HOUSE DOCKET, NO. 1472 FILED ON: 1/13/2009

# HOUSE . . . . . No. 3569

## The Commonwealth of Massachusetts

**In the Year Two Thousand Nine**

An Act regulating homeowners in common interest communities..

*Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same, as follows:*

SECTION 1. The General Laws are hereby amended by inserting after chapter 183B the following chapter:-

CHAPTER 183C.

BILL OF RIGHTS FOR HOMEOWNERS

183C: 1. Application and Definitions

1. Application. This statute applies to common-interest communities of single-family detached homes. The provisions protect homeowners with respect to actions by their association or its directors, officers, employees, managers, and other agents, but are not intended to alter the rights of homeowners or associations with respect to lenders, real estate agents, or developers.

2. Definitions.a. “Common-interest community” means a real-estate development or neighborhood in which individually owned lots or units are burdened by a servitude that imposes an obligation that cannot be avoided by nonuse or withdrawal: i. to pay for the use of, or contribute to the maintenance of, property held or enjoyed in common by the individual owners,

or ii. to pay dues or assessments to an association that provides services or facilities to the common property or to the individually owned property, or that enforces other servitudes burdening the property in the development or neighborhood.

b. “Homeowner” means the owner of property burdened by a servitude described in

c. “Association” means an organization, including homeowners as members, created to manage the property or affairs of a common-interest community.

d. “Common property” means property rights of an identical or a similar kind held by the homeowners as appurtenances to their individually owned lots or units.

e. “Declaration” means the recorded document or documents containing the servitudes that create and govern the common-interest community.

f. “Governing documents” means the declaration and other documents, such as the articles of incorporation or articles of association, bylaws, architectural guidelines, and rules and regulations that determine rights or obligations of homeowners or that otherwise govern the management or operation of an association.

g. “Corporate documents” means the declaration and other governing documents required to be filed or recorded under state law (such as articles of incorporation or articles of association), as well as other governing documents (such as bylaws) that state law requires an association to adopt even if not filed or recorded.

h. “Operating rule” means any rule or regulation not stated in the corporate documents, whether adopted by the directors or by homeowners in a vote, that applies to the management or operation of the association or to the conduct of the business and affairs of the association,

including (without limitation) user fees, charges for any violations of the governing documents of the association, and other fees or charges.

i. “Rule change” means adoption, amendment, or repeal of an operating rule.

j. “Directors” means the persons who constitute the association’s senior governing body, in articles of incorporation or articles of association, or in other governing documents.

k. “Ombudsperson” means the chief executive of the state Office of Ombudsperson for Homeowners, or the designated representative.

l. “Notice” means, with respect to any person, sending regular and certified mail (return receipt requested) to the person’s last known address. For homeowners, it means each address where the association sends its annual assessments, written in plain English.

183C: 2. The Right to Security against Foreclosure

1. Limit on Creating Foreclosure Power. No association may foreclose against a homeowner on any lien without express authority granted by the declaration. Foreclosure power cannot be added by amendment, except by unanimous homeowner vote.

2. Non-Judicial Foreclosures, and Precipitate Foreclosures, Prohibited. No association may foreclose against a homeowner on any lien unless, in addition to compliance with all other applicable laws, the association obtains a court order that specifies the assessments due, confirms the association followed proper procedure, and allows at least three months before the sale date for the homeowner to pay the court-specified debt.

3. Predicates for Judicial Foreclosure. No association may seek an order to foreclose against a homeowner on any lien unless, in addition to compliance with all other laws governing

foreclosure of a mortgage on residential real estate, (a) the lien secures only a debt for an assessment authorized by a declaration recorded before the homeowner bought the home, (b) the directors by a two-thirds vote approve the foreclosure action, and (c) the assessment past due on the date of the vote exceeds $2,500. Notwithstanding the foregoing, any lawfully recorded lien (including liens that do not themselves provide a suitable basis for foreclosure) may be enforced on conveyance of any interest in a home, including conveyance by otherwise proper foreclosure sale.

4. Right to Cure. Each association shall, in governing documents, establish rights to make payments that ensure the following:

a. Homeowners may at any time make full or partial payment on any amount due. Any homeowner payment shall be credited first toward any past due assessment or other amount due to avoid foreclosure.

b. At least for homeowners who suffer job loss, disability, divorce, or family medical expenses, the association shall without penalty allow a homeowner 30 days after an assessment to propose an installment plan. Upon receiving the homeowner's installment proposal, the directors shall designate a committee to meet with the homeowner privately, and the association shall provide a written response to the homeowner. If the association does not approve the request in full, the response shall allow the homeowner at least 15 days after denying the request to pay without incurring attorney fees. Nothing prohibits the directors from approving an installment plan more lenient than provided by existing rules, in which case the directors shall amend the existing rules so that all homeowners shall receive fair notice and equal treatment.

c. Within five days after any vote by directors to seek foreclosure, the association shall give the affected homeowner notice of the vote, and include the ombudsperson's Notice of Foreclosure Rights. Within five days after filing any lawsuit seeking foreclosure, the association shall give the ombudsperson Notice of Foreclosure Filing.

d. If a homeowner pays all overdue assessments after directors properly vote to seek foreclosure, a court order nonetheless may permit foreclosure if (i) the homeowner has not paid all overdue late charges plus all attorney fees actually and reasonably incurred after the directors' vote; and (ii) the declaration authorizes foreclosure for such nonpayment.

e. Upon a homeowner's request, within three days, an association shall provide the amount due to avoid foreclosure, including past due assessments and any other amounts allowed by paragraph 4d or approved by court order under paragraph 2.

5. Minimum Bid and Notice of Redemption Rights. If an association forecloses against a homeowner, and sets the home for sale, the following provisions apply:

a. A price below 75 percent of the equity, measured by appraised fair market value less senior liens subject to which the successful bidder takes title, makes the sale void.

b. Within 30 days after the sale, the association shall provide the homeowner notice including the date and time of sale, the buyer's name and purchase price, and the ombudsperson's Notice of Right of Redemption. Within ten days after sending this notice, the association shall record, in the real property records of the county where the home is located, an affidavit stating the date on which the association sent the notice and containing a legal description of the lot.

6. Right of Redemption after Foreclosure. Except to the extent that governing documents provide greater rights, after a foreclosure sale by an association the homeowner has

a. a right of redemption not less than if a secured lender foreclosed; and

b. at least 180 days, after recording of notice under paragraph 5b, to redeem the home.

183C: 3. The Right to Resolve Disputes without Litigation

1. Required Notice of Violation. Before an association may seek foreclosure, file suit, charge any fee (including attorney fees), limit common area use, or take other action against a homeowner for violation of governing documents, except for an emergency action as provided in paragraph 9, the association must, in addition to compliance with other law and governing documents, do the following:

a. Provide notice to the homeowner twice, at least 21 days apart, that

i. describes the basis for the claim, including how the homeowner allegedly violated quoted terms of the governing documents;

ii. states any amount the association claims is due, describes how the homeowner can remedy the violation, confirms the right to comply without waiving the right to dispute the violation, and (where applicable) gives notice of the right to request an installment plan for assessments;

iii. describes the ombudsperson, including that the ombudsperson has a list of no- and low-cost mediators and other information; and

iv. states the homeowner has a reasonable period to cure--of at least 21 days after the second notice, unless the homeowner had an opportunity to cure a similar violation within the past six months, and that during the cure period the homeowner can obtain a hearing as provided in paragraph 2 or mediation as provided in paragraph 3, and can contact the ombudsperson as provided in paragraph 4, without incurring any attorney fees charged by the association; and

b. If the certified mail notice is not delivered, reasonably try to confirm the homeowner's current address and either resend the notice as in paragraph 1a or, if no other address can be found, reasonably try to hand-deliver the notice, the period to cure starting anew from this notice.

2. Right to a Hearing. After notice of paragraph 1a, homeowners have the right at no cost to a hearing to verify facts and seek resolution with the directors or a committee designated by the directors. If the directors use a committee, any agreement must be enforceable, to be ratified by the directors unless it conflicts with law or the governing documents, and the homeowner must be allowed to appeal to the directors. In addition:

a. the association shall hold the hearing within 30 days after the association receives the homeowner's request and shall provide notice of the date, time, and place at least 10 days before the hearing; the homeowner may request postponement, which shall be granted if for not longer than ten days; additional postponements may be granted by written agreement of the parties; the homeowner may record the meeting; and the committee (and, on any appeal, the directors) shall issue a written decision including the notice required by paragraph 5; and

b. the association shall extend the period to cure under paragraph 1a(iv) until 15 days after notice of the written decision by the committee or directors, whichever is later.

3. Right to Confidential Mediation. After notice of paragraph 1a, except with respect to disputes involving only an assessment or small monetary charge (less than $___), homeowners shall have the right to one-half day of neutral mediation, with the proceedings to be kept confidential and not admissible in court except as provided by state law. The requesting homeowner(s) shall pay 50 percent of the mediator's charge and the association shall pay the balance. If after 30 days, the parties cannot agree on a mediator, the homeowner shall have the right to contact the ombudsperson as provided in paragraph

4. If the parties agree on a mediator, the association shall extend the period to cure under paragraph 1a(iv) until 15 days after the mediation.

4. Right to Petition the Ombudsperson. After notice of ¶ 1a, except with respect to disputes involving only an assessment or small monetary charge (less than $___), homeowners shall have the right to petition the ombudsperson upon payment of a filing fee not to exceed $___. The association shall cooperate in any investigation pursued by the ombudsperson. The association shall extend the period to cure for 30 days, and for a longer period if requested by the ombudsperson.

5. Right to Options. After receiving notice of a decision under paragraph 2, homeowners shall have the right, within 15 days, to invoke either the procedure of paragraph3 or paragraph 4. The notice of decision under paragraph 2b shall specify this right.

6. Right to Extend Time to Cure. During the period to cure as provided in paragraph 1, as extended in paragraphs 2 to 4, the association shall not incur attorney fees chargeable to the homeowner, and shall not take any enforcement action except for emergency action allowed by paragraph 9.

7. No Lawsuit Without Directors Voting. No association may sue a homeowner without an authorizing vote by a majority of all directors, in compliance with applicable law and governing documents that may set super-majority vote or other requirements.

8. Notice before Litigation. Except for emergency action allowed by paragraph 9, the association must provide distinct notice at least 15 days before filing suit against a homeowner, that

a. describes the basis for the suit, including how the homeowner allegedly violated specified terms of the governing documents; and

b. states any amount the association claims due, describes how the homeowner can cure the violation, and (where applicable) gives notice of the right to request an installment plan for assessments.

9. Exception for Emergencies. Nothing precludes an association from seeking a temporary injunction, or taking temporary enforcement action (such as suspension of rights to use a common property), in a good faith response to an emergency. An emergency is a situation that could not have been reasonably foreseen, poses a significant and immediate threat to the common-interest community, and makes compliance with the preceding paragraphs impractical. Any temporary enforcement action entitles the homeowner to immediate notice and the related rights above, provided enforcement action may remain in place pending (a) the final determination of homeowner rights or (b) the end of the conditions resulting in the immediate and significant threat, whichever comes sooner.

10. Additional Right to Petition the Ombudsperson. In addition to the rights of paragraph 4 and other rights in this model statute to petition the ombudsperson, except with respect to

disputes involving only small monetary charges (less than $___), and upon paying the ombudsperson a filing fee not to exceed $____, homeowners shall have the right to petition the ombudsperson to challenge violations of homeowner statutory rights. Before making a petition under this paragraph 10, homeowners first shall give the directors notice of the dispute, and allow two weeks for a response, to be extended by an additional two weeks if needed to complete any procedures for alternative dispute resolution required by the governing documents; provided this shall not require more than one-half day of confidential mediation or require the homeowner to pay a fee. The association shall cooperate in any investigation pursued by the ombudsperson.

11. No Additional Charges, but Additional Options Allowed. No association may charge homeowners for exercise of the foregoing rights, but associations may offer additional options for alternative dispute resolution (ADR); provided no association may require binding ADR, otherwise require a homeowner to waive the right to go to court, or bill homeowners for mandatory ADR. In any litigation, if a party moves to compel nonbinding ADR, the court may consider the extent to which the parties already have pursued ADR.

12. Annual Notice of Rights to Alternative Dispute Resolution. Once each year, each association shall alert homeowners of their rights to ADR, including statutory rights and any others available under paragraph 11.

Section 183C: 3. The Right to Fairness in Litigation

1. Judicial Protection. Individual homeowners may sue associations to enforce statutory rights (under this model statute or otherwise) as well as their rights under governing documents, without being required to sue other homeowners; further, the association shall pay for any notice to homeowners that the court finds to be appropriate. Governing documents shall not limit

judicial review or court enforcement; provided they may require ADR to the extent permitted by Section 2, The Right to Resolve Disputes without Litigation,.

2. Burden of Proof. Unless otherwise provided by statute, a homeowner has the burden to prove each breach of duty by a preponderance of the evidence. Except for ultra vires actions, or actions otherwise exceeding an association's or director's authority, homeowners must prove a breach caused, or threatens to cause, injury either to the homeowner as an individual or to the interests of any part of the common-interest community.

3. Compliance Under Protest. Homeowner compliance with an association's demand for action, or demand to cease action, including (but not limited to) any demand to pay assessments or attorney fees, does not waive homeowner rights to challenge such demand.

4. Protected Homeowner Rights to Attorney Fees. In any case brought by an association or homeowner to enforce governing documents or applicable law (under this model statute or otherwise), the homeowner shall be awarded reasonable attorney fees and costs to the extent that the homeowner prevails. Attorney fees shall reflect counsel's reasonable hourly rate and time worked, and shall not be limited by the amount the homeowner actually paid, if any.

5. Limited Association Rights to Attorney Fees. In any case brought by an association or homeowner to enforce governing documents or applicable law (under this model statute or otherwise), if authorized by the declaration, the association shall be awarded reasonable attorney fees and costs to the extent that the association prevails; provided that the reasonable attorney fees may be reduced at the discretion of the court based on finding that the judicial review benefited the association or homeowners by clarifying governing documents or applicable law,

or other equitable considerations. Attorney fees shall reflect counsel's reasonable hourly rate and time worked, limited by the amount the association actually paid.

Section 183C: 4. The Right to Be Told of All Rules and Charges

1. Governing Documents. Associations may not enforce charges or other rules against homeowners, except those set forth in plain English in governing documents. All operating rules shall be compiled in a single document, available to homeowners on request, that at the beginning provides contact information for the ombudsperson and a description of the ombudsperson's role.

2. Disclosure to Buyers. Unless otherwise provided by statute, the following provisions apply:

a. At least 21 days before an offer to buy a home becomes binding, the homeowner shall furnish the potential buyer withes

i. the information statement prepared by the ombudsperson (including an acknowledgment for the buyer to execute) and all the association's governing documents, excluding plats and plans;

ii. a statement of each existing assessment, any unpaid assessment currently due from the selling homeowner, and any other alleged violation of the association's governing documents by external features of the home or landscape as of the date of the certificate, citing applicable rules;

iii. the association's current operating budget and financial statement, including any legally required summary of the association's reserves; and iv. a statement of the number of foreclosure lawsuits filed within the past three years, any unsatisfied judgments and pending

legal actions against the association or otherwise relating to the common-interest community of which the selling homeowner has actual knowledge.

b. Upon a homeowner's request, within ten days the association shall furnish a certificate with the information specified in paragraph 2a. A requesting homeowner is not liable for erroneous information in the certificate. A buyer is not liable for any past assessment, any future assessment greater than stated in the certificate (unless lawfully increased after the sale), or for violations of governing documents by external features of the home or landscape not stated in the certificate. For this certificate, the association may charge only actual costs, not to exceed $__.

c. Upon request by a homeowner, potential buyer in receipt of a certificate pursuant to paragraph 2b, or homeowner's or buyer's authorized agent, within 21 days the association shall make any legally required study of the association's reserves reasonably available to copy and audit.

3. Limits on Default and Implied Powers. Governing documents, and statutes governing homeowners, shall be construed to favor homeowners' free and unrestricted use of their home, and against any person seeking to enforce a limit on homeowner rights.

a. Absent specific authorization in the declaration or in paragraph 3(b) or paragraph 3(c), associations do not have power to adopt any rules that restrict the use or occupancy of, or behavior within, individually owned homes.

b. Except as limited by statute or the governing documents, associations have implied power to adopt reasonable operating rules to govern the use of (i) common property and (ii) individually owned property to protect the common property.

c. If the declaration grants a general power to adopt rules, an association also has power to adopt reasonable operating rules designed to (i) protect homeowners from unreasonable interference in the enjoyment of their individual homes and the common property caused by use of other individually owned homes; and (ii) restrict the leasing of homes to meet valid underwriting requirements of institutional lenders.

d. Except to the extent provided by statute or authorized by the declaration, a common-interest community may not impose restrictions on the structures or landscaping that may be placed on individually owned property, or on the design, materials, colors, or plants that may be used.

e. An association may borrow money subject to any limits stated in the governing documents but, unless the declaration or a court-approved order grants specific authority, the association may not assign future revenues or create a security interest in common property without approval by 51 percent of all homeowners (or more if required by governing documents) in a vote after at least 30 days notice.

Section 183C: 5. The Right to Stability in Rules and Charges

1. Seniority of Documents. In resolving any conflict among governing documents, the senior document controls. Unless the documents otherwise provide, seniority is (a) declaration over (b) articles of incorporation or association over (c) bylaws over (d) operating rules.

2. Homeowner Powers to Amend Governing Documents. For any governing document, the

following apply:

a. Except as limited by the governing document, a senior document, or statute, homeowners have the power to amend subject to the following requirements:

i. Unless the governing document, a senior document, or statute specifies a different number, an amendment adopted by homeowners holding a majority of the voting power is effective to

a) extend the term of the governing document,

b) make administrative changes reasonably necessary for management of the common property or administration of the servitude regime, or

c) prohibit or materially restrict uses of individually owned homes that threaten to harm or unreasonably interfere with reasonable use and enjoyment of other property in the community, or to amend or repeal such prohibition or restriction adopted by amendment under this paragraph 2a(i)(c).

ii. Unless the governing document, a senior document, or statute specifies a different number, an amendment adopted by homeowners holding two-thirds of the voting power is effective for all other lawful purposes except as stated in paragraph 2b and paragraph 2c.

b. Amendments that do not apply uniformly to similar homes and amendments that would violate association duties to homeowners under the model statute are not effective without approval by homeowners whose interests would be adversely affected, unless the declaration clearly and specifically apprises purchasers that such amendments may be made. This paragraph 2b does not apply to non-uniform modifications made under circumstances that would justify judicial modification.

c. Except as otherwise expressly authorized by the declaration, and except as provided in paragraph 2a, unanimous homeowner approval is required to i. prohibit or materially restrict the use or occupancy of, or behavior within, individually owned lots or units, or ii. change the basis for allocating voting rights or assessments among homeowners.

d. At least 60 days before voting on any proposed amendment to a governing document, the association shall provide notice to all homeowners, including the specific text proposed and a description of the amendment's purpose and anticipated effects. No amendment takes effect before the association provides notice of adoption to all homeowners, certified by an association officer, and to the extent required by law, the association records the amendment.

e. Directors have no power to amend a governing document except where expressly authorized by statute or, where not otherwise contrary to statute, expressly authorized by the governing document or a senior document; provided that, if governing documents authorize directors to impose any duty or charge on homeowners, this shall be done by operating rule (as provided in paragraph 3) unless the governing document requires otherwise; and provided further that homeowners only, not directors, shall have power to amend

i. any provision that affects number, qualifications, powers and duties, terms of office, or manner and time of election or removal of directors; or

ii. any provision with respect to amendment of any governing document.

3. Limits on Operating Rule Changes by Directors. Directors may adopt, amend, or repeal operating rules only if all of the following requirements are satisfied:

a. All operating rules must be

i. in writing;

ii. within directors' authority conferred by law or corporate documents;

iii. not inconsistent with law and corporate documents;

iv. adopted, amended, or repealed in good faith and in substantial compliance with this model statute; and

v. reasonable.

b. Paragraphs 3d and 3e apply only to operating rules that relate to one or more of the following subjects:

i. Use of common property

ii. Use of a home, including any aesthetic or architectural standards that govern alteration of a home

iii. Homeowner discipline, including any withdrawal of privileges or charges for violating governing documents and any procedure for withdrawing privileges or imposing charges

iv. Any standard for delinquent assessment installment or other payment plans

v. Any procedure to resolve disputes

vi. Any procedure for reviewing and approving or disapproving a proposed physical change to a home or to the common area

vii. Any procedure for elections

c. For the following actions by directors, ¶¶ 3d and 3e do not apply:

i. A decision regarding maintenance of the common property

ii. A decision on a specific matter that is not intended to apply generally

iii. A decision setting the amount of a regular or special assessment

iv. A rule change required by law, if directors have no discretion as to the substantive effect of the rule change

v. Issuance of a document that merely repeats existing law or the governing documents

d. Directors shall provide written notice of a proposed rule change to homeowners at least 30 days before making the rule change. The notice shall include the text, and a description of the purpose and effect of the proposed rule change, except as provided by paragraph 3d(iii).

i. A decision on a proposed rule change shall be made at a meeting of the directors, after consideration of any comments made by homeowners.

ii. Not more than 15 days after making the rule change, the directors shall deliver notice of the rule change to every homeowner. If the rule change is an emergency rule change made under paragraph 3d(iii), the notice shall include the text of the rule change, a description of the purpose and effect of the rule change, and the date that the rule change expires.

iii. If directors determine that an immediate rule change is required to address an imminent threat to public health or safety, or an imminent risk of substantial economic loss to the association, directors may make an emergency rule change; and no prior notice is required. An emergency rule change is effective for 120 days, unless the rule change provides for a shorter

effective period. A rule change made under this paragraph 3d(iii) may not be readopted under this paragraph.

e. Homeowners holding 5 percent of the voting power may call a special meeting of the homeowners to reverse any rule change.

i. To call such special meeting homeowners must, no more than 30 days after being notified of a rule change, deliver a written request to the association's president, secretary, or registered agent, after which the directors shall give notice of the meeting to all homeowners. Homeowners are deemed notified of a rule change after receiving notice of the rule change or enforcement of the resulting rule, whichever happens first. Homeowner requests to copy or review association member lists with addresses, e-mail, and phone numbers for the purpose of seeking support to reverse a rule change shall be honored as soon as reasonably possible, in any event within three business days. Homeowners shall be allowed to use common property reasonably in seeking support to reverse a rule change.

ii. At such special meeting with a quorum present, the rule change shall be reversed by majority vote of homeowners represented and voting, unless a corporate document or statute requires otherwise.

iii. Unless otherwise provided by the corporate documents, for this paragraph 3e, one vote may be cast for each home.

iv. Special meetings under this paragraph 3e shall follow laws generally applicable to special meetings.

v. A rule change reversed under this paragraph 3e may not be readopted for one year after the date of the meeting reversing the rule change. Nothing in this paragraph 3e precludes directors from adopting a different rule on the same subject as a rule change that has been reversed.

vi. As soon as possible and not more than 15 days after the close of voting at a special meeting, the directors shall provide every homeowner with notice of the results of a vote held pursuant to this paragraph 3e.

vii. This paragraph 3e does not apply to emergency rule changes under paragraph 3d(iii).

4. Required Notice for Homeowner Votes on Assessments. Unless governing documents require a longer period, homeowner votes to impose or increase regular or special assessments require at least 30 days advance notice.

Section 183C: 6. The Right to Individual Autonomy

1. Signs and Flags. Homeowners have the right to display noncommercial signs, flags, and “for sale” signs on their property, provided the declaration may set reasonable limits so long as, for three months before any election or other vote held by an association, government, or other entity with geographic territory overlapping any part of a common interest community, the association shall not forbid display of reasonable-size signs relating to the election or vote.

2. Neighbor Contacts. Homeowners have the right peacefully to visit, telephone, petition, or otherwise contact their neighbors; provided the declaration may set reasonable restrictions if it permits some weekday afternoon and some weekend hours for such neighbor contacts.

3. Peaceful Assembly. Homeowners have the right to invite guests to assemble peacefully on their property, provided the declaration may set reasonable limits to protect nearby homes.

4. Common Property. Where an association makes any part of common property available for use by homeowners:

a. the governing documents shall state any charge for homeowners' use, which shall not exceed the association's marginal cost for use, as well as any other restrictions on such use, which shall be content-neutral and otherwise reasonable; and

b. the governing documents shall not unreasonably restrict homeowners' rights to invite public officers or candidates for public office to appear or speak in common areas, or unreasonably restrict lawful uses relating to an election or other vote held by the association or any government or quasi-governmental entity with geographic territory overlapping any part of the common-interest community.

5. Discrimination Prohibited. Restrictions on signs and flags, neighbor contacts, peaceful assembly, common property, or other self-expression shall not differ based on the content of a view sought to be expressed by a homeowner. If an association allows homeowners to express views on a topic, in a newsletter or other forum, other homeowners equally shall be allowed to respond with differing views.

6. No Forced Membership in Another Organization. No association may force a homeowner to join a separate organization unless (a) expressly authorized by the declaration before the homeowner's purchase or (b) associations merge in compliance with state law.

7. No Mandatory Charitable or Political Funding. Assessments or other mandatory dues from association members may not be used by the association for charitable or political purposes. Any solicitations for charitable or political purposes by an association will be conducted separately from the billing for customary assessments of fees, and clearly be designated as voluntary.

8. Ultimate Limit on Governing Documents. Governing documents must be created in compliance with law, and not include terms that are illegal or unconstitutional, or that violate public policy. Terms that are invalid because they violate public policy include, but are not limited to, terms

a. that are arbitrary, spiteful, or capricious;

b. that unreasonably burden a fundamental constitutional right;

c. that impose an unreasonable restraint on alienation;109

d. that impose an unreasonable restraint on trade or competition; or

e. that are unconscionable.

Section 183C: 7. The Right to Oversight of Associations and Directors

1. Open Records. All association meeting minutes, financial and budget materials, contracts, court filings, and other records must be maintained for at least four years at the association's main business office or other suitable location near homes in the association.

a. Except as provided in paragraph 1b, the association must make all records available for homeowners, their authorized agents, or the ombudsperson to inspect and copy

i. during regular working hours, within ten days of a written request without requiring a statement of purpose or reason; and

ii. during an inspection, allowing copying of up to 25 pages at no cost, if the association or its agent has a photocopy machine at the site of the records; and in any event

iii. with a charge to the homeowner only for actual copying costs, not to exceed 35 cents per page plus staff time charges not to exceed $10 per hour.

b. Documents protected by the attorney-client privilege or as work product are exempt from disclosure to the same extent as they would be in litigation, as are contracts being negotiated. The following records also are exempt from disclosure to homeowners or their agents, except upon court order for good cause shown, provided that the ombudsperson may obtain the following records, and provided further that such records shall be kept confidential except upon court order for good cause shown:

i. staff personnel records, except the association shall make available under paragraph 1a records of time worked and salary and benefits paid; and

ii. records of homeowners other than the requester, except the association shall make available under paragraph 1a the list of homeowners with their mailing addresses and a compilation of violations of the governing documents, other than for nonpayment of an assessment, and this compilation must

a) describe the violation alleged and the sanction sought or imposed; and

b) not identify the person against whom the sanction was sought unless the matter was considered in an open meeting or court.

c. If an association refuses to allow a homeowner, homeowner's agent, or the ombudsperson to review records as provided herein, the requester is entitled to an immediate injunction, a penalty of $500, or in the court's discretion, more, and attorney fees, even if the association makes records available after filing of a case.

d. Any director may inspect any association records, except attorney-client privileged or work product records concerning potential, ongoing, or past litigation against the director. In addition to their rights under paragraph 1a, directors may make copies of minutes of any meeting during their term of office, and of any other document for purposes reasonably related to their duties as directors.

e. Pending litigation does not reduce the rights provided in this paragraph.

2. Quarterly Review. Every 90 days (or more frequently if required by governing documents), the directors shall review at one of the association meetings

a. the latest statements from financial institutions that hold association accounts;

b. current reconciliations of the association's operating and reserve accounts;

c. year-to-date income and expense statement for association operating accounts, compared with the budget;

d. year-to-date revenues and expenses for the reserve account, compared with the budget; and

e. the status of any lawsuit, arbitration, or mediation involving the association.

3. Open Meetings. Except for executive sessions, homeowners may attend, record, and (subject to reasonable limits) speak at any meeting of the association or its directors.

a. Directors may meet in executive session only to

i. approve, modify, terminate or take other action regarding a contract between the association and an attorney;

ii. consult with counsel on litigation or otherwise to obtain legal advice, if the discussion would be protected by attorney-client privilege;

iii. discuss the character, alleged misconduct, professional competence, or physical or mental health of an association manager or employee;

iv. discuss a homeowner's failure to pay an assessment or other alleged violation of governing documents, except as provided in paragraph 3b; or

v. discuss ongoing contract negotiations.

b. Directors shall use executive session to discuss alleged violations of governing documents unless the person who may be sanctioned requests an open meeting in writing. The person who may be sanctioned may attend and testify at any hearing concerning the alleged violation, but has no right to attend director deliberations.

c. Meeting minutes shall note generally any matter discussed in executive session.

4. Open Voting. All votes by directors shall be recorded in the minutes available to all homeowners, except to the extent permitted by paragraph 3. Directors may not vote by proxy or by secret ballot, except a secret ballot to elect officers. This rule also applies to any committee or

agent of the association that makes final decisions to spend association funds, or approve or disapprove architectural decisions.

5. Special Meetings. In addition to any provisions for special meetings in the governing documents, the following provisions apply:

a. The directors shall provide 30 days notice and convene a special meeting of the association to be held no less than 30 days and no more than 60 days after the chair, the secretary, or the association's registered agent receives a petition stating one or more purposes for such meeting and signed by homeowners holding 10 percent of the voting power, unless other law or the corporate documents state a different percentage. The petition may specify a person to chair the special meeting. Each purpose and, if specified in the petition, the chair of such special meeting shall be stated in its notice.

b. If the directors fail to provide notice and convene the meeting as provided in paragraph 5a, then upon written petition to the ombudsperson (with copy to the association), the ombudsperson shall notice and convene the requested meeting subject to the other provisions of paragraph 5a. The association shall pay costs reasonably incurred by the ombudsperson. Such action shall not disqualify the ombudsperson from exercising any other power.

6. Election and Ballot Oversight. If at least 100 homeowners or homeowners holding 15 percent of the voting power in an election or other ballot provide a written request to the ombudsperson (with copy to the association) at least 15 days in advance, the ombudsperson shall supervise the election or ballot, and if so, shall retain copies of the election or ballot records (including all proxies submitted, whether or not counted). The ombudsperson also has discretion to supervise the election or ballot if one or more homeowners provide a written request at least

15 days in advance. The association shall pay costs reasonably incurred by the ombudsperson. Such action

shall not disqualify the ombudsperson from exercising any other power.

7. Recalls. Except for directors appointed by the developer and directors elected by cumulative voting, directors shall be subject to recall (without use of proxy votes) as follows:

a. Any director may be recalled without cause by persons holding a majority of the total voting power, provided a homeowner's voting power for purposes of recall equals that to elect directors, and when only specific homeowners have power to elect a director, only those homeowners have voting power for recall.

b. One or more directors may be recalled by written agreement or ballots without an annual or special meeting.

i. The written agreement or ballots, or a copy thereof, shall be served on the association by certified mail or by personal service under process permitted by state law.

ii. Within five business days after receipt of the agreement or ballots, the directors shall meet--without excluding directors proposed for recall -- and, as the only business, as to each director proposed for recall shall either (A) certify the recall, in which case recall takes effect immediately and the recalled director shall within five business days turn over to the association all association records and property possessed by the director, or (B) proceed as described in paragraph 7d.

iii. If a court or the ombudsperson finds a recall effort defective, written recall agreements or ballots used in that recall effort and not found defective may be reused in only the

next recall effort, if any. However, no written recall agreement or ballot shall be valid more than 120 days after being signed by a homeowner.

iv. A homeowner may revoke a vote by recall agreement or ballot, but only in writing delivered to the association before service of the recall agreement or ballot.

c. If corporate documents specifically provide, homeowners may recall a director or directors by a vote taken at an annual or special meeting of homeowners.

i. A special meeting of homeowners to recall a director or directors may be called by homeowners with 15 percent of voting power (as defined in paragraph 7a) by giving notice as required for a special meeting, except that electronic transmission may not be used, and the notice shall state the purpose of the meeting.

ii. Within five business days after the special meeting, the directors shall meet—without excluding all directors proposed for recall--and, as their only business, as to each director proposed for recall shall either (A) certify the vote to recall, in which case recall takes effect immediately and the recalled director shall within five business days turn over to the association all association records and property possessed by the director, or (B) proceed as described in paragraph 7d.

d. Separately with respect to each director proposed for recall, if the directors do not certify the recall, the directors shall, within five business days after their meeting, petition the ombudsperson for arbitration, following procedures adopted by the ombudsperson. For purposes of this arbitration, homeowners who voted for recall shall be considered one party under the petition. If the ombudsperson certifies the recall of a director, the recall will be effective upon mailing the final order of arbitration to the association, and each director so recalled shall deliver

to the association all records of the association possessed by the director within five business days after notice of the recall. Such decision shall be subject to review in court with jurisdiction in the county where the association maintains its principal office, but such pending action shall not delay implementation of the ombudsperson's decision.

e. Vacancies created by recall shall be filled by homeowner vote held within 30 days after the recall is certified by the directors or by the ombudsperson, except that a director whose term expires within 30 days need not be replaced, provided

i. for recall pursuant to paragraph 7b, no separate vote shall be held if the written agreement or ballot specifies one replacement director for each director recalled, and homeowners holding a majority of the voting power vote for the named replacements; and

ii. for recall pursuant to paragraph 7c, the homeowner vote for replacement may take place at the same meeting held for the recall.

f. If the directors fail to meet within five business days after service of a written recall agreement or ballot pursuant to paragraph 7b, or within five business days after adjournment of a recall meeting pursuant to paragraph 7c, the recall shall be deemed effective and the directors so recalled shall immediately turn over to the association all records and property of the association. Any homeowner may petition the ombudsperson for certification that directors have been recalled pursuant to this paragrapg 7f.

g. If a director who is removed fails to relinquish office or turn over records and property as required under this paragraph 7, a court in the county where the association maintains its principal office may, upon the petition by the ombudsperson, the association, or homeowners,

summarily order the director to relinquish office and turn over all association records and documents to the association.

h. Minutes of the meeting where directors decide whether to certify the recall are an association record. The minutes must record the date and time, each decision, and the vote count separately taken as to each director proposed for recall. In addition, when the directors decide not to certify a recall, as to each rejected recall, the minutes must identify any rejected vote and the specific reason for each

such rejection.

i. When recall of more than one director is sought, the written agreement, ballot, or vote at a meeting shall provide for a separate vote for each director sought to be recalled.

j. Nothing in this paragraph 7 prevents a recalled director from retaining documents lawfully obtained under paragraph 1.

Section 183C: 8. The Right to Vote and Run for Office

1. Voting Rights. No association may deny a homeowner's right to vote on any issue that affects an assessment or other provision of governing documents that apply to the membership class of the homeowner.

a. For a home with multiple owners, unless expressly provided by the declaration: if only one owner seeks to vote, that owner votes for the home; but if more than one owner seeks to vote, votes must be allocated by agreement of a majority of the home's owners or, absent agreement, co-owners shall split votes in proportion to their ownership interest. Agreement exists

if any homeowner votes without another homeowner protesting either before the vote in writing or, at the vote, promptly to the person presiding over the vote.

b. No vote may be cast except by the homeowner or, where permitted by law and the governing documents, by a person holding a proxy, provided the following applies

i. The proxy must be dated and designate a meeting for which it applies.

ii. The proxy may not be revocable without notice, and may be revoked only by actual notice to the person presiding over the meeting.

iii. The proxy must designate each specific agenda item to which it applies, except a homeowner may execute a proxy without designating any item if used solely to determine whether a quorum exists. For each specific agenda item designated, the proxy must specify a vote for or against the proposition or, in an election or recall, state a specific position regarding who to vote for or whether to vote for or against recall. If a proxy does not state proper instructions to vote on an item, the proxy must be treated as if the homeowner were present but not voting on that item.

iv. When a holder casts proxy votes, the holder must disclose the number of proxies held, and the proxies must be kept as part of the public record of the meeting for the period provided by law.

v. Association governing documents may provide for homeowner proxy voting by absentee ballot, with the ballot as specific as any other proxy, and with the association's secretary to announce the number of such ballots received for each vote at the meeting, and the ballots kept

as part of the public record of the meeting.

c. Votes allocated to homes owned by the association may not be cast, by proxy or otherwise, for any purpose.

2. Candidacy. No homeowner may be denied the right to run for office.

a. Unless a person is appointed by the developer: the person may not serve as director (or officer) if the person or any relative (defined under state law) serves as manager for the association or, if a master association, manager of any association that is subject to the governing documents of the master association.

b. Each candidate named on a ballot for director must make a good faith effort to disclose in writing, by actual notice to all homeowners or as otherwise provided in the corporate documents, any financial, business, professional or personal relationship or interest that would appear to a reasonable person to result in a potential conflict of interest if the candidate were elected director.

3. Voting Procedure. Unless state law sets different requirements, and if not otherwise specified by corporate documents, a quorum exists if homeowners with 25 percent of voting power attend, or where permitted, are present by proxy at a meeting; provided, where only a specified class may vote on a particular issue, a quorum to vote on that matter requires 25 percent of voting power of that class. At any meeting, election of directors, recalls, and homeowner votes on assessments, amendment to governing documents, operating rules, or other matters shall be conducted by secret ballot (except as provided with respect to proxies in paragraph 1b), with all ballots kept as part of the records of the election for the period provided by law.

4. Access to Forums. If any candidate for an election, or homeowner advocating a point of view for purposes reasonably related to a homeowner vote, is permitted to use a forum that is paid for by the community (such as a newsletter, bulletin board, or meeting area) to promote his or her candidacy for a board election, then other candidates and homeowners shall also be permitted equal access to the same forum under the same conditions.

Section 183C: 9. The Right to Reasonable Associations and Directors

1. Duties of Associations. In addition to compliance with law and governing documents, an association (whether acting through directors, officers, managers, or other agents, by homeowner vote, or otherwise) has the following duties to its homeowners:

a. To use ordinary care and prudence in managing property and financial affairs;

b. To treat homeowners fairly; and

c. To act reasonably in the exercise of discretionary powers, including rule-making, enforcement, and design-control powers.

2. Duties of Directors, Officers, Managers, and Other Agents. In addition to compliance with law and governing documents, association directors, officers, managers, and other agents must act in good faith, deal fairly with the association and its homeowners, and use ordinary care and prudence in performing their functions.

a. A director, officer, attorney, manager or other agent of an association shall not solicit or accept any form of compensation, gratuity or other remuneration that

i. would improperly influence or would appear to a reasonable person to improperly influence the decisions made by such agent; or

ii. would result or would appear to a reasonable person to result in a conflict of interest for such agent.

b. Unless appointed by the developer, a director or an officer of an association shall not

i. enter into or renew a contract with the association to provide goods or services to the association; or

ii. otherwise accept any commission, personal profit, or compensation of any kind from the association for providing goods or services to the association.

3. Protection Regarding Attorneys. In contracting for a lawyer to seek foreclosure or take other enforcement action, no association may make legal fees in whole or part contingent on the amount paid (for fees or otherwise) by a homeowner. Any homeowner payment to the lawyer shall be held for the association. No contract may authorize anyone to prevent a homeowner from seeking to resolve any dispute directly with directors or other agents of an association.

4. Protection Regarding Managers. All association managers must be licensed and bonded

where required by law. In contracting with managers, associations may pay a flat fee, hourly rates, or a combination of flat fees and hourly rates. Managers may not be paid any fee, bonus, incentive, or other amount based on the number or value of violations they allege or address. Managers may not impose charges on homeowners, except where reasonable and expressly authorized by governing documents. All homeowner payments to the manager shall be held for the association.

5. Determination of Architectural Requests. A homeowner's request that the association or related architectural body approve the homeowner's planned construction, landscaping, maintenance, or repairs shall be deemed approved unless, within 30 days or such other period as the declaration may specify, the association or architectural body provides written notice specifically detailing a lawful basis for disapproval in whole or part. Such notice shall specify that homeowners have the right to reconsideration by the directors, unless the directors collectively made the original decision. Each year the association in writing shall remind homeowners that rules govern approval of construction, landscaping, maintenance, or repairs.

6. Fines and Other Charges

a. Where otherwise authorized by statute, associations may seek a court order to impose fines for a homeowner's willful noncompliance with duties under corporate documents, but may not otherwise impose fines.

b. Where authorized by corporate documents, associations may recover reasonable compensation for damages or costs (such as late fees) when a homeowner's rule-breaking actually harms the association; provided that the association cannot place a lien for such charges without a court judgment.

c. Nothing here prevents an association from withdrawing homeowner privileges to use recreational and social facilities where otherwise authorized, including withdrawal for nonpayment of fines or other charges authorized in this paragraph 6.

7. Retaliation Specifically Forbidden. No association, director, officer, manager, or other agent of an association may take, or direct, or encourage another person to attempt retaliatory action against a homeowner because the homeowner has

a. complained about alleged violations of law or governing documents;

b. requested to review books, records, or other papers of the association; or

c. taken any other lawful action asserting homeowner rights or otherwise seeking to improve association operations. The retaliatory forbidden action includes, without limitation, ill-motivated litigation (e.g., Strategic Lawsuits Against Public Participation, or SLAPP suits) as well as deprivation of other rights protected by law or governing documents.

8. Remedies. In addition to other remedies authorized by this model statute or other law, homeowners are entitled to recover compensatory and, for intentional violations, punitive damages from associations, and their directors, officers, managers, or other agents who act unlawfully. In addition, upon proof of intentional violations by directors, officers, managers, or other agents of the association, homeowners are entitled to appropriate relief in equity including (without limitation) removal of offenders from positions with the association, a bar against their return to office for a specified time, and an order requiring the offender to repay the association for expenses including legal fees. The attorney general (and if otherwise authorized, local government officials) may obtain the same relief as any homeowner, as well as other appropriate equitable relief including a bar against the offender's serving in any capacity for an association.

Section 183C: 10. The Right to an Ombudsperson for Homeowners

1. Creation of the Ombudsperson for Homeowners. The state Office of Ombudsperson for Homeowners shall have powers and duties provided in this model statute.

a. Each association annually shall register with the ombudsperson, providing its name and contact information; the same information for each management company; the location of each

recorded governing document; the number of the association's homeowners; and other information required by the ombudsperson.

b. With the annual registration, each association shall pay to the ombudsperson $4 for each home in the common-interest community.

2. Investigation and Oversight. The ombudsperson shall investigate alleged denials of homeowner rights under this model statute, the Non-Profit Corporation Act, or other statute by associations, their current or former directors, officers, employees, managers, or other agents and, where authorized by law, shall oversee elections and other ballots.

a. The ombudsperson has subpoena power for investigations, and shall provide petitioning homeowners and responding associations a statement of facts and legal conclusions, to be completed within 90 days, unless the ombudsperson expressly finds a need for up to twice that time.

b. The ombudsperson shall expedite investigations concerning supervised elections or other ballots and arbitration of recalls, to be completed within 15 days, unless the ombudsperson expressly finds a need for up to twice that time.

3. Enforcement. If the ombudsperson advises the attorney general to pursue litigation concerning an association, the ombudsperson shall so advise all petitioning homeowners and all directors of the association. However, the attorney general, local governments (if otherwise authorized), and homeowners may seek judicial relief with or without such recommendation.

a. In addition to enforcement of subpoenas for the ombudsperson, the attorney general shall seek judicial enforcement of the ombudsperson's decisions regarding supervised elections

or other ballots, arbitration of recalls, and findings that specified intentional violations of this model statute or other law justify removal of a director, officer, manager, or other agent. With or without a referral from the ombudsperson, upon finding actual or threatened violations of homeowner rights, the attorney general may seek temporary, preliminary, or final injunctions, independent audits, removal of directors, statutory penalties, and other lawful relief. If the homeowner agrees, the attorney general also can present individual claims for relief with government claims.

b. If a local government agency has power to enforce governing documents, it also has power to enforce the model statute and other rights for homeowners.

4. Optional Mediation and Supervised Voting. The ombudsperson may offer to participate in any mediation, or to supervise any election or other ballot, even where not required by law. No such offer, whether or not accepted, disqualifies the ombudsperson from exercising any power or duty under this model statute; provided, by agreement in writing, the ombudsperson and parties can specify confidentiality or other condition on agreed action by the ombudsperson.

5. Licensing Managers. The ombudsperson shall license qualified association managers, with tests to confirm knowledge of the law and, for managers who seek to handle association funds, to confirm knowledge of accounting. The ombudsperson may set requirements for managers to be bonded.

6. Forms Updated, Mediators Listed and Homeowner Education. The ombudsperson shall keep current the information statement and other disclosure forms that sellers must give to buyers as provided in Section 104, The Right to Be Told of All Rules and Charges, the Notice of

Foreclosure Rights, the Notice of Foreclosure Filing, the Notice of Right of Redemption, and other forms that may assist homeowners. The ombudsperson also shall be required to maintain lists of available no- or low-cost mediation programs, publish and promote educational materials to secure homeowner rights, and accredit programs to license association management. All such documents prepared by the ombudsperson shall be translated into any language used at one or more polling places during elections, and also made accessible to persons with disabilities.

7. Rulemaking. The ombudsperson shall adopt rules governing investigations, oversight, licensing of managers, and its other functions as appropriate to implement this model statute.

8. Annual Reports. The ombudsperson annually shall publish information on

a. the number, kind, and size of associations in this state;

b. how state law affects operation and management of associations;

c. known violations of this model statute;

d. homeowners' use of options for mediation and arbitration, costs incurred, and the decisions and awards made by mediation and arbitration procedures;

e. the number of foreclosure cases filed, the number completed, and the reasons for such cases; and

f. other issues the ombudsperson considers of concern to homeowners.