

TYRANNICAL HOAS AND HOW TO REIGN IN THEIR FORECLOSURE POWER AND FURTHER PROTECT HOMEOWNERS

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I. INTRODUCTION

A growing number of Americans live in communities governed by Property Owners Associations (“POAs”). POAs include homeowners’ associations (“HOAs”), condominium associations, and housing cooperatives.¹ HOAs are governed primarily by state laws.² While these laws are not nationally uniform, HOAs are given an enormous amount of power and discretion which can significantly affect their residents. Use of one of these powers, the power to foreclose on a homeowner’s property, can be devastating to the homeowner since it can be their primary residence and can result in loss of the equity in the property.

This Article examines the growth of HOAs, the lack of proper training for HOA board members and property managers, and the problems resulting from them having too much power, especially when they exercise their power to foreclose on homes. It proposes solutions to limit that power and to help protect homeowners and their property. Section II will discuss the prevalence of HOAs; Section III will discuss some of the benefits and current problems with HOAs; Section IV will discuss homeowner-friendly statutes regarding assessments, liens, and foreclosures; Section V will discuss recommendations, and Section VI is the conclusion.

II. THE PREVALENCE OF HOAS

Property Associations were created in England, and the first HOA in the United States was established in Boston, Massachusetts, in 1844.³ During the next

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1. *Four Different Types of Planned Community Associations*, S. FLA. L., PLLC (Jan. 7, 2021), <https://www.southfloridalawpllc.com/2021/07/29/four-different-types-of-planned-community-associations/> (showing the different types of homeowners’ associations).

2. *HOA Laws Vary Among States*, HOMEOWNERS PROT. BUREAU, LLC, <https://www.hopb.co/hoa-state-laws#> (last visited Aug. 3, 2024).

3. Gemma Giantomasi, Note, *A Balancing Act: The Foreclosure Power of Homeowners’ Association*, 72 FORDHAM L. REV. 2503, 2505 (2004).

century, POAs became more common, especially in New England and the tri-state area around New York.⁴ During the 1960s and 1970s, POAs became common in the lives of most U.S. homeowners.⁵

As of October 2022, 53% of all homeowners live in HOA communities; HOAs in the United States now run 355,000 communities, and an average of twenty-two new associations form each day.⁶ Approximately 8,000 new HOA communities form each year.⁷ In 2021, 82.4% of newly built homes sold were part of HOA communities.⁸ HOA communities control about forty million housing units in the United States.⁹

Not surprisingly, the three most populous states, California, Florida, and Texas, are the states with the most HOAs.¹⁰ “California has the most HOAs (50,010) and the most residents living in an HOA community (14.3 million).”¹¹ Florida has the highest percentage of residents living in HOA communities (44.8%).¹² Texas has 21,470 HOAs, and roughly 6.10 million Texas residents live in HOAs.¹³ South Dakota, West Virginia, and Arkansas have the fewest HOAs, and South Dakota has the fewest homes in HOAs.¹⁴ “West Virginia has the highest homeownership rate (78.2%) but one of the lowest rates of HOA membership (2.9%).”¹⁵ Arkansas has the lowest percentage of residents living in HOAs at 1.9%.¹⁶ As you might expect, HOAs are more common in newer homes than older ones.¹⁷ In 2021, 82.4% of new homes sold were part of HOA communities, an increase of 2.74% year-over-year, and 66.9% of new homes completed were part of HOA communities, up 2.92% from 2020.¹⁸

In Florida, the third most populous state, there is 66.2% homeownership statewide.¹⁹ Florida has 48,940 HOAs.²⁰ Approximately 9.65 million people in Florida live in an HOA community.²¹ This includes 25.1% of Florida’s homeowners.²² “Each HOA in Florida has an average of 197 residents.”²³ In the United

4. *Id.*

5. *Id.*

6. *HOA Statistics*, IPROPERTYMANAGEMENT, <https://ipropertymanagement.com/research/hoa-statistics> (Oct. 9, 2022).

7. *Id.*

8. *Id.*

9. *Id.*

10. *Id.*

11. Shane Sentelle, *Top HOA Statistics and Trends of 2024*, THIS OLD HOUSE, <https://www.thisoldhouse.com/storage-organization/reviews/hoa-statistics> (Jan. 14, 2024).

12. *HOA Statistics*, *supra* note 6.

13. *Id.*

14. *Id.*

15. *Id.*

16. *Id.*

17. *Id.*

18. *Id.*

19. *Id.*

20. *Id.*

21. *Id.*

22. *Id.*

23. *Id.*

States, associations have elected volunteer boards; the board members must own property in the HOA, and they are supposed to operate the association.²⁴ Generally, there are three to five members on an HOA board, with the required number stated in the articles of incorporation or bylaws.²⁵ State statutes can set a minimum number of board members, and the Internal Revenue Service (“I.R.S.”) requires all nonprofits registered at the federal level maintain a minimum of three members on the board of directors.²⁶ Florida has a board member certification requirement for HOA, condominium associations, mobile home associations, and co-op associations, but most states do not have such a requirement.²⁷

A. Lack of Required Training for HOA Boards and Property Managers

Most HOA board members have no training requirement despite it being an important job. It is a job that requires them to make decisions that can greatly impact the homeowners’ and occupiers’ lives.²⁸ These decisions include how much to charge for assessments and how to enforce the rules in the declarations and covenants.²⁹ More specifically, board members make decisions like who should be fined for violations related to their property, who should have a lien placed on their property for getting behind on assessment payments or not paying a fine, and whose property should be foreclosed once a lien is in place.³⁰

Until July of 2024, Florida had two ways for board members to become certified; one way did not include training. A board member could either submit a letter to the secretary of their association confirming that they had both thoroughly read through and understood the association’s governing documents, and agree they would abide by, uphold, and enforce the documents to the best of their ability, *or they could* submit proof of their completion of a State of Florida approved association certification course.³¹ The certification must be completed within ninety days of their election or appointment and lasts up to four years as long as they are a board member.³² An association should suspend a director who has not filed their certificate within the required ninety days.³³ If suspended, the board member stays suspended until they provide proof of their certification, and the

24. *Rules and Expectations of Managers and HOA Boards of Directors*, KEYSTONE (Mar. 11, 2024), <https://www.kppm.com/rules-and-expectations-of-managers-and-hoa-boards-of-directors/>.

25. *How Many Board Members Should an HOA Have?*, HIGNELL COS. (Apr. 28, 2022), <https://blog.hignellhoa.com/how-many-board-members-should-an-hoa-have>.

26. *How Many Board Members Should a Nonprofit Have?*, FUNDING FOR GOOD (Mar. 13, 2022), <https://fundingforgood.org/how-many-board-members-should-a-nonprofit-have/>.

27. *See generally* FLA. STAT. § 723.078 (2023).

28. Steve Weil, *Who Should Make Decisions in HOAs: The Board or the Members?*, EDUC. CMTY. FOR HOA HOMEOWNERS, <https://echo-ca.org/who-should-make-decisions-hoas-board-or-members/> (last visited Aug. 5, 2024).

29. *Id.*

30. *See generally id.* (noting board decisions can affect assets and long-term financial planning).

31. FLA. STAT. § 720.3033(1)(a)-(d) (2023).

32. § 720.3033(1)(a)(1)-(2).

33. § 720.3033(1)(b).

board can temporarily fill their seat.³⁴ The certification course can be taken either online or in a physical classroom.³⁵ Self-study options can be completed at home, usually in less than four hours.³⁶ The cost is usually less than \$100.³⁷

Although HOAs have elected volunteer boards, neighborhood volunteers only operate about 35% of HOAs; the increase in HOAs has created a market for professional association managers.³⁸ Approximately 8,500 association management companies operate in the United States, and they have about 102,500 employees.³⁹ One does not need a license to become a community association manager (“CAM”) in most states.⁴⁰ Some states require that CAMs earn a state license; those states include Florida, Illinois, Virginia, and Nevada.⁴¹

The lack of required licensure and training is concerning considering CAMs deliver services such as association operations, system and equipment maintenance, finance, budgeting, customer service, resident relations, staff and vendor management, and compliance.⁴² CAMs work closely with board members, community leaders, and homeowners.⁴³ They work on-site to perform inspections, hire and supervise vendors, and create budgets.⁴⁴ A CAM also “oversees maintenance, ensures compliance, responds to emergencies, approves architectural modifications, and helps to keep the community running smoothly.”⁴⁵ Essentially, CAMs manage the community’s lifestyle and the quality of life of its homeowners.

About “7,500 HOAs are considered large-scale, meaning they have at least 1,000 lots or homes and a \$2 million annual budget.”⁴⁶ Homeowners pay HOAs \$103.2 billion per year.⁴⁷ About \$25.8 billion or 25% of the money paid is put toward reserve funds for maintenance of the shared property.⁴⁸ HOA fees vary by state, property type, and amenities, but the average HOA monthly assessment for a single-family home is \$250.⁴⁹ Some people live in communities that have two HOAs, and they generally must pay assessments to both associations. Obviously,

34. *Id.*

35. *Newly Elected Condo, HOA and Coop Board Members Must Take a Certification Course in Florida (2024)*, PROLICENSE FLA., <https://www.flcaa.com/post/newly-elected-condo-hoa-coop-board-members-must-take-certification-course-florida> (July 4, 2024).

36. *Id.*

37. *Florida Board Member Certification Online Course of Condo, HOA & Coop*, PROLICENSE FLA., <https://www.flcaa.com/board-certification-condo-hoa-fl> (last visited Aug. 4, 2024).

38. *HOA Statistics*, *supra* note 6.

39. *Id.*

40. *Is a Community Association License Necessary to Work in the Industry?*, VENDORSMART (Dec. 28, 2022), <https://blog.vendorsmart.com/community-association-license/>.

41. *Id.*

42. *How to Become a Licensed Community Association Manager*, FIRSTSERVICE RESIDENTIAL (Apr. 28, 2022), <https://www.fsresidential.com/corporate/news-and-articles/articles/why-and-how-to-become-a-community-association-mana/>.

43. *Id.*

44. *Id.*

45. *Id.*

46. *HOA Statistics*, *supra* note 6.

47. *Id.*

48. *Id.*

49. *Id.*

this can add up, especially when people retire, and their income is fixed but the assessments increase over time. Dealing with two HOA boards can also be difficult, especially if their members are untrained.

B. HOAs Are Popular with Developers and Cities

Both cities and developers see monetary value with HOAs, which are basically private governments.⁵⁰ Developers offer to build subdivisions and private roads, put in a private sewer system, a private pool, and other amenities to attract buyers.⁵¹ The home buyers pay for the amenities through the assessment fees.⁵² HOAs are popular with cities because cities are often low on funds, and they are not responsible for building the HOA roads and sewer system and do not have to take care of the pool and any other amenities.⁵³ Evan McKenzie, a University of Illinois Chicago political science professor, explains that cities also favor HOA developments because “they get a whole bunch of new taxpayers paying a full property tax and they don’t have to provide the services to them they have to provide to everybody else.”⁵⁴ As Professor McKenzie explains, the primary function of an HOA is to keep property values up, and the way HOAs accomplish this is by enforcing a variety of rules found in the HOA declarations and covenants.⁵⁵

Declarations and covenants are documents created by the property developers limiting what residents can and cannot do with their property, and contain uniformity requirements which help maintain property values and attract buyers.⁵⁶ Each HOA has a board responsible for enforcing the declarations and covenants. Once a developer turns the development over to a not-for-profit HOA, the board can amend the declarations and covenants.⁵⁷ These documents can also be amended to limit an HOA board’s power. The power of HOAs can also be strengthened because HOAs can develop policies that would not be permitted by governments, such as imposing limits on the residents right to free speech.⁵⁸ Unlike governments, HOAs are private entities and are not required to protect First Amendment rights.⁵⁹ For example, many HOAs do not permit residents to put flags or political signs in their yard.

50. Emily Stewart, *When Your Neighbors Become Your Overlords How HOAs Become an Unnecessary Evil*, VOX (Apr. 20, 2023, 8:30 AM), <https://www.vox.com/money/23688366/hoa-con-do-board-john-oliver-real-estate-coop>.

51. *Id.*

52. *Id.*

53. *Id.*

54. *Id.*

55. *Id.*

56. Shady Clever, *Understanding Covenants Restrictions: A Comprehensive Guide to Property Restrictions and Legal Obligations*, DANDY L. (Nov. 20, 2023), <https://dandyllaw.com/understanding-covenants-restrictions-a-comprehensive-guide-to-property-restrictions-and-legal-obligations/>.

57. *Id.*

58. Stewart, *supra* note 50.

59. *Id.*

The common property in an HOA community is usually owned by the HOA; individuals own their individual homes and their own “parcel of real estate.”⁶⁰ When homeowners take title to their property, they automatically become members of an HOA if the neighborhood has one.⁶¹ After taking title, the property owners must comply with the HOA’s governing documents.⁶² There are some HOAs where membership is voluntary, but there are very few of those HOAs, and this Article does not apply to them. HOAs pay for their operation and activities through assessments paid by each homeowner.⁶³ The power to impose assessments is an affirmative requirement created in the HOA’s declaration.⁶⁴ The requirement to pay assessments, like all the HOA requirements under the declarations and covenants, runs with the land, and all successors in title are bound.⁶⁵ Owners can be forced to satisfy their financial obligations to the HOA, and an HOA can sue to collect payment of assessments or fines.⁶⁶

Collection of assessments is the only way to pay for HOA expenses, so when owners fail to pay assessments, it can negatively affect the HOA’s purpose.⁶⁷ HOAs budget their expenses on the assumption each owner will pay their required share of the HOA’s common expenses through assessments.⁶⁸ If property owners fail to pay their assessments, it can cause HOAs to have problems with planning, budgeting, and paying expenses.⁶⁹ Also, HOAs may not be able to implement the services they are obligated to perform.⁷⁰ The failure by some homeowners to pay their assessments can also lead to an increase in assessments for all owners.⁷¹ In addition, if owners learn some owners are not paying their assessments, some owners may lose their incentive to pay their own assessments.⁷² Failure to pay assessments could result in unstable cash flow to the HOA, which would “defeat the very reasons for the creation of a community having mutual covenants, restrictions, and obligations.”⁷³

III. OVERVIEW OF BENEFITS OF AND CURRENT PROBLEMS WITH HOAS

A. *Benefits to Living in or Owning Property in a HOA*

The HOA homeowners, like developers and cities, are supposed to get benefits from HOA developments. Homeowners have common areas like pools,

60. Giantomasi, *supra* note 3, at 2509.

61. *Id.*

62. *Id.*

63. *Id.*

64. *Id.*

65. *Id.*

66. *Id.* at 2510.

67. *Id.* at 2512.

68. *Id.*

69. *Id.*; see Stewart, *supra* note 50.

70. Giantomasi, *supra* note 3, at 2512.

71. *Id.*

72. *Id.*

73. *Id.* (internal quotations omitted).

playgrounds, tennis courts, etc., that they can enjoy.⁷⁴ The HOA provides upkeep of common areas, including the landscaping at the entrances and other areas, so homeowners do not have to worry about getting people to volunteer to do those tasks.⁷⁵ They often have security gates and sometimes have paid security or neighborhood watch programs which can help prevent crime.⁷⁶

HOAs also help create uniformity in the neighborhood. They require residents to maintain their lawns and have limits on landscaping, so residents do not have to worry about neighbors' lawns being overgrown and having rodents or snakes.⁷⁷ This obviously helps with resale value. In addition, residents must keep the exterior of their homes in good condition, and there are usually limitations on exterior paint colors to keep a cohesive look in the neighborhood, to limit eyesores, and help resale values.⁷⁸ There are also often limits on what residents can put on their property such as chairs, lawn ornaments, and signs.⁷⁹ This too can help limit eyesores and increase resale values. In addition, there can be limits on parking cars, so neighbors cannot have several cars parked in the driveway, or have cars parked on the lawn or all over the streets.⁸⁰ Also, people generally cannot leave garbage and recycling cans out for days because there are controls over placement of the cans.⁸¹ Homeowners usually do not have to worry about neighbors' houses being used for party homes and vacation homes such as Airbnb's because there are often limits on short term rentals and limits on noise.⁸²

Living in an HOA can also create a sense of community because the arrangement encourages residents to participate in HOA meetings and organized social events.⁸³ In addition, residents see each other in common areas and community amenities.⁸⁴ Overall, HOAs enhance property values; "[h]ouses in HOAs are worth 5-6% more than similar homes outside of HOAs."⁸⁵

74. Based upon my experience practicing law in Florida; *see also 6 Benefits to Living in an HOA*, ASSOCIA, <https://hub.associaonline.com/blog/hoa-benefits> (last visited Aug. 4, 2024).

75. *6 Benefits*, *supra* note 74.

76. Based upon my experience practicing law in Florida; *see also HOA 101: What are the Pros and Cons of an HOA?*, ASSOCIA, <https://hub.associaonline.com/blog/hoa-pros-and-cons> (last visited Aug. 4, 2024).

77. Based upon my experience practicing law in Florida; *see also HOA Landscaping: Everything a Homeowner Should Know*, ELITE MGMT. SERVS., <https://emspm.com/hoa-landscaping/> (last visited Aug. 4, 2024).

78. Based upon my experience practicing law in Florida; *see also HOA Landscaping*, *supra* note 77; *see also Stewart*, *supra* note 50.

79. *See discussion infra* Section III.B; *see also Stewart*, *supra* note 50.

80. *See discussion infra* Section III.B; *see also Stewart* *supra* note 50.

81. *See discussion infra* Section III.B; *see also Stewart* *supra* note 50.

82. Based upon my experience practicing law in Florida; *see also HOAs and Airbnb: What to Consider*, VACASA, <https://www.vacasa.com/homeowner-guides/hoa-and-airbnb> (last visited Aug. 4, 2024).

83. *See 6 Benefits*, *supra* note 74.

84. *Id.*

85. Tony Mariotti, *HOA Stats: Average HOA Fees & Number of HOAs by State (2024)*, RUBY HOME REAL EST. (Jan. 22, 2024, 3:48 PM), <https://www.rubyhome.com/blog/hoa-stats/>.

B. *Some Disadvantages to Living in or Owning Property in a HOA*

There are several disadvantages to living in or owning property in an HOA. Security gates can hinder family and friends from visiting and can breakdown and cause traffic issues.⁸⁶ People who have physical issues that prevent them from maintaining their lawns and who cannot afford to pay for lawn care can get fined for not keeping up with mowing, trimming, and weeding.⁸⁷ Residents are limited on what color they can paint their home and what they can do to enjoy the outside of their home.⁸⁸ Also, homeowners have to get approval from the board for things, including painting their home, taking down a tree, putting on a new roof, or adding a parking slab.⁸⁹ Where to park cars can become an issue if a homeowner has more than one or two vehicles, and wants to use their garage for things like storage or a workout room.⁹⁰ Also, these parking limits can affect the ability to have guests stay overnight.⁹¹ Limits on what one can do to fix their vehicles at home can lead to paying someone else to do repairs that a homeowner could otherwise do themselves. Self-expression is also limited by restrictions on having signs in the yard or even inside windows.⁹²

There are also several financial disadvantages to living in or owning property in an HOA, such as having to pay regular assessments, usually monthly, quarterly, or yearly.⁹³ Homeowners could even live somewhere where they have more than one HOA, and they must pay assessments to both HOAs, which can be confusing and costly.⁹⁴ Sometimes, residents must pay regular assessments even if there are no common areas that can be enjoyed or only one amenity, like a pool or tennis court. Also, residents may have amenities they have to pay for, but they do not use. In addition, homeowners must pay regular assessments even if the common areas are not properly kept up. In other words, homeowners cannot stop paying

86. Based upon my experience practicing law in Florida.

87. Based upon my experience practicing law in Florida.

88. Based upon my experience practicing law in Florida; *see HOA Landscaping, supra* note 77; *Homeowners' Associations: Pros and Cons of HOAs*, SEC. BANK & TR. CO. (Aug. 18, 2022), <https://www.security-banks.com/blog/pros-and-cons-of-hoas>.

89. Based upon my experience practicing law in Florida; *What Projects Require HOA Approval? Plan Carefully Before Starting a Project*, PROP. MGMT. INC. (Feb. 20, 2023), <https://www.propertymanagementinc.com/blog/what-projects-require-hoa-approval-plan-carefully-before-starting-a-project>.

90. Based upon my experience practicing law in Florida; *What are the Rules? Defining Parking Rules in HOA-Governed Communities*, SPECTRUM ASS'N MGMT., <https://spectrumam.com/hoa-over-night-parking/> (last visited Aug. 4, 2024).

91. *What are the Rules?*, *supra* note 90.

92. Stewart, *supra* note 50. In addition, HOAs have historically been discriminatory and exclusionary. HOA neighborhoods have more white and Asian residents than non-HOA neighborhoods. Also, black residents continue to be discriminated against in HOAs; *see id.*

93. Based upon my experience practicing law in Florida; Amy Loftsgordon, *What are HOA Assessments?*, NOLO (Apr. 19, 2023), <https://www.nolo.com/legal-encyclopedia/what-are-hoa-assessments.html>.

94. Based upon my experience practicing law in Florida; Justin Nedell, *How to Know If My Home Has Multiple Governing Associations*, PROLOGIX (2022), <https://www.proplogix.com/blog/how-to-know-if-my-home-has-multiple-governing-associations/>.

assessments just because the HOA is not doing its job.⁹⁵ In addition, homeowners could have to pay special assessments when a common area needs major maintenance.⁹⁶ A special assessment is a short-term fee levied by the HOA to cover such additional costs.⁹⁷ HOAs can also raise the amount of regular assessments, which can make them even more burdensome for homeowners to pay, especially for long term and elderly residents.⁹⁸

As far as the assessments are concerned, if any assessments are paid late, the homeowner will likely have to pay late fees and interest.⁹⁹ The HOA may also try to add other fees, like the cost of preparing warning letters that precede the fines even if they were not prepared by an attorney. An HOA may count an assessment payment as late even when a homeowner paid it on time. This can occur when payments are on auto pay, and the homeowner never receives notice from the HOA that the payment should be made to another entity or sent to a different address.¹⁰⁰ This can also happen when an HOA changes property management companies.

Another financial disadvantage to living in or owning property in an HOA is the HOA's ability to fine homeowners for perceived violations of the declarations and covenants. It can be especially difficult when someone owns property located in an HOA they rent because they are responsible for their renter's compliance with all the HOA rules.¹⁰¹ A homeowners' tenant's failure to follow a rule can lead to the HOA imposing fines against the homeowner.¹⁰² Fines can be imposed for little things, including keeping garbage cans out too long or keeping them stored in the wrong place, having brown patches or weeds in your lawn, failing to pressure wash your house or driveway, or having a truck that has a work logo on it parked in the neighborhood.¹⁰³ HOA boards and property management companies have wide discretion to enforce the rules. If a homeowner or their tenant has an unpleasant interaction with an HOA board member or the property management company, this could lead to retaliation, and the homeowner could be targeted and harassed for perceived violations of the HOA declarations and covenants.

Florida HOA homeowners have been sued for having brown patches and weeds in their lawn, and for changing a concrete area in their front yard back to

95. Based upon my experience practicing law in Florida; *To Pay or Not to Pay? How to Handle Failed Payments in Your HOA*, CONDO. ASSOCS. (Nov. 10, 2021), <https://condominiumassociates.com/blog/to-pay-or-not-to-pay-how-to-handle-failed-payments-in-your-hoa>.

96. Based upon my experience practicing law in Florida; Loftsgordon, *supra* note 93.

97. Based upon my experience practicing law in Florida; Loftsgordon, *supra* note 93.

98. See Beth Ross, *How High an HOA Association Can Raise Dues or Assessments*, NOLO (July 27, 2023), <https://www.nolo.com/legal-encyclopedia/how-high-hoa-association-can-raise-dues-assessments.html>.

99. Based upon a review of the statutes of all fifty states; see *Late Charges & Interest*, FINDHOALAW, <https://findhoalaw.com/late-charges-interest/> (last visited Sept. 20, 2024) (discussing consequences of late fees in relation to California civil code).

100. Based upon my experience practicing law in Florida; see *infra* note 238.

101. Amanda Causey, *Renting in an HOA? Understand Who Is Responsible for What*, REAL MANAGE (Nov. 29, 2018), <https://blog.realmanage.com/en-us/renting-hoa-understand-responsibilities-landlord>.

102. *Id.*

103. Based upon my experience practicing law in Florida.

grass.¹⁰⁴ Another Floridian, Larry Murphree, a retired veteran, was fined numerous times for having a small American flag in a flowerpot on his front porch in the Sweetwater community.¹⁰⁵ This harmless and patriotic act led to a twelve-year court fight with his HOA.¹⁰⁶ Mr. Murphree “won” the case in 2012, but he only won \$1,223 in damages.¹⁰⁷ He eventually moved out of the community.¹⁰⁸ In the Villages community in Florida, Wayne and Bonnie Anderson were fined \$4,800 in 2019 and 2020 for displaying a small white cross on their property.¹⁰⁹ In Venice, Florida, homeowners were fined by their HOA for hanging their laundry on a clothesline.¹¹⁰

These stories are not unique to Florida. John Oliver in a *Last Week Tonight* segment talked about a ninety-two year old retired veteran in Arizona who often sat on a bench in his front yard where he ate snacks and greeted neighbors.¹¹¹ He was given a notice by his HOA to remove the bench or it would be removed for him.¹¹² In Indiana in 2019, a homeowner and small business owner, Jenn Kampmeier, was fined by the Lakes at Hayden Run HOA for parking her catering van in her driveway and for running her catering business out of her home.¹¹³ The HOA sued Ms. Kampmeier even though she agreed not to park her van in the driveway.¹¹⁴ The HOA won \$45,000 in fines, attorney’s fees, and costs.¹¹⁵ Ms. Kampmeier and her family ended up moving out of the Lakes at Hayden Run community.¹¹⁶ In Kansas, Jim Hildenbrand was fined and then sued by The Avignon Villas HOA for building a twelve- to eighteen-inch retaining wall around some foundation plant beds that surrounded his home, and Mr. Hildenbrand countersued the HOA.¹¹⁷ According to the Kansas City Star, the cost of the litigation reached \$400,000 in 2016, and the Wall Street Journal later reported the cost of litigation had reached one million dollars.¹¹⁸ In Conroe, Texas, a HOA fined

104. Based upon my experience practicing law in Florida.

105. *Murphree v. Tides Condo.*, 2014 WL 1293863, at *4 (M.D. Fla.).

106. *Id.*

107. Deborah Goonan, *Florida Lawmakers Consider Revoking HOA Power to Fine Homeowners*, INDEP. AM. COMTYS. (Feb. 8, 2022), <https://independentamericancommunities.com/2022/02/08/florida-lawmakers-consider-revoking-hoa-power-to-fine-homeowners/>.

108. *Id.*

109. Valarie Boey, *Resident Says HOA in The Villages Is Suing Her for Displaying Cross, Lawn Ornaments*, FOX, <https://www.fox35orlando.com/news/a-small-cross-is-causing-big-controversy-in-the-villages> (June 11, 2021, 5:56 AM).

110. Corey Beckman, *Venice Homeowners Association Fines Resident \$2,500 over Legally-Protected Clothesline*, FOX, <https://www.fox13news.com/news/venice-homeowners-association-fines-resident-2500-over-legally-protected-clothesline> (May 8, 2020, 4:54 PM).

111. *Last Week Tonight with John Oliver* (HBO television broadcast Apr. 10, 2023).

112. *Id.*

113. Goonan, *supra* note 107.

114. *Id.*

115. *Id.*

116. *Id.*

117. *Id.*

118. *Id.*

a family because their children put up their artwork in the home's windows, and a HOA in Peoria, Arizona, fined a family for their children's driveway chalk art.¹¹⁹

HOAs in several states have fined homeowners for environmentally friendly things the owners have done. As a result, several states have passed or considered passing laws prohibiting HOAs from enforcing such restrictions.¹²⁰ For example, in California, HOAs were fining homeowners for not watering their lawns during their historic drought, so legislators had to pass laws prohibiting HOAs from issuing such fines.¹²¹ Both Colorado and Utah passed laws preventing HOAs from enforcing declarations and covenants that do not allow homeowners to install solar panels.¹²² Another such issue that legislatures have addressed is HOAs not allowing homeowners to put in electric car charging stations or have drought-tolerant and native plants on their properties.¹²³

Once a fine is imposed on a homeowner, in several states, the HOA can put a lien on the homeowner's property for an unpaid fine.¹²⁴ If the fine remains unpaid after the lien is placed on the property, the HOA can foreclose on the property.¹²⁵ This means homeowners can lose their property simply because they violated a HOA rule, were fined for it, and did not pay the fine. In Florida, a HOA can get a lien for fines amounting to \$1,000 or more.¹²⁶ HOAs can also place liens on properties when homeowners fall behind on paying assessments, and those late assessment payments are usually subject to both late fees and interest.¹²⁷ The liens are also subject to foreclosure.¹²⁸ In some states, a lien can be placed on a property for simply being behind as little as one assessment or for less than \$200.¹²⁹

Once a lien is placed on the property, a homeowner may also be responsible for paying the attorney's fees and costs involved in the HOA imposing the lien and collecting the money.¹³⁰ The amount of attorney's fees and costs grows if the HOA files a foreclosure lawsuit.¹³¹ If there is no settlement, and the HOA wins the foreclosure lawsuit, the homeowner almost certainly loses their property unless they can pay the full amount of the judgment because the property is then auctioned

119. *Id.*

120. *Id.*

121. *Id.*

122. *Id.*

123. *Id.*

124. Based upon a review of the statutes of all fifty states; *see, e.g.*, Amy Loftsgordon, *Ohio HOA and COA Foreclosures*, NOLO, <https://www.nolo.com/legal-encyclopedia/ohio-hoa-foreclosures.html> (July 9, 2024) (“In Ohio, an HOA or COA is entitled to a lien for unpaid assessments and related charges once the amount due is ten days late.”).

125. Based upon a review of the statutes of all fifty states; *see also* Loftsgordon, *supra* note 124.

126. FLA. STAT. § 720.305(2) (2024).

127. Loftsgordon, *supra* note 93.

128. *Id.*

129. *See* OHIO REV. CODE ANN. § 5312.12 (West 2010) (requiring no minimum fine amount before a lien is placed); *but see* FLA. STAT. § 720.305(2) (2024) (requiring a fine of \$1,000 or more before a lien can be placed).

130. FLA. STAT. § 720.3085(1)(a) (2024).

131. Based upon my experience practicing law in Florida.

off to pay the money the homeowner owes.¹³² Again, a loss of someone's property can result from owing an HOA as little as under \$200 in assessments or from a small fine, depending on the state the HOA is located in. What often becomes the cost prohibitive factor for a homeowner in these situations is the attorney's fees and costs involved. They usually add up to much more than the fine or assessments that the homeowner owes. This is not uncommon.¹³³

Just like with a mortgage foreclosure, a successful HOA foreclosure will result in a homeowner losing their property unless they can pay what is owed under the foreclosure judgment, including attorney's fees and costs, before the property is sold.¹³⁴ Most HOA property owners do not know their property can be sold at an auction for much less than what the property is worth; the sale amount just has to meet or exceed what is owed to the HOA per the foreclosure judgment.¹³⁵ Homeowners often do not understand the gravity of the consequences when they get fined by their HOA or fall behind on their assessments, including that it can cost them their home and any equity they may have in their home. This is by far the worst consequence and biggest downside to living in a community that has a HOA. It is also true for property owners who own condominiums, since they are governed by condominium associations that have basically the same power to foreclose on owners who fall behind on assessments.¹³⁶

There is no national database regarding HOA foreclosures.¹³⁷ An August 2023 Colorado Sun investigation found, since 2018, Colorado HOAs filed about 3,000 foreclosures, and about 8% ended in sales at auction.¹³⁸ There was a moratorium on most foreclosures by mortgage lenders during the COVID-19 pandemic.¹³⁹ The Community Association Institute proposed pausing foreclosures until at least July 31, 2021.¹⁴⁰ They also proposed waiving late fees and penalties for owners who experienced temporary financial hardships due to COVID-19.¹⁴¹

132. See generally Bob Gourley, *What Happens After an HOA Foreclosure?*, AXELA CONDO & HOA COLLECTIONS (May 25, 2022), <https://www.axela-tech.com/blog/what-happens-after-hoa-foreclosure/> (describing an auction as one of the few options a HOA has for recovering its money).

133. Based upon my experience practicing law in Florida.

134. Natalie Campisi, *Foreclosure: What Is It and How It Works?*, FORBES, <https://www.forbes.com/advisor/mortgages/foreclosure-basics/> (May 19, 2022, 6:46 AM).

135. See generally Hannah Warrick, *How to Buy a Foreclosed House in Ohio (2024 Update)*, CLEVER REAL EST., <https://listwithclever.com/real-estate-blog/how-to-buy-a-foreclosed-home-in-ohio-an-in-depth-guide/#faqs> (May 1, 2024) (listing a "pro" of buying a foreclosed house in Ohio as being able to purchase the home for below market price).

136. Loftsgordon, *supra* note 124.

137. Sarah Holder, *When the Homeowners Association Comes for Your Home*, BLOOMBERG (Sep. 14, 2023, 6:00 AM), <https://www.bloomberg.com/news/features/2023-09-14/hoa-foreclosures-continue-in-colorado-despite-reform>.

138. Jesse Paul, *HOA-Foreclosed Homes in Colorado Are Auctioned off for a Fraction of Their Market Value, Erasing Years of Equity*, COLO. SUN, <https://coloradosun.com/2023/08/14/hoa-foreclosed-homes-auction-equity/> (Jan. 3, 2024, 9:36 AM).

139. Brittany Freeman et al., *They Faced Foreclosure Not from Their Mortgage Lender, but from Their HOA*, ROCKY MOUNTAIN PBS (Apr. 19, 2022), <https://www.rmpbs.org/blogs/news/colorado-hoa-foreclosure-investigation/>.

140. *Id.*

141. *Id.*

However, HOAs had wide discretion to make foreclosure decisions.¹⁴² Sadly, from April 2020 through July 2021, in Colorado, about 450 HOAs filed more than 730 foreclosure cases.¹⁴³

Other problems with HOAs having so much power include selective enforcement of the rules and the degree HOAs pursue payment of past due assessments and fines. Again, HOA boards and property management companies have wide discretion on how to enforce the declarations and covenants.¹⁴⁴ If a homeowner is on bad terms with a HOA board member and/or the property management company, the homeowner can be targeted by them. For example, the homeowner can be harassed for small perceived violations of the HOA rules.¹⁴⁵ If the issue is not fixed, fines, a lien, and foreclosure can follow. A targeted homeowner may also have liens placed on their property once they fall one payment behind on assessments and face foreclosure while other homeowners who are behind on assessments are not pursued as aggressively.¹⁴⁶ This happens more than one might think. Homeowners can become a target for many reasons, such as being outspoken or critical at HOA meetings or on social media, questioning the HOA rules, requesting financial and other HOA records, having a personal dispute with a board member, asking the HOA to enforce rules against other owners, or asking the HOA to keep up common areas.¹⁴⁷

HOAs and property management companies have even sued homeowners for defamation for critical posts the homeowner made on social media and for comments made at board meetings.¹⁴⁸ These lawsuits appear to be more and more common.¹⁴⁹ Florida has a SLAPP (Strategic Lawsuit Against Public Participation) statute; this statute makes it illegal for an association or property management company to file a meritless lawsuit against a homeowner and to file solely because the homeowner has exercised the right to file a grievance with a state agency regarding issues with the HOA or property management company.¹⁵⁰ However, proving a HOA SLAPP violation and selective enforcement of the rules is difficult. SLAPP lawsuits and other lawsuits filed by HOAs against clients can negatively affected their mental health and physical health.¹⁵¹ For some clients, it can become

142. *Id.*

143. *Id.*

144. Stewart, *supra* note 50.

145. Based upon my experience practicing law in Florida; Gregory M. Garrison, *What Constitutes HOA Harassment?*, GREGORY M. GARRISON APC (Nov. 10, 2023), <https://www.garrisontriallawyers.com/blog/2023/11/what-constitutes-hoa-harassment/>.

146. Garrison, *supra* note 145.

147. Based upon my experience practicing law in Florida; *see also* Stewart, *supra* note 50.

148. *See* North Shore Towers Apartments Inc. v. Kozminsky, 193 N.Y.S.3d 310, 312 (2023).

149. *See* Robert Rivas, *Should an HOA Board Member Pursue Legal Action in Response to Criticism?*, S. FLA. BUS. & WEALTH (Nov. 8, 2021), <https://sfbwmag.com/is-taking-legal-action-a-remedy-to-criticism-from-unit-owners/>.

150. FLA. STAT. § 720.304 (2023).

151. Based upon my experience practicing law in Florida; *see generally* Blake Harris, *Beyond Money: The Emotional and Psychological Cost of Lawsuits*, BLAKE HARRIS L., <https://blakeharrislaw.com/blog/the-emotional-and-psychological-cost-of-lawsuits> (last visited Aug. 5, 2024) (discussing the emotional and financial strain lawsuits can bring).

an obsession.¹⁵² In addition, often homeowners do not understand that they cannot stop paying their assessments just because the HOA or condominium association is not keeping up the common areas or is not fixing something related to their property that their condominium association is responsible for.¹⁵³ The failure to pay assessments just gives the association another reason and means to target the property owner.

As previously stated, another problem with HOA lien foreclosures is houses sold after such foreclosures can be sold for much less than the fair market value of the property.¹⁵⁴ In 2019, the South Carolina Supreme Court reversed a HOA foreclosure sale because the court found that the sale price of approximately \$3,000 for a house worth about \$128,000 was so grossly inadequate that it shocked the Court's conscience.¹⁵⁵

C. HOA Actions Impact Real People

The HOA foreclosure on the home of Captain Mike Clauer is pretty typical of the HOA foreclosure process. Captain Clauer was serving in Iraq in 2009.¹⁵⁶ He served as a company commander of an Army National Guard unit assigned to escort convoys.¹⁵⁷ It was extremely dangerous work.¹⁵⁸ He was halfway through his deployment when he got an unexpected and panicked telephone call from his wife, who was living in their Texas home.¹⁵⁹ "She was bawling on the phone and was telling me that the HOA had foreclosed on our house, and it was sold," he says.¹⁶⁰ "And I couldn't believe that could even happen."¹⁶¹ Clauer had a hard time understanding the situation because his \$300,000 house was already completely paid for, and his wife had only missed two HOA assessment payments.¹⁶²

Despite his best efforts to get back to Texas before his family was on the streets, he was too late.¹⁶³ The Clauers' four-bedroom, 3,500-square-foot home was sold for only \$3,500 "on the courthouse steps" through Texas's non-judicial foreclosure process; the \$3,500 was just enough to cover the overdue HOA assessments and legal costs.¹⁶⁴ The new owner quickly sold it for \$135,000.¹⁶⁵ Clauer told NPR: "Having a house like this paid for was huge for us, for our

152. Based upon my experience practicing law in Florida.

153. See *supra* text accompanying note 95.

154. See Warrick, *supra* note 135 and accompanying text.

155. Winrose Homeowners' Ass'n, Inc. v. Hale, 837 S.E.2d 47, 53 (S.C. 2019).

156. Wade Goodwyn, *Not So Neighborly Associations Foreclosing on Homes*, NPR (June 29, 2010, 3:30 PM), <https://www.npr.org/2010/06/29/128078864/not-so-neighborly-associations-foreclosing-on-homes>.

157. *Id.*

158. *Id.*

159. *Id.*

160. *Id.* (internal quotations omitted).

161. *Id.* (internal quotations omitted).

162. *Id.*

163. *Id.*

164. *Id.*

165. *Id.*

retirement plans. We thought we were so far ahead, and now it's like we're starting from the beginning.”¹⁶⁶ The HOA had foreclosed on their \$300,000 home that was completely paid off because his wife had missed two assessment payments.¹⁶⁷ The “[l]awyers for the HOA said that while Clauer’s case is regrettable, it was his and his wife’s fault for not paying their dues in a timely manner.”¹⁶⁸

Fortunately, the Clauer’s were able to sue the HOA and the subsequent buyers of their home in federal court based on the Servicemembers Civil Relief Act, passed by Congress in 2003, enacted to prevent non-judicial foreclosures against military personnel fighting overseas.¹⁶⁹ A non-judicial foreclosure allows an association to foreclose on property without going through the judicial process.¹⁷⁰ There is no litigation and no opportunity to defend the foreclosure in the non-judicial foreclosure action itself.¹⁷¹ The property owner is often sent a notice of delinquency, and they are given a certain amount of time to pay the debt in full.¹⁷² If the property owner fails to pay, the property is sold.¹⁷³ Several states allow non-judicial HOA foreclosures; Florida does not.¹⁷⁴ Happily, the Clauer’s case was settled in 2010, and the Clauers became the owners of their home again as part of the settlement.¹⁷⁵

Situations where elderly homeowners and other vulnerable people are foreclosed upon by a HOA for unpaid assessments has caught the eye of some state legislatures. In 2001, an eighty-two-year-old widow, Wenonah Blevins, was foreclosed upon by her association when she could not pay \$814.50 in assessment fees.¹⁷⁶ Ms. Blevins home was worth \$150,000, but it was sold at auction for only \$5,000.¹⁷⁷ Fortunately, Ms. Blevins was able to file a lawsuit against the association, and she eventually regained ownership of her home.¹⁷⁸ She also won

166. *Id.*

167. *Id.*

168. *Id.*

169. Clauer v. Heritage Lakes Homeowners Ass’n, Inc., 2010 WL 446545, at *2 (E.D. Tex.).

170. *Judicial vs. Non-Judicial Foreclosure Under the Law*, JUSTIA (Oct. 2023), <https://www.justia.com/foreclosure/judicial-vs-non-judicial-foreclosure/>.

171. *Id.* (“If you have a defense to a non-judicial foreclosure, you will need to file a lawsuit in court to raise the defense. By contrast, you would respond to the pre-existing lawsuit if you have a defense to a judicial foreclosure.”)

172. *Id.*

173. *Id.*; *Tax Deed: Definition, How to Clear It, and Tax Deed Sales*, INVESTOPEDIA, <https://www.investopedia.com/terms/t/tax-deed.asp> (Dec. 15, 2023) (“In a tax deed sale, the property with the associated delinquent property taxes is sold.”).

174. Based upon a review of the statutes of all fifty states; Seth Williams, *The Full List of All Judicial and Non-Judicial Foreclosure States in the U.S.*, R.E.TIPSTER, <https://retipster.com/judicial-non-judicial-foreclosure-states-list-map/> (last visited Aug. 5, 2024) (scroll to view an interactive map of the United States, as well as a full list of states).

175. Valerie Wigglesworth & Erinn Connor, *Frisco Soldier Gets Home Back After HOA Foreclosure*, NBCDFW, <https://www.nbcdfw.com/news/local/frisco-soldier-gets-home-back-after-hoa-foreclosure/2121160/> (July 29, 2010, 12:06 PM).

176. Giantomasi, *supra* note 3, at 2503.

177. *Id.*

178. *Id.*

a \$300,000 settlement from the association.¹⁷⁹ Her case in Houston, Texas got the attention of Texas legislators and led them to propose laws to limit the power of associations to foreclose on homes.¹⁸⁰ They wanted to stop associations from using their foreclosure power to make life difficult for the vulnerable and elderly.¹⁸¹ In 2001, Texas passed Property Code Chapter 209, which included pro-homeowner reforms.¹⁸² These statutes had limited effect until 2011 with passage of more owner-friendly statutes.¹⁸³ But of course, most HOA foreclosures do not have happy endings.

IV. HOMEOWNER-FRIENDLY STATUTES REGARDING FINES, ASSESSMENTS, LIENS AND FORECLOSURES IN FLORIDA AND OTHER STATES

In Florida, statutes regarding HOAs are found in Chapter 720, and statutes regarding condominium associations are found in Chapter 718.¹⁸⁴ There are some positive aspects to the laws in Florida. Late fees are limited; they cannot be more than \$25 or 5% of the amount of each installment that is paid late, whichever is less.¹⁸⁵ Also, before an association can require payment of attorney fees for collection of past due assessments, the association must deliver a written notice of late assessment to the parcel owner which specifies the amount owed to the association and gives the parcel owner a chance to pay the amount owed without the addition of attorney's fees.¹⁸⁶

There are also other procedures and requirements specified in Florida statutes which most other states do not have. These laws, in part, help protect homeowners' due process rights by making sure proper notice is given before liens are recorded and foreclosures on the liens are filed. "To be valid, a claim of lien must state the description of the parcel, the name of the record owner, the name and address of the association, the assessment amount due, and the due date."¹⁸⁷ In addition, a homeowners' association cannot file a claim of lien against a parcel for unpaid assessments unless the HOA has given a written notice or demand for past due assessments, as well as any other amounts owed to the association pursuant to its governing documents.¹⁸⁸ The written notice or demand has to be made

179. *Id.*

180. *Id.*

181. *Id.*

182. David A. Kahne, *History*, HOMEOWNERS RTS IN TEX. HOAs: SUBDIVISIONS, TOWNHOMES AND CONDOS. (Aug. 12, 2021), <https://texashoas.org/history/>.

183. *Id.*

184. *See generally* FLA. STAT. § 720.308 (addressing assessments and charges and states that if a community was created after October 1, 1995, the governing documents must describe the way expenses are shared and specify the member's proportional share thereof); *see also* FLA. STAT. § 720.3085 (addressing assessment payments, liens and the foreclosure process. Whenever authorized by the governing documents, the association has a lien on each parcel of property to secure the payment of assessments, administrative late fees, interest on assessments and attorney's fees and costs).

185. FLA. STAT. § 720.3085(3)(a) (2024).

186. § 720.3085(3)(d).

187. § 720.3085(1)(a).

188. § 720.3085(4).

substantially in a specified form stated in the statute and must give the owner forty-five days to pay before a claim of lien is recorded.¹⁸⁹

The manner by which the notice must be sent is stated in the statute.¹⁹⁰ Also, a lawsuit to foreclose a lien cannot be filed until forty-five days after the parcel owner has been provided notice of the association's intent to foreclose and collect the unpaid amount.¹⁹¹ The notice must be given in the same manner as the pre-claim of lien notice, and the notice may not be given until forty-five days has passed from the prior required notice.¹⁹² Again, the notice given must be in substantially the same form specified in the statute.¹⁹³ These notices provide property owners with necessary information and some time to try to prevent their property from being foreclosed.

Surprisingly, in 2024, the Florida legislature passed several new laws that help protect HOA homeowners. The new laws include a couple of the suggestions that are made in the recommendations section of this Article; Florida will now require HOA board members and property managers to receive initial and ongoing training.¹⁹⁴ Additional new homeowner protections include extra transparency requirements for HOA financial information, financial documents, and other HOA documents, as well as restrictions on what HOAs can prevent homeowners from doing to improve and make use of their property, restrictions on what HOAs can fine homeowners for, additional procedures required before fines can be imposed on homeowners, and a prohibition on HOAs assessing compounded interest on late assessments.¹⁹⁵

189. § 720.3085(4)(a).

190. § 720.3085(4)(b).

191. § 720.3085(5).

192. *Id.*

193. *Id.*

194. Directors must now attend a Board Certification course (the option to sign form has been removed). FLA. STAT. § 720.3033(1)(a) (2024); *see* FLA. STAT. § 468.4334 (2024) (showing that a CAM who works with a HOA must biennially complete at least five hours of CE specific to HOAs, three hours of which must related to record keeping).

195. FLA. STAT. § 720.303(13) is created to require HOAs, prior to October 1, 2024, to provide a physical or digital copy of the Association's rules and governing documents to all members. FLA. STAT. § 720.303(13)(a) explains that a HOA with at least 1,000 parcels must prepare audited financial statements notwithstanding its total annual revenue. FLA. STAT. § 720.303(7)(a)(4) explains that, notwithstanding anything in the governing documents, an association may not deny an application for the installation, enhancement, or replacement of hurricane protection which conforms to the specifications adopted. The association may require the owner to adhere to an existing unified building scheme for the external appearance of structures and other improvements. FLA. STAT. § 720.3035(6)(b) states the board, ARC or similar committee must "reasonably and equitably" apply and enforce on all parcel owners the architectural standards found in the governing documents. FLA. STAT. § 720.3035(1)(a) states the board, ARC or similar committee may not enforce or adopt a covenant, rule or guideline that, under § 720.3035(1)(b), limits or places requirements on the interior of a structure that is not visible from the parcel's frontage or an adjacent parcel, adjacent common area or community golf course. Notwithstanding any provision to the contrary in the governing documents, under FLA. STAT. § 720.305(7), an association may not levy a fine or impose a suspension for (note this specifically states fines and suspensions only) leaving garbage receptacles at the curb or end of the driveway within twenty-four hours before or after designated garbage collection day or time; FLA. STAT. § 720.3075 states bylaws may not preclude a property owner, tenant, guest or invitee of the owner from parking personal vehicles, including pickup trucks, in the owner's driveway or in

California has the most comprehensive statutes for HOAs and other common interest communities. The most recent law enacted in California, Assembly Bill 1410, went into effect in January 2023.¹⁹⁶ It makes three important changes to California law: it does not allow HOAs to pursue legal action for assessments during emergencies, it allows HOA members to use social media without facing penalties by the HOA, and it prevents HOAs from prohibiting an owner of a separate interest from renting or leasing a part of that owner-occupied separate interest for a period of more than thirty days.¹⁹⁷ Like Florida, California requires owners receive notice before a lien for a past-due debt is recorded, which helps protect homeowners' due process rights.¹⁹⁸

Unlike Florida, California helps homeowners by requiring associations to offer homeowners dispute resolution for past-due assessments; there are two forms of dispute resolution that must be offered.¹⁹⁹ One is the "right to dispute the assessment debt by submitting a written request for dispute resolution to the association pursuant to the association's 'meet and confer' program."²⁰⁰ The other is the right to request alternative dispute resolution with a neutral third party.²⁰¹ Florida only requires mediation be offered to homeowners when there is a non-monetary dispute.²⁰² Also, in California, the decision to record a lien must be made by the board through a majority vote in an open meeting.²⁰³ Additionally, California does not allow a HOA to foreclosure for delinquent assessments of less than \$1,800, not including any accelerated assessments, late charges, fees and costs of collection, attorney's fees, or interest.²⁰⁴ Instead, they allow other collection means to be pursued.²⁰⁵ However, California does allow non-judicial foreclosures, which requires less due process since the HOA does not have to go to court, whereas Florida does not allow non-judicial foreclosures.²⁰⁶

any other area where an owner, tenant, guest, or invitee has a right to park as governed by state, county, and municipal regulations. Also, the governing documents may not prohibit, regardless of any official insignia or visible designation, owner, tenant, guest, or invitee of the owner from parking their work vehicle which is not a commercial motor vehicle (as defined in §320.01(25)) in the owner's driveway under FLA. STAT. § 720.3075(3)(b). Under FLA. STAT. § 720.305, enforcement hearings must be held within ninety days after issuance of the notice of hearing. The committee may hold the hearing by phone or other electronic means and provide this information to the individual so they may participate by such means under FLA. STAT. §720.305(2)(b). FLA. STAT. § 720.3085(3) states that notwithstanding any provision in the declaration or bylaws (does not state articles of incorporation), compound interest may not accrue on assessments and installments on assessments that are not paid when due.

196. Assemb. B. 1410 (Cal. 2022) (codified under CAL. CIV. CODE §§ 4515, 4739, and 5875).

197. *Id.*

198. CAL. CIV. CODE § 5660 (West 2014).

199. § 5660(e)-(f).

200. § 5660(e).

201. § 5660(f).

202. FLA. STAT. § 720.311(2)(a) (2014).

203. CAL. CIV. CODE § 5705(c) (West 2014).

204. CAL. CIV. CODE § 5720(b) (West 2014).

205. § 5705(b).

206. *Id.*

Some other states have also helped homeowners by limiting unfair foreclosures through statutes that set a minimum amount of money owed and/or minimum time that has passed since the date of nonpayment before the foreclosure of a lien is allowed.²⁰⁷ In Arizona, a property “may be foreclosed... only if the unit owner has been and remains delinquent in the payment of assessments, for a period of one year or in the amount of \$1,200 or more, whichever occurs first.”²⁰⁸ In Connecticut, a HOA cannot foreclose a lien on a homeowner unless the owner owes an amount equal to at least two months of common-expense assessments based on the periodic budget last adopted by the association when the foreclosure is commenced.²⁰⁹ Georgia does not allow a foreclosure action against a lien unless the amount of the lien is at least \$2,000; this amount appears to include late fees and interest.²¹⁰

Vermont does not allow lien foreclosures unless the homeowner owes at least three months of common expenses based upon the periodic budget last adopted by the HOA, and the owner fails to accept or comply with a payment plan offered by the HOA.²¹¹ Also, the HOA board must vote to commence a foreclosure action against the specific property.²¹² Washington State also has a threshold for when a lien foreclosure can be filed. It is three months or more of assessments, or “\$2,000 of assessments, not including fines, late charges, interest, attorneys’ fees, or costs incurred by the association in connection with the collection of a delinquent owner’s account.”²¹³ Like Vermont, the HOA board must vote to commence a foreclosure action against the specific property.²¹⁴ In Colorado, when assessments are payable in installments, each installment may be subject to a statutory lien if the unit owner fails to pay the installment within fifteen days after the installment is due, but the HOA cannot pursue legal action for unpaid monthly installments until the unit owner fails to pay at least three monthly installments.²¹⁵

Colorado has another statute that favors property owners by helping them avoid liens and foreclosures through negotiation. Colorado requires HOAs to negotiate payment plans in good faith for delinquent assessments, and the monthly plans must be at least eighteen months long for equal installments.²¹⁶ In 2018, Pennsylvania amended its statutes to require HOA bylaws to establish procedures for alternative dispute resolution for disputes between two or more unit owners or a unit owner and the association.²¹⁷ This alternative dispute resolution is limited to disputes where all parties agree to use alternative dispute resolution, and the costs and fees associated with it, excluding attorney fees, are to be assessed equally

207. ARIZ. REV. STAT. ANN. § 33-1807(A) (2019), *to be amended by* H.B. 2648, 56th Leg., 2d Reg. Sess. (Ariz. 2024).

208. *Id.*

209. CONN. GEN. STAT. § 47-258(m)(1) (2023).

210. GA. CODE § 44-3-232(c) (West 2008).

211. VT. STAT. ANN. tit. 27A § 3-116(m)(1) (1994).

212. *Id.*

213. WASH. REV. CODE ANN. § 64.38.100(2)(a)(i)-(ii) (West 2023).

214. § 64.38.100(2)(d).

215. COLO. REV. STAT. § 38-33.3-316(1)(b) (2023).

216. § 38-33.3-316.3(2).

217. 68 PA. CONS. STAT. § 5321(b)(1) (2018).

against all parties to a dispute.²¹⁸ Some states also have ombudsmen who help in the process of HOA foreclosure sales or earlier in the process.²¹⁹ Ombudsmen are usually appointed by the state, and they can help investigate complaints against HOA boards and property managers and can try to help resolve conflicts or concerns between the homeowners and either entity, often through mediation or recommendations.²²⁰

Regarding the time limit for a HOA to foreclose on a lien, it varies from three to six years after the assessments become due. In Florida, it is likely five years from the date of the first missed assessment payment.²²¹ All states allow HOAs and their board members to buy homes the HOA has foreclosed.²²²

Besides state statutes, the Restatement (Third) of Property provides guidance for HOAs and homeowners who reside in them and arguments they may want to make in court.²²³ The Restatement requires associations “to treat members fairly” and “to act reasonably.”²²⁴ Reasonableness should be a part of all aspects of an association’s rulemaking, enforcement, and design control.²²⁵ The Restatement discourages associations from using “precipitate or excessive action.”²²⁶ For example, “[s]evere measures against minor, insubstantial infractions are precluded.”²²⁷ HOAs are encouraged to be transparent; residents must be given “reasonable access to information about the association, the common property, and the financial affairs of the association.”²²⁸ Associations also have some protections under the Restatement. Homeowners who sue have the burden of proving a breach of duty by the association and must prove the breach poses a harm or threat of injury to the people living in the community either individually or to the interests of the collective group.²²⁹

The Restatement’s guidance is based on the goal of protecting HOAs and other common-interest communities from unnecessary litigation and judicial overreaching.²³⁰ In addition, it provides protections to property owners from

218. § 5321(b)(2)-(3).

219. Rebecca Lindstrom, *Woman’s Battle with HOA Ended with Her Losing Home, Then Purchasing it for \$3.24*, ALIVE (Nov. 22, 2019), <https://www.11alive.com/article/news/investigations/the-reveal/hoa-battles-metro-atlanta/85-c33d4c4e-b9c4-46cb-8042-394ef1121399>.

220. *Id.*

221. FLA. STAT. § 95.11(2)(b)-(c) (2024).

222. Based upon a review of the statutes of all fifty states; *see, e.g.*, FLA. STAT. § 720.3085(f) (2024) (“The association may purchase the parcel at the foreclosure sale and hold, lease, mortgage, or convey the parcel.”).

223. RESTATEMENT (THIRD) OF PROP. (Am. L. Inst. 2000).

224. RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 6.13(1)(b)-(c) (Am. L. Inst. 2000).

225. § 6.13(c).

226. § 6.13 cmt. b.

227. *Id.*

228. § 6.13(1)(d).

229. § 6.13(2).

230. § 6.13 cmt. b. (citing aim of protecting “common-interest communities against excessive litigation and unnecessary judicial interference with collective decisions.”).

association mismanagement, abuse of power, and unfair treatment.²³¹ Its reporter describes the difficult balance that must be struck to allow “these communities to maintain their financial viability and to carry out their functions, while also ensuring, to the extent possible, that they remain desirable places to live by protecting reasonable expectations as to the privileges that accompany home ownership.”²³²

V. RECOMMENDATIONS AS TO HOW TO PREVENT HOAS AND PROPERTY MANAGEMENT COMPANIES FROM ABUSING THEIR POWER, ESPECIALLY THE POWER TO FINE AND TO FORECLOSE LIENS

1. *Forbid Liens for Unpaid Fines*

There are many statutory and other changes that can be made to help ensure HOAs and property management companies do not abuse the power they have to foreclose the liens they place on properties. One is to not allow liens for unpaid fines to be foreclosed. Only a minority of states do not allow HOAs to foreclose on homeowners if their only debt to the HOA is for fines.²³³ Colorado recently passed a law that does not allow liens for fines to be foreclosed.²³⁴ Florida law provides a fine must be for at least \$1,000 before a HOA can seek a lien for the unpaid fines, and Florida caps fines at \$1,000 for each violation, but these liens can be foreclosed.²³⁵ If liens for fines could not be foreclosed, it would give HOAs and property managers less of an incentive to impose fines for alleged rule violations and less incentive to seek liens for unpaid fines since the liens would not get paid unless and until the property was sold and only if it sells for a profit.

2. *Forbid Foreclosures on Homesteads*

Florida and other states could also forbid lien foreclosures for properties that are homesteads. A homestead generally is “a permanent free-standing house, a condo, or a manufactured home that the homeowner occupies as their principal residence... the exact definition of a homestead depends on the state.”²³⁶ Forbidding foreclosures on homesteads would help prevent elderly people and other vulnerable people from losing their homes to foreclosure simply because they are past due on assessments or are fined for things like having a bench in their front yard, or having visitors who parked on the street overnight, and then failed to pay the fine.

231. *Id.* (noting desire to protect “individual community members from careless and risky management practices, unreasonable exercise of discretionary powers, and unfair treatment at the hands of those who control the association.”).

232. Susan F. French, *Highlights of the New Restatement (Third) of Property: Servitudes*, 35 REAL PROP. PROB. & TR. J. 225, 236 (2000).

233. Holder, *supra* note 137.

234. H.B. 22-1137, 74th Gen. Assemb., Reg. Sess. (Colo. 2022).

235. FLA. STAT. § 720.305(2) (2024).

236. Josephine Nesbit, *What is a Homestead?*, U.S. NEWS & WORLD REP. (May 23, 2022, 9:21 AM), <https://realestate.usnews.com/real-estate/articles/what-is-a-homestead>.

The HOA could still sue to get a judgment for the money owed plus any late fees and interest if they truly needed the money for their budget. If the HOA did not need the money and could wait, they would get paid through the lien when the property is sold. If a state does not want to ban foreclosures on homestead properties, the ban could be limited to homestead properties owned by people sixty-five years and older and people with documented disabilities. This foreclosure restriction for homesteaded properties could also be further limited by being placed only on larger HOA communities, like those with more than 200 properties. Any of these foreclosure bans would protect many people, especially vulnerable people, from losing their homesteads for nonpayment of small amounts of money. Many of the people protected would likely have equity in their property, which would also be protected since foreclosure sales often result in the property being sold for less than market value.

3. *Forbid All HOA Foreclosures or All Non-Judicial Foreclosures*

Although HOAs and property managers perform some of the functions local governments perform, they are not governments; they are not bound by due process requirements, and they have a lot of discretion. A stricter way to reign in HOAs and property management power and limit their discretion would be to disallow lien foreclosures altogether. Again, HOAs would not be without recourse to collect money they believe is owed to them; they could still file a lawsuit which would likely end in a settlement. If the HOA instead gets a judgment, or a settlement agreement is breached, the HOA could collect the money by the same means as any other judgment: by garnishing wages, levying other property, and levying bank accounts. The HOA could also wait until the property is sold. They would be entitled to collect what is owed from the profits of the sale. Instead of eliminating all lien foreclosures, states could eliminate non-judicial foreclosures which most states currently allow, but Florida does not. Requiring all HOA foreclosures to go through the court procedure where a judge oversees and reviews the process helps ensure due process, fairness, and equity.

4. *Limit the Time Period an HOA Has to Foreclose a Lien*

If HOAs are going to continue to be allowed to foreclose liens on properties for unpaid fines and/or assessments, there are more limitations states can place on the HOA's power to protect homeowners. One simple way is to limit the amount of time an HOA has to initiate a foreclosure on a lien once it is placed on the property; the law could state that a lien is extinguished if no foreclosure action has been filed more than one year after the lien was recorded or filed. Florida has such a limitation for liens placed on condominium units by condominium associations.²³⁷ This time limit would prohibit HOAs from letting liens linger on properties without foreclosing, which would limit their power regarding liens. In Florida, it would lead to quicker use of mediation to attempt to resolve the issues since courts require mediation before a case goes to trial, and Florida does not

237. FLA. STAT. § 718.116(5)(b) (2023).

require that mediation be offered before a lien is recorded or a lawsuit regarding unpaid fines or assessments is filed.

5. *Create Thresholds for When a Lien Can Be Filed*

Another way to limit HOA power and discretion is to create a threshold for when a lien foreclosure can be filed. As stated above, several states like California, Arizona, and Washington have such thresholds. Florida and other states should make the threshold at least eight or more months of assessments, or \$2,000 of assessments, not including fines, late charges, interest, attorney's fees, or costs incurred by the association in connection with the collection of a delinquent owner's account, whichever occurs first. A threshold like this also makes targeting homeowners for foreclosure less likely, and it gives homeowners additional time to avoid a lien foreclosure.

6. *Require Negotiations and Specific Notices Prior to Filing Liens*

There are several steps that should be required before an HOA or property management company can even place a lien on a property. HOAs should be required to negotiate payment plans in good faith for delinquent assessments and fines, and the monthly plans should be for at least eighteen months with equal payments. This gives homeowners a chance to pay what is owed over time and to limit what they may owe in interest, costs, and attorney's fees. It should also help prevent HOAs from having to pay an attorney to draft and record a lien and to pursue possible litigation.

If no payment plan is reached, notice of a possible lien should be given to the property owner by regular mail, certified mail, and e-mail. The mail should be sent to the address where the property owner lives. The e-mail should be sent to the e-mail address on record. The notice should state the amount of assessments owed, the amount of interest owed, the amount of late fees owed, the amount of costs owed, and the amount of attorney's fees, if any, owed. The notice should also give the owner a total payoff amount that does not exceed the total of the assessments, interest, late fees, costs, and attorney's fees stated, and give at least ninety days from the date of the notice to pay the total or to make a written agreement with the HOA to make payments on the total. Since most homeowners do not understand liens and their consequences, the notice should clearly explain what a lien is and that the lien can lead to the owner losing their property if the HOA chooses to foreclose on the unpaid lien within one year (or whatever the limit is) of a lien being filed or recorded.

HOAs should also be required to offer pre-lien mediation; the cost could be split equally between the HOA and the homeowner, and a cap of \$300 (or less) per hour on the mediator's fee could be mandated, depending on the state. Mediation has been proven to help resolve all types of disputes, and in this author's experience, very contentious cases between HOAs and homeowners can be resolved in mediation. Mediation gives the homeowner equal power, especially if they have an attorney, and it allows any non-monetary issues to be resolved and for hurt feelings to be addressed as well. Sometimes underlying issues, like the

homeowner feeling singled out or bullied, are the root of the problem, and getting those issues resolved with communication through a neutral third party can be the catalyst for resolving monetary issues and for preventing future issues.

Since HOAs should be required to offer pre-lien mediation, the above stated notice should also include a list of at least six mediators and offer the homeowner an option to agree to set mediation with one of the mediators. The homeowner would be required to choose a mediator or suggest one of their own in writing and provide at least three possible dates for mediation to be set. The requested dates must be within ninety days of the date of the notice. The homeowner must communicate the request for mediation and possible dates to the HOA by regular mail and e-mail within thirty days of the date on the notice. The notice sent by the HOA must include a form for requesting mediation that can be filled out by the homeowner and mailed and or e-mailed back to the HOA and property management company.

7. Require HOA Board Vote and Notice Prior to Foreclosure

It should be required that the HOA's board vote in an open meeting before a lien foreclosure action is filed and at least 80% of the board approve of the foreclosure action. Also, within ten days of a lien being filed or recorded, a copy of the lien must be sent to the owner by regular mail, certified mail, and e-mail. The mail must be sent to the address where the property owner lives. The e-mail must be sent to the e-mail address on record. The notice must explain what a lien is and that it can lead to the owner losing their property if the HOA chooses to foreclose on the unpaid lien within one year (or whatever the limit is) of a lien being recorded. In addition, the notice must provide a payoff amount that the homeowner can pay within ninety days of the date on the notice, and if the full amount is paid, the lien will be dissolved. Further, if the HOA cannot prove that a copy of the lien was sent to the homeowner within ten days of the filing or recording, the lien should be void.

8. Send Notices to Homeowners and Powers of Attorney

There also should be safeguards put in place to protect homeowners who have other people who are taking care of their finances through a power of attorney either temporarily or permanently. Once an association is made aware of a person having a power of attorney who is handling the homeowner's finances, the HOA should be required to send all notices to both the homeowner and the person who has the power of attorney. The HOA should also be required to personally serve the person with the power of attorney with any lawsuit filed against the homeowner.

This protection stems from the situation of Gabor Koves and from other foreclosure and near foreclosure stories.²³⁸ Often, older homeowners can no longer

238. Gabor Koves is my father. My older brother, who lived in another state, had the Power of Attorney for my father and paid his two HOA assessments through automatic payments. At least once, the assessments were behind because the payments were being mailed to the wrong address.

live in their homes, so they have family members or renters living in their property. Those same homeowners, like Gabor Koves, sometimes have people with a power of attorney who take care of paying the assessments. Sometimes the homeowner is living in the home, but is in the hospital for an extended period of time. Homeowners in these positions will often not even see a notice of nonpayment, or not see it for a long time, which can lead to a lien on the property and a foreclosure. Also, even if the homeowner actually sees the notice of delinquency, they may not understand the notice, may not know what to do, or may feel completely helpless to do anything because of their failing health or financial situation.²³⁹ If the person who has power of attorney over that homeowner's finances is also required to receive notices, they can step in and deal with the situation, and this can be done sooner rather than later, which will save the homeowner potentially thousands of dollars in attorney's fees and costs and will get the HOA the money they are owed.

9. *Forbid HOAs and Board Members from Buying Properties Their HOAs Foreclose*

Another way to reduce the probability that HOA boards will abuse their power to foreclose on properties is to not allow HOAs and HOA board members to buy properties they foreclose on. All states should enact a law that disallows HOAs and board members from purchasing properties they foreclose. This provides less incentive for the HOA and board members to foreclose since they can no longer financially benefit by buying the property at a price far below market value and then either renting it or selling it for a profit.

10. *Cap Fees Associated with Fines and Assessments*

To give homeowners a better chance to pay off what they owe, states should cap the fees associated with collecting fines and assessments at a reasonable amount. These fees include late fees for missed assessment payments, interest on overdue assessments and fines, and costs associated with collection and attorney's fees. Often, these additional costs, especially attorney's fees, add up to several times more than the fine or the unpaid assessments, which is why the homeowner ends up in foreclosure. Late fees could be capped at the lesser of \$20 or 5% of the amount of each installment that is paid past the due date. Interest could be capped at 10%, and attorney's fees could be capped at between \$2,000 and \$5,000 depending on the state. Capping attorney's fees would also make it less likely attorneys would recommend foreclosure to their clients since the attorney may end up spending more time on the case than they can recoup in fees. In addition, the law should make it crystal clear that HOAs cannot charge any "administrative" or

My brother did not become aware of this until a person who is connected to the HOAs texted me to let me know the assessments were past due, and I told my brother. My brother, after several attempts, got in touch with the property management company and was able to make the payments and prevent a lien from being recorded.

239. Based upon my experience practicing law in Florida.

other fees for anything else. For example, they cannot charge for a board member or property manager drafting or mailing required notices to homeowners or other such tasks.

The charging of improper fees is currently a problem in Florida even though the statute states:

If no rate is provided in the declaration or bylaws, simple interest accrues at the rate of 18 percent per year....

If the declaration or bylaws so provide, the association may also charge an administrative late fee not to exceed the greater of \$25 or 5 percent of the amount of each installment that is paid past the due date.”²⁴⁰

No other fees related to unpaid assessments that an HOA can charge are mentioned in the statutes. If a state wanted to allow HOAs to charge for tasks like notices that the HOA or their property managers complete (instead of an attorney), they could cap the amount that could be charged and specify that no other costs or attorney’s fees can be included in the amount of the association’s lien. Some possible cap amounts are: \$165 for a demand or intent to lien letter, \$325 for a notice of delinquent assessment, \$90 for an intent to record a notice of default letter, and \$400 for a notice of default.²⁴¹

11. Increase Transparency and Notice Through Websites

One way to reduce selective enforcement by HOAs and property management companies and to increase transparency is to require HOAs to have a website and to publish on the website, ten days or less after each assessment payment is due, the addresses that have past due assessments, how much is owed (not including late fees and interest), which, if any of them, have an active lien and which, if any, have active lawsuits for the unpaid assessments. Every sixty days, the HOAs should also be required to publish on their website the addresses that have past due fines, what the specific violations were, how much is owed, which, if any, of them have an active lien, and which, if any, have active lawsuits for the unpaid fines. Only homeowners in the specific HOA community and any relevant property management company would have access to the website. This publication requirement would also help to notify the applicable property owners and allow them to see if the information posted online matches the information they were given in any other notices. This could also eventually eliminate the need for many of the letters that are sent to delinquent homeowners.

This process should be combined with a statutory fifteen-day grace period for late assessment payments, meaning HOAs could not charge any interest or late fees for payments that were less than sixteen days late. Homeowners who regularly check the website would see they missed a payment and could avoid being charged a late fee and interest if they pay within the fifteen-day grace period. This is especially important for homeowners who do not regularly check their mail and

240. FLA. STAT. § 720.3085(3)(a) (2024).

241. NEV. REV. STAT. § 116.3116(5)(a)-(d) (2022).

for those who have their assessment payments automatically withdrawn from a bank account since they may not have received notice of changed circumstances, such as a new property manager taking over and changing the bank account the assessment money is deposited in. This is not an infrequent issue, and it would give homeowners a chance to make sure their payments are properly being withdrawn and credited.²⁴²

12. *Require Minimum Foreclosure Price and Right of Redemption*

To further deter HOA foreclosures and to prevent homeowners from losing the equity they have in their homes if they are foreclosed, states should put two laws in place. One requiring the foreclosed property must be sold at a minimum of the market value of the property. The second is that the homeowner has a right of redemption for the foreclosed property. A right of redemption gives the homeowner one final window of time to keep their property; it allows them to pay the money owed in the judgment even after the foreclosure sale has occurred.²⁴³ The amount of time the homeowner has to redeem should be any time before the certificate of sale is issued or the amount of time listed in the final judgment, whichever is greater.

13. *Require Training for HOA Board Members and Property Managers*

To help make sure that HOA board members use the power they have judiciously and fairly, states must require all board members have training before they take office. The training should be designed by each state, so it incorporates the law and legal issues, including liability and ethics issues, unique to each state. The content should also include basic dispute-resolution skills, and basic leadership, budgeting, organizational, and communication skills. It could be provided solely online. There should be a mechanism to prove the person taking the course is the person who was voted onto the board, and each person taking the course should get a printable certificate once they pass the course. The course should include tests, and the tests should require the potential board member get at least 75% correct on each section to pass. The potential board member could get two chances to complete the training. There should also be a separate, specific training for each of the board positions such as president, treasurer, and secretary that must be taken and passed, and supplemental training required each year that the person is a HOA board member; this training should include relevant changes in the law regarding HOAs.

Requiring training will also help ensure the people on HOA boards are truly interested in and dedicated to the position. The fact they are willing to complete training to become a HOA board member will also hopefully translate into board

242. Based upon my experience practicing law in Florida.

243. Amy Loftsgordon, *Right of Redemption Following an HOA Foreclosure*, NOLO (Apr. 19, 2023), <https://www.nolo.com/legal-encyclopedia/the-right-redemption-following-hoa-foreclosure.html>.

members who are professional and want to do the right thing for both the HOA and the homeowners.

Training should be required for property managers as well. In addition, property managers should have a licensure requirement. As stated above, property managers are often the people who truly run many of the HOAs. Their training should be at least sixteen hours and should include a section covering relevant state statutes, basic management principles and responsibilities, an overview of association documents, how to create association budgets, management of finances and insurance, and dispute resolution. There should also be a cumulative test that requires a score of at least 80% correct to pass.

14. *Create State Ombudsmen Office*

Another mechanism to limit the power and discretion of HOAs and property management companies is to have a state ombudsmen office. According to the Community Associations Institute, as of 2018, at least six states including Florida have a community association ombudsman or resource center, but the majority, including Florida, do not have offices that address HOA issues.²⁴⁴ In the arena of corporate and state government and ethics reform, reducing and rectifying abuses of power often takes place through routine auditing, penalties for abuse of authority and mismanagement, and conferring power in an independent watchdog with substantial oversight functions.²⁴⁵ Something equivalent to such an agency could be created by states and used to watch over HOA boards and property management companies to detect abuses of power.²⁴⁶ These could be state ombudsmen who have the power to oversee standards of reasonableness and business judgment.²⁴⁷ States should implement such an office to perform routine fiscal audits and help make certain there is transparency in the HOA and property management governance process.²⁴⁸

State ombudsman agencies could also help to reduce the amount of litigation brought by HOAs, HOA property managers, and homeowners related to HOA governance.²⁴⁹ The litigation process is often not the best process to help settle many of the “unique, sometimes tedious, and certainly very context-specific concerns brought by disgruntled” HOA homeowners and homeowners associations.²⁵⁰ Being required to use a state administrative agency as a first option has worked well in other areas involving housing, and it could work well with HOA boards.²⁵¹

244. Holder, *supra* note 137; see also *Memorandum on Offices of Community Association Ombudsman*, CMTY. ASSOCS. INST. 3, https://www.caionline.org/Advocacy/Priorities/Ombudsman/Documents/Ombudsman_Report.pdf (Feb. 2018).

245. Paula Franzese, *Privatization and Its Discounts: Common Interest Communities and the Rise of Government for “The Nice,”* 37 URB. LAW. 335, 353 (2005).

246. *Id.* at 354.

247. *Id.*

248. *Id.*

249. *Id.*

250. *Id.*

251. *Id.*

In addition, to be effective, the ombudsmen agency should have the power to remove HOA board members who they find violated the law, acted contrary to association governing documents, and violated election regulations, ethical restrictions, and so on. Furthermore, if the association documents allow the homeowners to be fined, board members who are found to have acted improperly should be fined, and they should be prohibited from using the association attorney to dispute the HOA's action.

15. Educate Potential Homeowners on the Powers of HOAs

More can also be done to educate potential HOA property owners so if they decide to buy property in an HOA, they are not blindsided by the consequences of the power given to HOAs and property managers. Again, most people do not understand they can suffer financial consequences for not following HOA rules and lose their home to a lien foreclosure if they fail to pay fines or assessments. People should be informed of these and other issues related to living in a HOA before they decide to buy property within one. States should require owners who are selling property in HOAs to provide a copy of, or access to, the declarations and covenants, and a document providing the current amount of assessments homeowners must pay to every potential buyer who provides an offer on the property.

Along with these documents, the seller should be required to provide an information sheet on the state laws regarding collection of HOA fines, assessments, liens, and lien foreclosures, as well as basic HOA homeowner rights. The information sheet could be created by the state and should be in layman's terms; states could get input on the form from the leadership of their association of realtors. Documents could be provided via a link to the HOA's website, email, or hard copy. The potential buyer would then get at least five business days to sign a document saying they have read and understand all documents and they either want to proceed with the offer or are withdrawing their offer. In other words, the potential buyer would always have the opportunity to back out of a potential purchase based on these documents.

16. Cap on Fines and Assessment Increases

Finally, regarding fines, there should be a cap placed on the amount of the fine for each homeowner violation; the maximum should be no more than between \$500 and \$1,000. Also, a fine should not be allowed unless the homeowner was provided at least two written warnings and given at least ninety days from the first warning and sixty days from the second warning to fix the issue(s). In addition, the homeowner should be given a hearing in front of the board before any fine is issued. After the hearing, the HOA board should be required to vote on whether a fine should be issued, and 80% of the board should be required to vote yes to imposing a fine. Regarding assessments, there should be a statutory percentage cap on how much an HOA can raise them each year.

VI. CONCLUSION

Captain Clauer, his family, and Ms. Blevins should not have lost their homes to a HOA foreclosure and should not have had to sue to get them back. In many ways, HOAs and the property management companies that work with them are mini-governments, but they do not have the same constraints on their power as governments do. Also, the people on the HOA boards and the employees of the property management companies usually do not have the same level of training and experience that government employees who make life altering decisions have. The boards and property managers can make decisions based upon dislike for or prejudice against certain homeowners or the tenants who live in the homeowner's property. They do not have to be fair or equitable in how they deal with violations of the HOA declarations and covenants. Also, they can limit the homeowner's ability to express themselves in ways governments cannot since they are not constrained by the Constitution.

Although there are some advantages to living in HOA communities, like higher property values, there are many disadvantages. The biggest disadvantage is the HOA can foreclose on your home. In many states, HOAs can foreclose if you do not pay a fine, and in all states, they can foreclose for unpaid HOA assessments. There is no reason people should lose their homes, especially their homesteads, simply because the HOA places a lien on their property for an unpaid fine or assessment. HOAs can collect any unpaid and overdue money in the same way other entities and people do; they can sue the offending party (homeowner) who owes them money, which can lead to a settlement or a judgment against the homeowner and take actions to enforce the settlement or to collect the judgment if necessary.

There are many laws that can be enacted to help reign in the power of HOAs and property management companies. These laws would create better educated and more professional board members and property managers. The laws regarding limiting fines and foreclosures would still allow the HOA boards to do their job, and the laws would help protect homeowners from losing their homes to foreclosure and from being targeted for alleged violations of declarations and covenants. Several states have enacted some of the suggested laws, but this sometimes only happens after lawmakers discover the sad and preventable foreclosures that have taken place in their political districts.