolution are mitigated by the fact that those costs are divided and shared by all of the residents of the CID.\textsuperscript{235} Therefore, the association board has little incentive to resolve the dispute efficiently. The association's monthly fees can simply be increased to compensate for the extra expenditure and no one resident will carry a substantial burden.\textsuperscript{236} Therefore, no one resident has a disincentive against bringing suit.

Amplifying this effect is the fact that the individuals responsible for making decisions about enforcement are generally the association's lawyers.\textsuperscript{237} Since they are the very individuals who will benefit from the association's legal fees, they, not surprisingly, often encourage, rather than discourage, the more inefficient legal resolution of the conflict.\textsuperscript{238}

Second, the close-knit and long-term aspects of the community, which would normally allow the social norms to operate, are rendered moot by the very existence of the association board.\textsuperscript{239} The board functions in the role of a neighbor, yet has none of the same concerns of preserving harmony that an actual neighbor would have.\textsuperscript{240} The CID dispenses with the classic situation of a next-door neighbor who is interested in remaining on good terms with another, or in being well thought of in the community.\textsuperscript{241}

As has been pointed out, "lawmakers interested in the resolution of humdrum disputes that arise within a group are unlikely to improve upon the group's customary rules."\textsuperscript{242} Yet this legal preclusion of social norms is exactly what a CID is designed to do.\textsuperscript{243} It is also worthwhile to note that Nahr-
stedt, the plaintiff in the central case, paid greater heed to perceived social norms than to contractual restrictions.\textsuperscript{244} In making her decision to purchase, she relied more on the salesperson's assurance that the pet restriction was largely unenforced, and on the presence of cats in the windows, than she did on the binding contract.\textsuperscript{245}

It is problematic when the law impedes social controls.\textsuperscript{246} It has been asserted that "[l]aw varies inversely with other social control."\textsuperscript{247} Given this, preemptive enforcement by association boards not only prevents the operation of efficient social controls in a particular case, but also inhibits them from functioning in the future.\textsuperscript{248} Ellickson points out that laws of this kind will "lead to more nastiness within relationships."\textsuperscript{249} He rightly notes that laws which do not foster informal cooperation are likely to create situations where "there is both more law and less order."\textsuperscript{250}

Yet it is absurd to imagine that legal dispute resolution may be dispensed with altogether.\textsuperscript{251} As the magnitude of the dispute rises, so too does the need for formal resolution.\textsuperscript{252} More importantly, social norms are only functional when applied to common disputes.\textsuperscript{253} When fundamental entitlements or constitutional rights are involved, the legal system is the appropriate forum.\textsuperscript{254}

Some system must be developed that can fulfill all of these needs. The system should promote dispute resolution through the most efficient means possible, whether those means are social norms or litigation. It should unburden the courts from the sort of absurd micro-management evidenced in \textit{Duffey v. Superior Court}.\textsuperscript{255} It should promote the health, happiness, and safety of CID residents, while avoiding the sometimes tyrannical preemptive enforcement of association boards. These are the aims of the proposal presented.
IV. PROPOSAL

A. Review by Writ of Mandamus

To address the general judicial burden concerns of the courts, CIDs should be included within the group of private organizations that are subject to a writ of administrative mandamus under California Civil Procedure Code section 1094.5.\textsuperscript{256} The writ of administrative mandamus applies

\[\text{[w]here the writ is issued for the purpose of inquiring into the validity of any final administrative order or decision made as the result of a proceeding in which by law a hearing is required to be given . . . and discretion in the determination of facts is vested in the inferior tribunal, corporation, board or officer.}\textsuperscript{257}

In determining whether administrative mandamus is appropriate, "[t]he decisive question is whether the agency exercises an adjudicatory function."\textsuperscript{258} The writ is more efficient than a standard civil action in several respects.

The writ provides for trial by a court sitting without a jury.\textsuperscript{259} The hearing is limited to review of the administrative record which may be filed with the petition or may be ordered to be filed by the court.\textsuperscript{260} On review, the enforcement action of the CID would be subject to substantial evidence review.\textsuperscript{261}

Substantial evidence review is extremely cursory in that abuse of discretion is only established if "the findings are not supported by substantial evidence in the light of the whole record."\textsuperscript{262} This standard significantly limits the court's

\textsuperscript{256} \textit{CAL. CIV. PROC. CODE} § 1094.5(a) (West Supp. 1996).

\textsuperscript{257} \textit{Id.} (emphasis added).

\textsuperscript{258} Temescal Water Co. v. Department of Pub. Works, 280 P.2d 1, 8 (Cal. 1955).

\textsuperscript{259} \textit{CAL. CIV. PROC. CODE} § 1094.5(a) (West Supp. 1996).

\textsuperscript{260} \textit{Id.}

\textsuperscript{261} \textit{Id.} § 1094.5(c). In fact, the court has the discretion to alter the level of review to an independent judgment standard, but legislative provision could be made to limit CID review to the lower substantial evidence standard. \textit{Id.}

\textsuperscript{262} \textit{Id.}
scope of review. Though a seemingly vague standard, it is an effective tool in limiting a court's discretion.

Thus, the writ limits the court's standard of review and scope of inquiry, and eliminates the need for a jury trial. This greatly enhances efficiency compared to a standard court proceeding such as is normally instituted in cases of CID restriction enforcement.

Though normally used to judicially review the decisions of state and municipal administrative agencies, a writ of administrative mandamus has also been applied to corporations and private hospital boards acting in a quasi-judicial manner. Hence, it is no great stretch of the statute's intent to include CIDs within its purview.

The result would be that CIDs would conduct their own hearings and generate a record for review by the court. This alternative would be far less costly than a full court case. Such a hearing would be made even more efficient, and lead to a decrease in the number of actions being brought, by the addition of one simple requirement that the association board would have to prove in such a hearing: an actual harm caused by the violation.

B. The Requirement of a Provable Harm

In this context, a provable harm would take the form of any real injury to another unit owner caused by the violation of the CID restriction. For example, this could consist of a neighbor's allergic reaction to a cat, or aesthetic offense being taken due to the presence of a pickup truck or satellite dish. In fact, any complaint which arose from the violation would

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264. Id. If it seems to the reader that the substantial evidence standard is vague, it may be comforting to note that a prominent authority in the area of administrative law, and now Supreme Court Justice, Stephen Breyer, has arrived at a similar conclusion. Id. at 216. "It is not easy to determine in the abstract precisely what the 'substantial evidence' standard requires of a court..." Id. at 216-17.
265. Id. at 216.
266. Anton v. San Antonio Community Hosp., 567 P.2d 1162 (Cal. 1977) (holding that administrative mandamus is appropriate to review actions of non-governmental agencies).
suffice. The injection of this simple standard would simultaneously cure many of the ills which currently plague CID restriction enforcement.\textsuperscript{268}

It would dispense with the difficult and time-consuming inquiry into whether a particular restriction is reasonable.\textsuperscript{269} A restriction, the violation of which results in a complaint or injury is, by definition, a reasonable restriction because its enforcement provides a benefit to the complaining party.\textsuperscript{270} If the complaint-causing restriction had not been violated, there would have been no harm to the complaining party. Thus, the court would not need to inquire into whether the restriction is reasonable in the abstract, because the facts of a particular case would provide de facto proof of its reasonableness.

Elements of the social norms mentioned above would be artificially injected into the proceeding by requiring that any enforcement proceeding only be undertaken if there is a provable harm caused by the violation of the restriction. Social norms, which tend to correct problems more efficiently, would be allowed to function. Under the proposal, the fact that a complaint was made to the association board would, in most cases, demonstrate that those social norms had failed to rectify the problem.\textsuperscript{271} This would then make it more appropriate to invoke a legal remedy because the best cost-avoider has, in that instance, failed.\textsuperscript{272}

Efficiency is further enhanced because proof of a single harm would be all that is necessary to dispose of the issue. Therefore, so long as the veracity of the complaint is established, there is no need for the sort of fact-intensive determinations that so concerned the Nahrstedt court.\textsuperscript{273}

Similarly, the fear of lawsuits against association board members, the third problematic area in CID enforcement, would also be assuaged.\textsuperscript{274} Requiring that a provable harm

\begin{itemize}
\item \textsuperscript{268} See supra part III.C-D.
\item \textsuperscript{269} See supra part II.B.
\item \textsuperscript{270} See supra part II.B.
\item \textsuperscript{271} See generally Ellickson, supra note 209.
\item \textsuperscript{272} See id. Ellickson repeatedly noted that the subjects of his study only invoked legal remedy where social norms had failed. See id.
\item \textsuperscript{273} Nahrstedt v. Lakeside Village Condo. Ass'n, 878 P.2d 1275, 1289 (Cal. 1994). The court noted its concern over "a fact-intensive determination that can only be made by examining in detail [the particular facts]." Id.
\item \textsuperscript{274} See supra part III.C.
\end{itemize}
be a condition precedent to enforcement would prevent many of the problems which motivate inefficient preemptive enforcement.\textsuperscript{275}

Such a requirement would release association board members from the fear of allegations of arbitrary enforcement.\textsuperscript{276} If a board member can only enforce those rules the violation of which has resulted in a complaint or injury, the scope of enforcement is narrowed. For example, a cat spotted sitting in a window would not call for enforcement unless another resident complained that the very sight of it was offensive to him or her. Therefore, the board can focus on those violations which in fact injure, harm, or offend another resident. Thus, it would be unnecessary to venture into the realm of enforcement for its own sake, or enforcement which is effected merely to prevent later problems with waiver or arbitrary enforcement allegations.

Similarly, the conflict of interest problem for the association lawyers would be minimized.\textsuperscript{277} Often, these lawyers are the very ones who profit from the legal enforcement.\textsuperscript{278} Thus, the impartiality of their advice is less than perfect.\textsuperscript{279} With the requirement of a provable harm, their advice would be dictated not by self-interest, or by interpretation of an increasingly vague body of law, but rather by the presence or absence of a single fact — a provable harm.

\textbf{V. Conclusion}

This comment has attempted to show that CIDs are sui generis. They are wholly distinct from any other entity in the legal landscape. It follows that the legal system's attempt to impose rule structures from other areas of the law has resulted in an unworkable system. One cannot pretend that the unique structure of the CID does not demand new remedies. To act as the \textit{Nahrstedt} court did, and attempt to remedy the problem through obstructive standards, is no solution. It is disingenuous to propose that the law of equitable servitudes can be applied, without modification, to a new and different set of circumstances.

\textsuperscript{275} See supra part III.B-C.
\textsuperscript{276} See supra part III.C.
\textsuperscript{277} See supra text accompanying notes 184-86.
\textsuperscript{278} See supra text accompanying notes 184-86.
\textsuperscript{279} See supra part III.B.
CIDs are a relatively new phenomena in the United States, and so it is natural that the courts have not yet fashioned an effective set of remedies for the special problems they pose. This comment simply aims to propose one possible solution.

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