LET THE SUNSHINE IN: ENDING SECRECY IN COMMON INTEREST COMMUNITIES IN MASSACHUSETTS AND OTHER STATES

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Synopsis: In 2021, one of the Champlain Towers high-rise condominium buildings in Surfside, Florida collapsed, killing 98 people. That catastrophe has been blamed in part on keeping the condominium owners in the dark about the extent of the building's structural problems and the very high cost of repairs. Secrecy in many condominium/HOA communities facilitates a profitable business model by protecting developers, property managers, and association boards from embarrassment, angry owners, and legal liability for mistakes and misdeeds. But secrecy can also preclude the owners from having an informed voice in managing their communities, electing responsible community leaders, and preventing serious safety hazards like Champlain Towers. This Article argues that the "Sunshine Laws"—namely the Open Meeting and Public Records Acts that broadly apply to public governing bodies—should also extend to at least some condominium and HOA communities because they are quasi-public bodies that effectively operate as "mini governments."

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I. INTRODUCTION

From the earliest days, corruption and scandals have rocked American politics.[1] Beginning in the early twentieth century, Teapot Dome and other notorious political scandals created impetus for legal reforms to curb widespread secrecy in government and dramatically improve openness and transparency.[2] These reforms were inspired by the words of U.S. Supreme Court Justice Louis D. Brandeis that, in preventing public corruption, "Sunlight is said to be the best of disinfectants . . . ."[3]

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[1] *See* Steve, *It's Time to Revisit These 20 Political Scandals That Rocked the United States*, HISTORY COLLECTION (Apr. 28, 2019), https://historycollection.com/its-time-to-revisit-these-20-political-scandals-that-rocked-the-united-states [https://perma.cc/DK9V-VTSP].

[2] *See id*. The infamous Teapot Dome scandal involved President Harding's Secretary of the Interior leasing public oil reserves to private companies in exchange for bribes.

[3] Louis D. Brandeis, *What Publicity can Do*, *in* OTHER PEOPLE'S MONEY, AND HOW THE BANKERS USE IT, chpt. V (UNIV. OF LOUISVILLE, 1914), http:/louisville.edu/law/library/special-collections/the-louis-d.-brandeis-collection/other-peoples-money-chapter-v [https://perma.cc/ANR3-Z9YS] ("Publicity is justly commended as a remedy for social and industrial diseases. Sunlight is said to be the best of disinfectants; electric light the

The Open Meeting Laws require that most federal, state and local government proceedings be open to the public.[4] The Freedom of Information (Public Records) Acts require that most non-confidential government records be available for public inspection.[5] Echoing Justice Brandeis, these laws are often referred to as "Sunshine Laws,"[6] and every state now has a version of these laws.[7]

But, starting around the 1960s, new and increasingly pervasive and powerful forms of government emerged that were shielded from these important citizen protections because they were not originally regarded as "governments." These new entities are collectively referred to as common interest communities (CICs), which include condominiums, cooperatives, homeowner associations (HOAs), and various other permutations of residential planned communities.[8] The commonality shared by CICs is that

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most efficient policeman."); Andrew Berger, *Brandeis and the History of Transparency*, SUNLIGHT FOUND. (May 26, 2009, at 10:47 EDT), https://sunlightfoundation.com/2009/05/26/brandeis-and-the-history-of-transparency/ [https://perma.cc/2M3L-25P6]; MELVIN I. UROFSKY, LOUIS D. BRANDEIS: A LIFE (Pantheon Books, 2009).

[4] *See* ANN TAYLOR SCHWING, OPEN MEETING LAWS 1–6 (Fathom Publ'g Co., 3d ed. 2011).

[5] *See* Freedom of Information Act, 5 U.S.C. § 552 (1966). The federal Freedom of Information Act (FOIA) was enacted in 1966. But some corresponding state laws, variously known as "public records acts" or "freedom of information acts," predate the federal law. For example, Florida's first Public Records Law (chap. 5942) was passed in 1909. *See* ATHAN G. THEOHARIS, A CULTURE OF SECRECY: THE GOVERNMENT VERSUS THE PEOPLE'S RIGHT TO KNOW (Univ. Press of Kansas 1998).

[6] *See* La. Att'y Gen., Opinion No. 14-0169 (Oct. 20, 2014). The Louisiana Attorney General, citing the Brandeis quotation, said "[t]ransparency laws are commonly referred to as the 'Sunshine Law'" in referencing the Louisiana Open Meeting Law and the Louisiana Public Records Law. *Id.* at 1.

[7] The National Conference of State Legislatures reported: "To help increase transparency and public awareness of government decision-making, all 50 states have enacted laws that require certain government records to be open to the public." *Public Records Law and State Legislatures,* NAT'L CONF. FOR STATE LEGIS. (Apr. 16, 2025), https://www.ncsl.org/cls/public-records-law-and-state-legislatures [https://perma.cc/2G92-WHAC]. *See generally* DAVID ECKENRODE, CITIZENS' RIGHTS: A GUIDE TO PUBLIC RECORDS AND OPEN MEETING LAWS (2003).

[8] *See* RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 1.8 (A.L.I. 2000). A "common-interest community" is:

> [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 (1) to pay for the use of, or contribute to the maintenance of, property held or enjoyed in common by the individual owners, or (2) 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

they are all hybrid forms of real property ownership in which individual ownership (or at least exclusive use) of an interior space is combined with collective ownership of spaces and structural elements located outside of the unit interiors (generally known as common areas/elements or limited common areas/elements).[9]

State laws and the documents that create a CIC (for example, a Master Deed or a Declaration of Covenants, Conditions & Restrictions—"CC&Rs") empower CIC owners to elect a governing body,[10] and they vest that governing body with broad authority to enact and enforce rules and policies for the community—which is analogous to a municipal

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> enforces other servitudes burdening the property in the development or neighborhood.

Id. The term "common interest development" (CID) refers to the same thing as a CIC. CICs include condominiums and homeowner associations, which may also be referred to as "planned unit developments" (PUD). Cooperative ownership developments are structured differently but are often included within the general rubric of CIC. For a comprehensive discussion of both the history and characteristics of common interest communities (together with relevant citations), see Nahrstedt v. Lakeside Vill. Condo. Ass'n, 878 P.2d 1275, 1279–84 (Cal. 1994); Wayne S. Hyatt, *Condominium and Home Owner Associations: Formation and Development*, 24 EMORY L.J. 977 (1975). Although this Article simplifies and generalizes by mostly treating all CICs the same, state laws may distinguish between different types of CICs, such as between condominiums and HOAs or between CICs organized as not-for-profit corporations or as condominium trusts.

[9] *See* Hyatt, *supra* note 8, at 979. For example, in *Berish v. Bornstein*, the Massachusetts Supreme Judicial Court said, "Ownership of a condominium unit is a hybrid form of interest in real estate, entitling the owner to both 'exclusive ownership and possession of his unit . . . and . . . an undivided interest [as tenant in common together with all the other unit owners] in the common areas . . . .'" 770 N.E.2d 961, 971 (Mass. 2002) (quoting Noble v. Murphy, 612 N.E.2d 266, 269 (Mass. App. Ct. 1993)). The Uniform Condominium Act defines "condominium" as "real estate, portions of which are designated for separate ownership and the remainder of which is designated for common ownership solely by the owners of those portions." UNIF. CONDO. ACT § 1-103(9) (UNIF. L. COMM'N 1980). The legal structure of a cooperative differs from that of a condominium in that all units and common elements are owned by the cooperative, although owners have the exclusive right to use of their respective units. *See* William Schwartz, *Condominium: A Hybrid Castle in the Sky*, 44 B.U. L. REV. 137, 139 (1964).

[10] *See* Wayne S. Hyatt & James B. Rhoads, *Concepts of Liability in the Development and Administration of Condominiums and Home Owners Associations*, 12 WAKE FOREST L. REV. 915, 920 (1976); Cohen v. Kite Hill Cmty. Ass'n, 191 Cal. Rptr. 209, 213–14 (Ct. App. 1983); *see also* WAYNE S. HYATT & SUSAN F. FRENCH, COMMUNITY ASSOCIATION LAW: CASES AND MATERIALS ON COMMON INTEREST COMMUNITIES 391–452 (2d ed. 2008); WAYNE S. HYATT, CONDOMINIUM AND HOMEOWNER ASSOCIATION PRACTICE: COMMUNITY ASSOCIATION LAW 29–104 (3d ed. 2000). *See generally* ROBERT G. NATELSON, LAW OF PROPERTY OWNERS ASSOCIATIONS § 2.4 (1989); EVAN MCKENZIE, BEYOND PRIVATOPIA: RETHINKING RESIDENTIAL PRIVATE GOVERNMENT (Urban Instit. Press, 1st ed. 2011).

government.[11] Yet, because CICs were historically regarded as creatures of contract and not the legislature, they were not treated as "public bodies" subject to the Open Meeting Laws or the Public Records Acts.[12] This oversight enabled CICs to institute closed board meetings, restrict owner access to non-confidential records, and implement other questionable owner secrecy practices. But such practices arguably exceed the legitimate, traditionally-recognized scope of an association's governing powers because they do not come within the "touch and concern the land" test for covenants that run with the land, nor do they qualify as equitable servitudes because these secrecy practices are also usually kept secret.[13]

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[11] *See* Hyatt & Rhoads, *supra* note 10, at 917; Johnson v. Keith, 331 N.E.2d 879, 882–83 (Mass. 1975).

[12] *See, e.g.*, Tyler P. Berding, *The Contractual Community: Why Community Associations Are Not "Governments,"* CONDOISSUES.COM (Jan. 24, 2018), https://condoissues.blogspot.com/2012/01/contractual-community.html [https://perma.cc/ 6K84-747T]. After reviewing the many similarities between community associations and municipalities, the author argued:

> [W]hile these two governance systems may appear similar, their respective legal bases are really quite different. [This is] why the occasional characterization of community associations as 'mini governments' or 'quasi-governmental agencies' is particularly inapt . . . . The authority of the community association is not derived from constitutional law, per se, but rather from the common law of contract . . . .

Id. But see Deborah Goonan, *HOAs, condos, & co-ops: Quasi-governments or* '*contractual communities*'*?*, INDEPENDENT AMERICAN COMMUNITIES (Sept. 18, 2018) (responding to Berding's post and saying his arguments are based on "theory vs. reality"). The thrust of the present Article is that CIC owners never knowingly and willingly contract away their Constitutional rights to open and participatory association governance, nor should public policy permit them to do so. This Article therefore raises important Constitutional questions about the proper scope of a CIC board's authority to make rules and policies in a different context from other jurisprudence and legal literature on this subject.

[13] In the *Nahrstedt* case, the California Supreme Court provided a comprehensive explanation of the legitimate scope of a CIC's governing authority as follows: "Restrictive covenants will run with the land, and thus bind successive owners, . . . [but these] restrictions *must relate to use, repair, maintenance, or improvement of the property, or to payment of taxes or assessments* . . . ." *See Nahrstedt*, 878 P.2d at 1283 (emphasis added). This is commonly called the "touch and concern the land" requirement. Closed board meetings and other common CIC secrecy practices as discussed herein, however, do not "touch and concern the land." Alternatively, the court said, "Restrictions that do not meet the requirements of covenants running with the land may be enforceable as equitable servitudes *provided the person bound by the restrictions had notice of their existence*." *Id.* (quoting Riley v. Bear Creek Planning Comm., 551 P.2d 1213 (1976)) (emphasis added). Because closed board meetings and other CIC secrecy practices are rarely reduced to writing and are never accessible to buyers prior to making their purchases, these practices

Association secrecy in states without CIC owner rights protections has allowed CIC real estate developers, management companies, and other industry entities, working with their attorneys, to conceal many misdeeds—such as construction defects, underfunded reserve accounts, serious deferred maintenance, and financial mismanagement—from unsuspecting owners and buyers until the time for taking legal action lapses, or a disaster occurs like the deadly Champlain Towers South collapse.[14] A leading advocate for CIC owner rights said in a 2008 law review article: "If society's intention in setting up associations is to encourage the formation of undemocratic Gulags ruled by unaccountable boards and for the enrichment of those who profit from owner ignorance or impotency—we have succeeded completely."[15]

The 2006 AARP Report "A Bill of Rights for Homeowners in Associations: Basic Principles of Consumer Protection and Sample Model Statute" identified some of the ways that common CIC governance practices can victimize CIC owners,[16] which is an AARP concern because

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are arguably ultra vires acts that may constitute a breach of the board's fiduciary duties to the owners. *See, e.g.*, Buddin v. Golden Bay Manor, Inc., 585 So.2d 435, 437 (Fla. Dist. Ct. App. 1991) (holding board rulemaking to be *ultra vires*).

[14] The tragic 2021 collapse of Champlain Towers South in Surfside, Florida resulting in ninety-eight deaths has been attributed to a combination of deferring critical, but expensive, maintenance and resisting the unwelcome financial realities of the repair costs by some association leaders. *See* Robert Simons et al., *Champlain Towers South Collapse: Frequency, Governance and Liability Issues*, 14 J. OF SUSTAINABLE REAL ESTATE 57–74 (2022). CIC owner rights and greater owner knowledge about the finances and operations of their communities, however, could lead to inconvenient and embarrassing questions for developers, property management companies, and boards, as well as to potential legal liability for their mistakes. Accordingly, CIC developers, management companies, and boards, with the backing of their legal counsels, are incentivized to establish secrecy policies that may serve the more immediate interests of the developers and management companies instead of the long-term best interests of the owners.

[15] Edward R. Hannaman, *Homeowner Association Problems and Solutions*, 5 RUTGERS J. OF L. & PUB. POL'Y 699, 699 (2008). Attorney Hannaman is the founder and long-time president of the New Jersey Common-Interest Homeowners Coalition (C-IHC), an organization that promotes CIC owner rights.

[16] *See* DAVID A. KAHNE, A BILL OF RIGHTS FOR HOMEOWNERS IN ASSOCIATIONS: BASIC PRINCIPLES OF CONSUMER PROTECTION AND SAMPLE MODEL STATUTES 1–9 (AARP Pub. Pol. Inst. 2006), http://pvtgov.org/pvtgov/downloads/AARP2006-BOR.pdf [https://perma.cc/R8WN-NXX9] [hereinafter AARP BILL OF RIGHTS]. The introduction provides, "When conflicts do occur, residents have few practical options. This is because associations have the power to make rules (like a legislature), enforce rules (like an executive), and resolve disputes over rules (like a judge) [–] all through a board of volunteer directors . . . ." *Id.* at 2; *see also* Susan F. French, *The Constitution of a Private Residential Government Should Include a Bill of Rights*, 27 WAKE FOREST L. REV. 345 (1992).

seniors are an especially vulnerable group.[17] CIC secrecy protocols facilitate and perpetuate such governance. To protect owners and combat abusive CIC practices, states were urged to adopt the AARP Bill of Rights.[18] Key AARP owner rights provisions assure owners timely access to important, non-confidential association information through open meetings[19] and accessible records,[20] similar respectively to the Open Meeting Laws and Public Records Acts.

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[17] *See* AARP BILL OF RIGHTS, *supra* note 16. The AARP Bill of Rights identified a number of common CIC practices that tend to disproportionately impact older persons, especially because of limited financial resources and a hesitance to engage legal assistance or become embroiled in lengthy and uncertain litigation. *Id.* Thus, this document says:

> Often there is no impartial forum for an aggrieved homeowner other than a courtroom. Few jurisdictions have an effective alternative dispute resolution (ADR) system covering associations in common-interest communities, and few states have meaningful administrative oversight of these associations. Yet many owners cannot afford legal representation. Further, much of the existing law in this field was established by attorneys of developers and property managers, whose own perspective may differ from that of individual homeowners.

Id. at 2.

[18] *See id.* at Foreward ("The purpose of this publication is to outline a key set of ten principles (articulated as a 'bill of rights') that states can follow when developing laws and regulatory procedures for common-interest communities."). In 2011, for example, Kansas adopted the Kansas Uniform Common Interest Owners Bill of Rights Act (UCIOBORA), KSA 58-4601 through 58-4623. *See* KAN. STAT. ANN. §§ 58-4601–4623. All state statutory citations in this Article refer to the current statute unless otherwise indicated. A report on the history of this legislation was published by the Kansas Legislative Research Department. *See* KATELIN NEIKIRK, KAN. LEGIS. RSCH. DEP'T, THE KANSAS UNIFORM COMMON INTEREST OWNERS BILL OF RIGHTS ACT 1–8 (2018). In 2016, the District of Columbia amended its 1976 Condominium Act (§ 42-1901.02) by adopting the Condominium Owner Bill of Rights and Responsibilities Amendment Act of 2016. *See* D.C. CODE §§ 42-1901.02–1904.10. In 2024, a Common Ownership Communities Bill of Rights Act was introduced in Maryland. *See* Md. H.B. 266, 2024 Gen. Assemb., Reg. Sess. (Md. 2024).

[19] AARP BILL OF RIGHTS, *supra* note 16, at 12. Article VII: The Right to Oversight of Associations and Directors provides: "Homeowners shall have reasonable access to records and meetings . . . ." Section 107(3) of the sample model statute, which embodies the principles of article VII, provides: "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." *Id.* at 46. This section of the Model Statute also limits the permissible scope of "executive sessions" consistent with the Uniform Common Interest Ownership Act (UCIOA). *Compare id.* at 46 (limiting the scope of business that can be carried out in "executive sessions"), *with* UNIF. COMMON INTEREST OWNERSHIP ACT § 3-108(b) (UNIF. L. COMM'N 2021).

[20] Section 107(1) of the Sample Model Statute provides:

Today, approximately half of all U.S. jurisdictions, including every New England state except Massachusetts and Rhode Island, mandate that meetings of a CIC governing body be open to CIC owners (except properly limited executive sessions).[21] Many states have modernized their laws to include other portions of the AARP Bill of Rights, for example by adopting a version of the Uniform Common Interest Ownership Act (UCIOA) or one of the other uniform acts designed for CICs.[22] But Massachusetts has stubbornly clung to its vintage 1963 Condominium Act (G.L. c.183A),[23] even in the face of Massachusetts judges calling it a "primitive, first generation condominium statute" that has outlived its utility.[24]

> 1. Open Records. All association meeting minutes, financial and budget materials, contracts, court filings, and other records must be maintained . . . [and] the association must make all records available for homeowners . . . 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 . . . [(iii)] with a charge to the homeowner only for actual copying costs . . . .

AARP BILL OF RIGHTS, *supra* note 16, at 45. This section of the Sample Model Statute also provides an exception for "[d]ocuments protected by the attorney-client privilege or as work product . . . to the same extent as they would be in litigation . . . ." *Id*.

[21] *See infra* notes 123–126 and 135–155 and accompanying text.

[22] The original Uniform Common Interest Ownership Act (UCIOA) was created by the National Conference of Commissioners on Uniform State Laws by combining the Uniform Condominium Act, the Uniform Planned Community Act, and the Model Real Estate Cooperative Act. *See generally* UNIF. COMMON INTEREST OWNERSHIP ACT (UNIF. L. COMM'N 2021). The most recent version was issued in 2021. Article 3 of the UCIOA (Management of the Common Interest Community) includes a number of owner rights provisions, including the requirement of open board meetings. *See id.* § 3-108(b)(1); *infra* Part II.B. Article 4 of the UCIOA (Protection of Purchasers) includes important consumer rights protections for prospective buyers. *See* UNIF. COMMON INT. OWNERSHIP ACT § 4-101 *et. seq.* In addition to the UCIOA, there are other uniform acts for CICs, such as the Uniform Condominium Act (UCA), the Uniform Planned Community Act (UPCA), the Planned Community Act (PCA), the Uniform Real Estate Cooperative Act (MRECA – a combination of the UCA and the UPCA), and a Uniform Common Interest Owners Bill of Rights Act (UCIOBRA) modeled on the AARP BILL OF RIGHTS. *See supra* note 16; Norman Geis, *Beyond the Condominium: The Uniform Common-Interest Ownership Act*, 17 REAL PROP., PROB. & TR. J. 757 (1982); Patrick J. Rohan, *The Model Condominium Code – A Blueprint for Modernizing Condominium Legislation*, 78 COLUM. L. REV. 587 (1978).

[23] *See* MASS. GEN. LAWS ch. 183A.

[24] Barclay v. DeVeau, 415 N.E.2d 239, 245 (Mass. App. Ct. 1981), *superseded by sub nom.*, 429 N.E.2d 323 (Mass. 1981).

Change is clearly overdue, but it needs a catalyst. This Article proposes extending the Massachusetts Open Meeting Law[25] to at least some CICs based on their sizes and the scope of their municipal-like functions (for example, road maintenance, street lighting, and trash collection). These CICs should be regarded as quasi-public bodies because they effectively operate as mini governments.[26] Applying the Open Meeting Law to open to owners the meetings of the governing bodies of at least some CICs could pave the way to more comprehensive legislative reform. Although the focus of this Article is Massachusetts, this approach could similarly apply to other states with Open Meeting Laws that currently lack owner rights protections.[27]

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[25] *See* MASS. GEN. LAWS ch. 30A, §§ 18–25; 940 MASS. CODE REGS. 29.00 (2017). This law replaced the earlier Massachusetts Open Meeting Law, effective July 1, 2010. *See* MASS. GEN. LAWS ch. 39, §§ 23A–23C (repealed 2009). The current Open Meeting Law provides: "Except as provided in section 21, all meetings of a public body shall be open to the public." MASS. GEN. LAWS ch. 30A, § 20(a). A pair of 1980s-era Massachusetts Supreme Judicial Court cases, which were decided under the earlier version of the statute, addressed the scope of a "public body" subject to this law. In *District Attorney for Northern District v. Board of Trustees of Leonard Morse Hospital*, the court held that the hospital board of trustees was "not a governmental body within the meaning of the open meeting law." 452 N.E.2d 208, 209 (1983). In *Bello v. South Shore Hospital*, the court reversed a lower court decision that held that the actions of the hospital (which received state and federal funding) constituted "state action" for purposes of Constitutional due process rights. 429 N.E.2d 1011, 1013 (1981). This Article argues for a more expansive interpretation of the current Massachusetts Open Meeting Law in view of social and legal changes over the last forty years.

[26] *See* Evan McKenzie, *Common-Interest Housing in the Communities of Tomorrow*, 14 HOUSING POL'Y DEBATE 203 (Fannie Mae Found. 2003). In his award-winning books *Privatopia: Homeowner Associations and the Rise of Residential Private Government* and *Beyond Privatopia: Rethinking Resident Private Government*, Professor McKenzie made a strong case that modern common interest communities (which he refers to as common interest developments – CIDs) increasingly represent a convergence of public and private governments. *See* EVAN MCKENZIE, PRIVATOPIA: HOMEOWNER ASSOCIATIONS AND THE RISE OF RESIDENTIAL PRIVATE GOVERNMENT ch. 6 (Yale Univ. Press 1994); MCKENZIE, *supra* note 10, at 64–65; *see also* RANDY K. LIPPERT & STEFAN TREFFERS, INTRODUCTION: CONDOMINIUM GOVERNANCE AND LAW IN GLOBAL URBAN CONTEXT (Routledge, 1st ed. 2021); Andrea J. Boyack, *Community Collateral Damage: A Question of Priorities*, 43 LOY. U. CHI. L.J. 53 (2011); Hyatt & Rhoads, *supra* note 10 (discussing the "quasi-governmental" nature of CICs and noting that associations should be regarded as "mini governments" because in almost every case their powers, duties and responsibilities are identical to a municipal government).

[27] *See infra* notes 135–155 for the states that currently require open board meetings. States without such requirements currently all have open meeting laws that arguably should be extended to at least some of their CICs.

Part II of this Article discusses some of the ways that deficiencies in the current Massachusetts Condominium Act have empowered CIC governing bodies to preserve secrecy and keep vital association information from buyers and owners. A set of Massachusetts cases (1981–2020) is discussed to illustrate how the combination of CIC secrecy and legislative inertia has led to victimization of some Massachusetts CIC owners.

Part III of this Article discusses CIC open meeting requirements and other owner rights legislation in other states. These legislative reforms have started to erode what one legal scholar criticized as the CIC "contract myth" that has enabled abusive CIC governance.[28] This part also looks at some of the impediments to CIC legislative reform in Massachusetts, including CIC trade group opposition to the pending Condominium Owners Rights Act (CORA).[29]

Part IV of this Article presents three alternative legal approaches to support the argument that, as a bridge to legislative reform, at least some CICs should be subject to the Massachusetts Open Meeting Law because they are quasi-public bodies that effectively operate as mini governments.

Part V of this Article turns to the 2017 Massachusetts *Open Meeting Law Guide* issued by the Office of Attorney General Maura Healey (who is now Governor).[30] In view of the expansive scope accorded to the term "public bodies" in that *Guide*, it would be only a short jump for a Massachusetts court or the Attorney General's Division of Open Government to extend the Open Meeting Law to a quasi-public body like a CIC in an appropriate case. Arizona's history illustrates how a carefully crafted state Attorney General's Opinion on extending the Arizona Open Meeting Law to a CIC can be a stepping-stone to needed legislative reform.[31]

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[28] *See infra* Parts III.B, III.C; Andrea J. Boyack, *Common Interest Community Covenants and the Freedom of Contract Myth*, 22 J. L. & POL'Y 767, 768–69 (2014) ("Buyers of homes in a CIC are deemed to have voluntarily elected to be legally bound to all the private community rules, to have such rules specifically enforced, and to subject their property to a security interest securing their obligations to the community."); *see also* Hidden Harbour Ests., Inc. v. Basso, 393 So.2d 637, 639–40 (Fla. Dist. Ct. App. 1981) (arguing that CIC rules are presumed valid because owners purchased their units knowing and accepting those rules thereby agreeing to subordinate their individual preferences on certain issues to the choices of the community).

[29] S.B. 980 and H.B. 4826, 194th Gen. Ct., Reg. Sess. (Mass. 2025).

[30] OPEN MEETING LAW GUIDE AND EDUCATIONAL MATERIALS, OFF. OF ATT'Y GEN. MAURA HEALEY (Jan. 2018) https://www.documentcloud.org/documents/20521647-ma-ag-open-meeting-law-guide-2017-guide-with-ed-materials-revised-1-30-18-1/ [https://perma.cc/6Z4P-VVC2].

[31] *See infra* notes 419–428 and accompanying text.

Some of the arguments put forward in this Article admittedly run counter to a substantial body of current CIC jurisprudence. But looking at history alone misses emerging legal trends and ignores the enormous growth of CICs and the very large and growing number of people who are impacted by outdated CIC laws.[32]

II. CIC SECRECY ABUSES, MASSACHUSETTS CASE LAW, AND LEGISLATIVE INERTIA

A. CIC Secrecy Policies

Secrecy in community associations plays directly into the hands of those seeking to take unfair advantage of CIC buyers and owners. The combination of the bare-bones Massachusetts Condominium Act, too much judicial deference to the Legislature, and excessive CIC secrecy policies has facilitated many undesirable industry practices. G.L. c. 183A has frequently been described as an "enabling statute" that affords CIC developers a desirable measure of latitude in planning their communities. But absent significant CIC consumer protections, developers, management companies, and other industry players have skillfully exploited legislative gaps to design and operate communities for their personal benefit with few guardrails.[33]

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[32] The Community Associations Institute (CAI) Foundation for Community Association Research reported that it expects 3,000–4,000 new CICs to begin development in 2025, and that 77.1 million Americans currently live in over 350,000 of these communities, representing an astonishing 33% of all U.S. housing stock. *See HOA Growth Expected*, COMMON GROUND 14 (Mar.–Apr. 2025) https://foundation.caionline.org/research/industry-data/ [https://perma.cc/56G9-5GKX].

[33] *See, e.g.*, Barclay v. De Veau, 429 N.E.2d 323, 326 (Mass. 1981) ("Statutes like c. 183A which imprint the condominium with legislative authorization are essentially enabling statutes . . . [that provide] planning flexibility to developers and unit owners."); Noble v. Murphy, 612 N.E.2d 266, 269 (Mass. App. Ct. 1993) (citing *Barclay* in saying that "[c]lose judicial scrutiny and possible invalidation or limitation of [association rules] . . . would deny to developers and unit owners the 'planning flexibility' inherent in . . . c. 183A"). However, in *Trustees of Cambridge Point Condominium Trust v. Cambridge Point, LLC*, the Supreme Judicial Court of Massachusetts criticized a developer-appellant for endeavoring to disguise an abusive provision of the governing documents—which had the effect of insulating the developer from association lawsuits—as a routine provision. 88 N.E.3d 1142, 1153 (Mass. 2018). That court—invalidating a provision that required 80% owner consent before the association could file a lawsuit—stated:

> We conclude that it is overreaching for a developer to impose a condition precedent that, for all practical purposes, makes it extraordinarily difficult or even impossible for the trustees to initiate any litigation against the devel-

As explained in this section, CIC secrecy policies are routinely established when a CIC association (also called an "organization of unit owners") is created even though the association's documents never explicitly empower the governing body to do so.[34] These policies typically continue throughout the period of developer (also referred to as the "declarant") control, and the policies often persist even long after the transition from developer to owner control. Even after transition, developers who are still selling their developer-owned properties can manipulate owner-elected executive boards (sometimes also referred to as the "Directors" or the "Trustees") with a variety of sticks and carrots to continue favoring developer interests.[35] In some cases, developers have inserted "poison pill" provisions into the CIC governing documents that make later governance changes difficult, if not impossible.[36] Exploitive association

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> opers . . . Such a provision has all the same flaws as a waiver of liability provision—which we would find void as contravening public policy—but without the transparency of such a provision. We therefore conclude that [the bylaw provision], viewed in light of the totality of the circumstances, is void because it contravenes public policy.

Id.; *see also* LIPPERT & TREFFERS, *supra* note 26, at 6. Lippert and Treefers observed that early (1960s) North American condominium laws failed to anticipate that the volunteer boards charged with governing their communities would effectively become supplanted by "a complex network of external property management, insurance, law, developer and other-firms, and new quasi-state bodies [that] would be managing or influencing condominium affairs." *Id.*

[34] *See supra* notes 13–14 and accompanying text. Courts have the power to inquire whether an association is acting within the scope of its authority and whether its actions bear a reasonable relationship to legitimate CIC purposes. HYATT, *supra* note 10, at 98. Closed board meetings and other excessive secrecy practices do not meet this standard. Also problematically, "[e]ven when a purchaser is aware of the content of the applicable CIC [rules and policies] prior to closing, it is still pure fiction to claim that the owner manifests her 'choice' to be obligated thereunder when she closes the home purchase." Boyack, *supra* note 28, at 840.

[35] In the author's experience, CIC developers often organize and do business as thinly capitalized LLPs/LLCs. As a developer is approaching completion of selling the developer-owned units in a CIC, there is likely to be a lengthy "punch list" of construction items that the developer promised but has not yet delivered—for example, paved roads/sidewalks/driveways, landscaping, and recreational amenities to name a few. The developer may negotiate with an owner-elected board to complete the punch list (the "carrot") provided the board "cooperates" by keeping monthly fees low and continuing to hide construction problems so the developer can sell his remaining units at premium prices. The "stick" in this negotiation is the developer threatening to put the thinly capitalized LLP/LLC into bankruptcy and never complete the punch list if the board refuses to cooperate with the developer's requests.

[36] *See Cambridge Point*, 88 N.E.3d at 1153 (invalidating one version of such a "poison pill" provision); *infra* notes 172–190 and accompanying text.

governance can be almost impossible to change because owners often lack access to essential information, have no easy means of organizing enough other owners to amend the governing documents, and typically face unrealistically high "supermajority" voting requirements.[37]

Some common CIC practices that are enabled by association secrecy policies include hiding construction defects,[38] keeping monthly fees artificially low,[39] minimizing maintenance and repairs,[40] and deferring appropriate funding of reserve accounts.[41] Concealing construction defects and keeping fees low help the developer to sell the remaining developer-owned units at premium prices.[42] Even after the transition to owner control, owner-elected executive boards are often reluctant to raise monthly fees or to disclose information about construction defects or underfunded reserve accounts that could anger owners and adversely impact the values of homes in their communities.[43] These realities encourage the preservation of developer-instituted secrecy policies long after owner-friendly changes should have been made. As discussed below, these secrecy policies may include closed executive board meetings, excessively broad confidentiality agreements for community leaders, secret settlement agreements imposed on some owners, and obstacles to owner access to non-confidential association records.[44]

B. Closed Executive Board Meetings

Closed executive board meetings are the linchpins for an interconnected set of association secrecy policies as discussed below. Different types of association meetings serve different purposes.[45] Those meetings

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[37] *See Cambridge Point*, 88 N.E.3d at 1146, 1153.

[38] *See infra* notes 106–118 and accompanying text.

[39] *See, e.g.*, Deborah Goonan, *4 Risks for Homeowners in Developer-Controlled HOA Communities*, INDEPENDENT AMERICAN COMMUNITIES (Nov. 8, 2019), https://independentamericancommunities.com/2019/11/08/4-risks-for-homeowners-of-developer-controlled-hoa-communities/ [https://perma.cc/5RMW-QFLC].

[40] *See id*; Patrick M. Audley & Henry A. Goodman, *Beware Deferred Maintenance: What to Do When the Bill Comes Due*, CONDOMEDIA 32–33 (Mar. 2022). CondoMedia magazine is a monthly publication of the New England regional chapter of the CAI.

[41] *See* Audley & Goodman, *supra* note 40.

[42] *See id; supra* note 35 and accompanying text.

[43] *See supra* note 14 and accompanying text.

[44] *See infra* Parts II.B–E.

[45] *See Meetings & Hearings, Motions & Minutes*, MD. DEP'T OF HOUS. & CMTY. AFFS. (Feb. 2018), https://montgomerycountymd.gov/DHCA/housing/commonownership/

may include annual owner meetings, special owner meetings, periodic community meetings and executive board meetings. The first three of these meetings are primarily informational and generally open to any interested owners.[46] Depending on state law and the association's governing documents, however, CIC executive board meetings can be closed to owners who are not board members,[47] in contrast to the meetings of "public bodies" which are subject to the open meeting laws.

It is during those executive board meetings, however, that the real business, management, and governance of a CIC take place.[48] Association budgeting and financial planning are discussed and voted on. The board and management candidly discuss and the board votes on important community issues. Rule and policy changes are also discussed and voted on. Important association documents are discussed and voted on. Thus, the votes taken during these executive board meetings vitally affect the everyday lives of the owners as well as the future financial health of the community.[49] Should these decision-making meetings be conducted in secret?

But the Massachusetts Condominium Act is mostly silent about CIC meetings. The Condominium Act does not require CIC meetings of any type, and it says nothing about notice, quorums, owner attendance, or even minutes.[50] As a result, Massachusetts CIC meetings and other practices are

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meetings_motions_minutes.html [https://perma.cc/XE78-82AX] (discussing three different types of community association meetings and the different purposes they serve); *Understanding Association Meetings*, NEV. DEP'T BUS. & INDUS., REAL EST. DIV. (Feb. 20, 2018), https://red.nv.gov/uploadedFiles/rednvgov/Content/CIC/Brochures/hoa_meetings.pdf [https://perma.cc/R6M8-KKBK].

[46] *See* MD. DEP'T OF HOUS. & CMTY. AFFS., *supra* note 45. The category of "Community Meetings" or "Membership Meetings" could be considered a variant of "Special Meetings." Unlike Special Meetings, however, they are not necessarily limited to discussing and deciding a single issue. Rather, they may be used to provide periodic updates to the community on finances, maintenance, amenities, etc.

[47] In many states, board meetings must be open to owners. *See infra* notes 122–154 and accompanying text. Even in states that do not require open board meetings, many associations hold open meetings because their governing documents require it, or because they have chosen to do so in the interest of owner trust and transparency.

[48] *See, e.g.,* MD. DEP'T OF HOUS. & CMTY. AFFS., *supra* note 45 ("A 'board meeting' is a regularly scheduled open meeting of the board of directors for the purpose of conducting the association's business.").

[49] *See id*.

[50] *See, e.g.*, Stephen Marcus, *State of Massachusetts: Frequently Asked Questions*, COMTY. ASS'NS INST. (Jan. 1, 2011), https://web.archive.org/web/20220419143255/https://www.caionline.org/Advocacy/LegalArena/Laws/Documents/CCAL%20Mass.pdf [https://perma.cc/F4S3-3ST8].

largely dictated by the governing documents according to the preferences of CIC developers, management companies, and their attorneys.[51] Thus, in Massachusetts and other states without owner rights protections, CICs can choose to exclude owners from their Executive Board Meetings and to employ other practices to preserve secrecy on non-confidential association information and records that might be inconvenient, embarrassing, or potentially raise legal issues. A recent survey of managers of CIC management companies revealed the unsettling fact that continuing legislative expansion of CIC owner rights was high on their list of concerns.[52]

The practice of closed Board meetings also deprives owners of critical insight into the discussions, reasoning, and voting of their elected Board members.[53] Owners cannot intelligently choose whether to reelect a Board

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[51] *See id.* The association's legal counsel theoretically represents the association as a whole through its governing body (the board), not any individual or group of owners. But the legal advice that a board receives from the association's legal counsel sometimes seems to be less guided by the best interests of the community at large than by those of the association's management company—which may have advised the board on its selection of that legal counsel. This arrangement presents an inherent conflict of interest in that legal counsel's loyalty may not fully align with the CIC owners who are paying the bills. In some instances, a management company may manage multiple CIC properties in a particular geographical area. Because of industry consolidation, multiple management companies in a region may in turn be under the control of a regional/national parent company that coordinates the operations of its management companies, which gives these companies even greater influence in their associations' choice of legal counsel. CIC lawyers/firms in such areas might well perceive that they will be regarded more favorably if they have a solid track record of providing legal advice consistent with industry interests. In an article on the HOAleader.com subscribers' website, a reader asked whether it was a conflict of interest for the same lawyer/law firm to represent both an association and its management company. *See* HOAleader.com, *When Your Law Firm Represents Your Condo/HOA and Your Management Company* (June 2025) (member password protected, on file with author). One of the responses from Scott D. Weiss, CCAL, a partner in a prominent Tennessee CIC law firm, representing more than 800 CIC communities in the state, candidly acknowledged: "Most of our business comes from management companies – they refer us." *Id.* Unfortunately, the interests of unit owners, which do not always align with those of industry entities, become subordinated in this process. For example, state and national CAI Legislative Action Committees (LACs), largely staffed on a pro bono basis by industry attorneys, seem to consistently lobby in favor of legislation considered beneficial to industry interests while opposing CIC owner rights reforms. *See infra* Part III.D.

[52] *See infra* note 213 and accompanying text; *infra* Part III.D.

[53] In *Foudy v. Amherst-Pelham Regional School Committee*—a case decided under the earlier version of the Massachusetts Open Meeting Law, MASS. GEN. LAWS ch. 39, §§ 23B—the Supreme Judicial Court said: "It is essential to a democratic form of government that the public have broad access to the decisions made by its elected officials *and to the way in which the decisions are reached*." 521 N.E.2d 391, 394 (Mass. 1988)

member when the Board has conducted the most important parts of its business behind closed doors. This undemocratic practice would never be tolerated in modern American politics—why is it accepted in CICs?

The 2021 version of the Uniform Common Interest Ownership Act (UCIOA) addresses these common CIC meeting issues with thoroughness and clarity.[54] Massachusetts's neighbors, Connecticut[55] and Vermont,[56] have been UCIOA states for a number of years and, as discussed in Part III.A., Maine may soon follow.[57]

Section 3-108(a) of the UCIOA provides for two of the types of CIC meetings—Annual Owner Meetings and Special Owner Meetings—both of which must be properly noticed and open to owners.[58] Section 3-108(b) then addresses executive board meetings.[59] This section provides that "meetings of the executive board and committees of the association authorized to act for the association . . . *must be open to the unit owners except during executive sessions*."[60] This section further provides that executive boards and committees "may hold an executive session only during a regular or special meeting of the board or a committee."[61] This

(emphasis added). In *City of Revere v. Massachusetts Gaming Commission*, the Supreme Judicial Court repeated the above quotation from the *Foudy* case saying: "And the new version of the [Open Meeting Law] statute does not alter our belief [in those principles]." 71 N.E.3d 457, 475 (Mass. 2017); *see also* Boelter v. Bd. of Selectmen of Wayland, 93 N.E.3d 1163, 1172–73 (Mass. 2018) (holding that electronic communications among the board members prior to a meeting regarding an action to be taken at the meeting constituted a violation of the Open Meeting Law); *see generally* David C. Drewes, *Putting the "Community" Back in Common Interest Communities: A Proposal for Participation-Enhancing Procedural Review*, 101 COLUM. L. REV. 314 (2001).

[54] *See* UNIF. COMMON INT. OWNERSHIP ACT § 3-108(b) (UNIF. L. COMM'N 2021). The UCIOA was amended in 2008 to add the provisions related to open executive board meetings. *Id.* Some states, like Minnesota, adopted earlier versions of the UCIOA and never amended their laws to incorporate updated versions of the UCIOA. *See* MINN. STAT. § 515B.3-108.

[55] *See* CONN. GEN. STAT. §§ 47-200 to -295. *Compare* CONN. GEN. STAT. § 47-250 *with* UNIF. COMMON INT. OWNERSHIP ACT § 3-108(b) (UNIF. L. COMM'N 2021) (regarding open board meetings).

[56] *See* VT. STAT. ANN. tit. 27A, §§ 1-101 to 4-120. *Compare* VT. STAT. ANN. tit. 27A, § 3-108(b) *with* UNIF. COMMON INT. OWNERSHIP ACT § 3-108(b) (UNIF. L. COMM'N 2021) (regarding open board meetings).

[57] *See infra* notes 128–133 and accompanying text.

[58] *See* UNIF. COMMON INT. OWNERSHIP ACT § 3-108(a)–(b)(1) (UNIF. L. COMM'N 2021).

[59] *See id*. § 3-108(b).

[60] *Id*. § 3-108(b)–(b)(1) (emphasis added).

[61] *Id.* § 3-108(b)(1).

section guards against secret executive sessions. Additionally, this section limits the scope of executive sessions to five very specific categories of well-recognized confidential information.[62] This section also ensures voting transparency by providing: "No final vote or action may be taken during an executive session."[63]

Section 3-108(b)(2) prevents subterfuge to circumvent open meeting requirements by providing: "The executive board and its members may not use incidental or social gatherings of board members or any other method to evade the open meeting requirements of this section."[64] Section 3-108(b)(4) also assures owner input into the decision making process by providing: "At each executive board meeting, the executive board shall provide a reasonable opportunity for unit owners to comment regarding any matter affecting the common interest community and the association."[65] Additionally, section 3-121 sets forth requirements for providing effective notice to owners concerning matters like meetings.[66]

UCIOA section 3-102(h) is an important supplement to UCIOA open meeting requirements. This provision requires the executive board to "establish a reasonable method for unit owners to communicate among themselves . . . on matters concerning the association."[67] An association

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[62] *See id.* ("An executive session may be held only to: (A) consult with the association's attorney concerning legal matters; (B) discuss existing or potential litigation or mediation, arbitration, or administrative proceedings; (C) discuss labor or personnel matters; (D) discuss contracts, leases, and other commercial transactions to purchase or provide goods or services currently being negotiated, including the review of bids or proposals, if premature general knowledge of those matters would place the association at a disadvantage; or (E) prevent public knowledge of the matter to be discussed if the executive board or committee determines that public knowledge would violate the privacy of any person."); *see also* Ellen Shapiro, *Executive Session: Transparency Versus Privacy*, CONDOMEDIA 26–27 (Mar. 2022). The Massachusetts Open Meeting Law, G.L. c.30A, sec. 21, provides ten exceptions that allow a public body to convene in a private executive session.

[63] UNIF. COMMON INT. OWNERSHIP ACT § 3-108(b)(1) (UNIF. L. COMM'N 2021). Unfortunately, the existence of a legal requirement, like UCIOA section 3-108(b), for boards to conduct open meetings does not necessarily mean that associations observe that practice. The author has noted postings periodically appear in the CAI Members Open Forum Digest (a daily online blog platform hosted by the Community Associations Institute) from posters in UCIOA states complaining that their boards continue to hold secret meetings. (representative posts on file with author). The UCIOA does not prescribe a penalty for violating its open meeting requirements.

[64] *Id.* § 3-108(b)(2).

[65] *Id.* § 3-108(b)(4).

[66] *See id.* § 3-121.

[67] *Id.* § 3-102(h).

may have ambiguous and overly broad rules prohibiting door-to-door distribution of flyers, posting of signs, use of owner phone or email lists, and even unsanctioned owner gatherings in or on association common areas.[68] Such rules inhibit owner communications and seem to be inconsistent with section 3-102(h) unless effective alternatives are provided.

These rules may be couched as efforts to protect owners from unwanted disturbances, but the real objective may be to restrict owners from sharing association-related information and complaints about management. Selective enforcement of such rules can also be used as a tool to favor preferred candidates in Board elections. Unfavored candidates may have no effective ways to campaign without risking a rule violation.[69]

Associations have also tried to use claims of trademark or servicemark infringement and related causes of action to shut down owner-run social media sites using the association name that endeavor to provide alternative owner-to-owner communication channels that are not overseen and regulated by the association or management.[70] Some of the concerning First Amendment "free speech" and "freedom of assembly" issues raised by these persistent association efforts to restrict CIC owner communications are discussed in Parts III.B. and III.C. of this Article. While section 3-102(h) does not specify any particular "reasonable method" to assure owner-to-owner communications or directly address any of the First

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[68] For example, an association may prohibit unapproved advertising or soliciting on association property including door-to-door, email, and printed advertising/soliciting including but not limited to placards, folders, signs and flyers. The rule may additionally provide that the use or distribution of resident phone lists, contact lists, or any other unit owner information is prohibited. There may be no definition of what constitutes "advertising" or "soliciting." Furthermore, if the information was not derived from a confidential association source, the association should not be able to regulate its use or distribution. *See, e.g.*, Dublirer v. 2000 Linwood Ave. Owners, Inc., 103 A.3d 249, 260 (N.J. 2014) (holding that an owner was permitted to continue door-to-door distribution of leaflets critical of the building's management).

[69] *See, e.g.*, Mazdabrook Commons Homeowners' Ass'n v. Khan, 46 A.3d 507 (N.J. 2012) (refusing to enforce the association's prohibition against an owner posting signs about his political candidacy).

[70] *See, e.g.*, Bd. of Dirs. of Sapphire Bay Condo. W. v. Simpson, Civil Action No. 04-62, 2014 WL 4067175, at *1–2, *12 (D.V.I. Aug. 13, 2014), *aff'd*, 641 F App'x 113, 117 (3d Cir. 2015) (unpublished opinion) (analyzing and rejecting each of the association's claims for federal, state, and common law trademark/servicemark infringement, as well as for misappropriation, unfair competition, false advertising, and dilution against an owner operating a social media site using the association's name for identification). On appeal, the U.S. Court of Appeals for the Third Circuit affirmed the District Court decision "in its entirety." *See* Bd. of Dirs. of Sapphire Bay Condo. W. v. Simpson, 641 F. App'x 113, 117 (3d Cir. 2015) (unpublished opinion).

Amendment issues, it does affirm the need for associations to provide effective owner communication channels.[71]

C. Excessively Broad Confidentiality Agreements

Excessively broad confidentiality agreements operate hand-in-hand with closed executive board meetings to keep sensitive, even if non-confidential, association information and records from owners.[72] Owners serving in CIC governing positions may often be exposed to association information and documents that legitimately qualify as "confidential" under generally accepted legal standards.[73] Asking these individuals to respect the confidentiality of truly confidential information and documents is certainly reasonable.

Some CICs, however, require members of their governing bodies to execute excessively broad confidentiality agreements that may be virtually unlimited in scope and duration, and clearly go beyond legitimately confidential matters.[74] Such associations have been known to deny specific

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[71] *See* UNIF. COMMON INT. OWNERSHIP ACT § 3-102(h) (UNIF. L. COMM'N 2021).

[72] The problem of excessively broad confidentiality agreements only arises in communities that exclude owners from their regular board meetings. If these meetings were open to owners, except for properly limited "executive sessions," the confidentiality agreements could simply be limited to the matters discussed in those executive sessions. Many CICs do not use any confidentiality agreements for members of their governing bodies and instead rely on the good judgment of those members to respect the sensitive nature of truly confidential information. That approach is reinforced by a community-wide code of ethics or similar document, such as one of the model codes on the CAI website. *See Board Member Ethics*, CMTY. ASS'NS INST. (2021), https://www.caionline.org/getmedia/68dfd3d7-dac5-4d2a-92b4-63eeb7b24adf/modelcodeethicsboardmembers2021.pdf [https://perma.cc/8NUJ-GY6C].

[73] *See supra* notes 59–63 and accompanying text.

[74] *See, e.g.,* COLORADO HOA FORUM, HOMEOWNER ADVOCATES, *HOA Non-disclosure Agreements (NDA) Highly Questionable, Likely Illegal*, https://coloradohoaforum.com/home-14/ [https://perma.cc/K5CQ-VFQF]. For example, one such confidentiality agreement, required for the governing members of one association, included the following secrecy provision:

> All information and documentation that I receive from the Association or from any others in connection with my service on the [board or committee] will be treated with strict confidentiality, unless otherwise designated for dissemination. Neither the contents nor the existence of this information or documentation will be shared with anyone other than the officers, directors, employees, and authorized agents of the Association, through any means other than normally accepted communication, such as minutes, meetings, etc.

See, e.g., Representative Confidentiality Agreement (2020-2024) (on file with author) [hereinafter Confidentiality Agreement].

requests to modify these agreements to exclude information and documents that by law must be made accessible to owners.[75]

These excessively broad confidentiality agreements may be of questionable enforceability. But the mere threat of legal action can discourage current and former board members from potentially breaching their Confidentiality Agreements by sharing certain information with owners.[76] If the executive board meetings in these communities are closed to owners, current and former board members may be the only community members with knowledge of these matters. If these individuals are precluded from sharing that information, owners may have no way to access association information to which they are rightfully entitled.[77]

D. Secret Settlement Agreements

Another legally questionable practice in some CICs is to employ an excessive fine/penalty policy to bully alleged rule violators into signing settlement agreements with non-disclosure provisions.[78]

With this tactic, the association initially assesses an exorbitant fine (relative to the severity of the alleged rule violation) against an alleged rule violator. Then, following some negotiations and, perhaps, a "kangaroo court" hearing before the same body that levied the fine,[79] an offer is

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[75] In regard to the Confidentiality Agreement, the board of a Massachusetts CIC denied a written request from the author and his spouse to modify its Agreement to exclude financial records that MASS. GEN. LAWS ch. 183A § 10(c)(4) requires to be made available to owners. These records clearly did not qualify as "confidential" information under MASS. GEN. LAWS ch. 183A § 10(c)(4). Nevertheless, the confidentiality provision prohibited disclosure of even "the existence of . . . information or documentation" covered by the provision. *See* Confidentiality Agreement, *supra* note 74. Owners who are unaware that documents even exist are unlikely to request access to those documents, thus preserving secrecy.

[76] *See* Confidentiality Agreement, *supra* note 74; Boyack, *supra* note 28, at 829 ("Contractual promises designed to have the *in terrorem* effect of discouraging breach, in the form of penalizing liquidated damages clauses, are likewise subject to judicial restraint and invalidation.").

[77] Some of these Agreements advise board members that their signed documents "shall become part of the permanent files," perhaps in an effort to control these owners even after they no longer serve on the board. *See* Confidentiality Agreement, *supra* note 74.

[78] *See, e.g.,* Representative Settlement Agreement (proffered to a friend of the author in 2024 to settle an alleged rule violation) (on file with author) [hereinafter Settlement Agreement].

[79] *See* AARP BILL OF RIGHTS, *supra* note 16 at 1–2. Some management company contracts provide that a proportion of those exorbitant fines be shared with the management

extended to the alleged rule violator to dramatically reduce the fine conditioned on the "violator" executing an association-drafted "settlement agreement."

The settlement agreement will contain a stringent secrecy/non-disclosure provision that prohibits the owner/violator from discussing any part of the matter with anyone.[80] In most of these cases, however, there is little (if anything) that is genuinely confidential subject matter; and any right to confidentiality in these matters should rest with the alleged violator, not the association. By comparison, in other branches of American government, civil and criminal rule enforcement proceedings are routinely open to the public,[81] and the outcomes of those proceedings are generally public information.[82]

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company, thereby incentivizing the company to issue more violation notices. Contrastingly, section 6(a) of the proposed CORA legislation provides that an association's internal dispute resolution procedure "take place in a neutral, unbiased forum using neutral, unbiased individuals." S.B. 980 § 6(a), 194th Gen. Ct., Reg. Sess. (Mass. 2025).

[80] For example, one such settlement agreement included the following secrecy provisions:

> The Parties regard it as absolutely essential that the amount and terms of the settlement remain confidential, and hereby agree and covenant that the amount and other terms and conditions of this agreement shall forever remain confidential and will not be disclosed to any other person unless disclosure is required by law . . . and such person has been informed that the agreement must be kept confidential, and they are prohibited from disclosing any information about the settlement or the agreement . . . The parties further agree that the terms of confidentiality are material to this agreement and that a breach of this confidentiality provision . . . may result in court-ordered sanctions, including attorneys' fees incurred in the enforcement of this provision.

Settlement Agreement, *supra* note 78 at 1. Such a provision would be subject to judicial scrutiny. *See* Boyack, *supra* note 28, at 829.

[81] Some states with requirements for open CIC board meetings provide that fines for owner rule violations must be considered and voted on in open meetings. *See, e.g.*, TEX. RESIDENTIAL PROP. OWNERS PROT. ACT § 209.0051(h) (West 2011), *amended by,* S.B. 1168 § 8 , 84th Leg., Reg. Sess. (Tex. 2025), *amended by* S.B. 1588, 87th Leg., Reg. Sess., (Tex. 2021). In Illinois, discussions related to an alleged owner rule violation must be conducted in a closed session of the board, but the vote to impose a fine must be done in an open meeting. *See* 765 ILL. COMP. STAT. 160/1-40(5). Furthermore, this information must be recorded in the meeting minutes and be available to all owners. *See* 765 ILL. COMP. STAT. 160/1-30(i)(1)(iii).

[82] To the extent that there is any legitimate argument for confidentiality in CIC rule enforcement actions, however, such a right to confidentiality should rest exclusively with the alleged rule violator. The association should have no say whatsoever in how much the alleged violator chooses to share with others about the settlement. If the association is using excessive fines, threats of expensive legal action, social ostracism in the community, or

Furthermore, if the objective of fining CIC owners for association rule violations is to secure the compliance of the violator and send a message to other community residents, secrecy clauses in these settlement agreements are clearly counterproductive.[83] On the other hand, secret CIC settlement agreements may serve an entirely different purpose. A fundamental principle of CIC governance is non-discrimination among similarly situated owners.[84] But if settlement agreements are kept secret, there is no way to know whether some owners are being treated less harshly because of favoritism while other troublesome owners are treated more severely.[85]

Additionally, these settlement agreements sometimes contain a false recitation that the parties to the agreement "cooperated" in drafting it.[86] This recitation is clearly intended to defeat the contract interpretation principle that ambiguities should be decided against the drafter.[87] In reality, however, it is unlikely that the alleged violator had any input whatsoever into drafting the settlement agreement.

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any other bullying tactics to try to coerce an owner into signing one of these excessively broad settlement agreements, these facts should rightfully be exposed to other owners. The Brandeis quote about sunlight being the best disinfectant applies equally to this kind of association secrecy. *See* Brandeis, *supra* note 3.

[83] If enforcement actions are kept secret, they cannot serve as examples or warnings to the community. Moreover, the inevitable and uncontrollable gossip about such cases can be damaging to community spirit.

[84] Edward Hoffman Jr. & Kayla Hernandez, *Holy Fiduciary Duty*, COMMON GROUND 29 (Mar./Apr. 2025), https://lsc-pagepro.mydigitalpublication.com/publication/?i=839771&p=26&view=issueViewer&pre=1 [https://perma.cc/VHA7-X6BX] ("Enforcement of covenants, restrictions, rules, and regulations should be applied uniformly and consistently. A potential breach of fiduciary duty claim may include selective enforcement or discrimination.").

[85] *See id*. at 27.

[86] *See* Todd D. Rakoff, *The Law and Sociology of Boilerplate*, 104 MICH. L. REV. 1235, 1235, 1241 (2006).

[87] *See, e.g.,* Karnette v. Wolpoff & Abramson, LLP, 444 F. Supp. 2d 640, 647 (E.D. Va. 2006) (discussing the principle that "requires that ambiguity in non-negotiated or adhesion contracts to be construed against the profferer"). For example, the Settlement Agreement, *supra* note 80, includes the following provision: "The parties cooperated in the drafting of this agreement, and, as such, its provisions shall not be construed against any party."

E. Obstacles to Records Access

G.L. chapter 183A, section 10(c) assures unit owners access to important association financial records.[88] But association procedures for accessing those records can be expensive and cumbersome.[89] One common practice is to require an owner to state in writing the reason for a document request, even though such a requirement is not specifically authorized by the statute.[90] If an owner is legally entitled to an association document, the reason for the request should be irrelevant. Another common practice is to arbitrarily impose unreasonable fees on an owner's record request.[91]

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[88] *See* MASS. GEN. LAWS ch. 183A, § 10(c)(4)(i)–(v) ("The organization of unit owners shall keep a complete copy of the following items . . . (4) financial records, including the following: (i) records of all receipts and expenditures, invoices and vouchers authorizing payments, receivables, and bank statements relating thereto; (ii) records regarding the replacement reserve fund or any other funds of the organization of unit owners and bank statements relating thereto; (iii) audits, reviews, accounting statements, and financial reports relating to the finances of the organization of unit owners; (iv) contracts for work to be performed for or services to be provided to the organization of unit owners; and, (v) all current insurance policies of the organization of unit owners, or policies which name the organization as insured or obligee."). This section additionally provides: "Such records shall be kept in an up-to-date manner within the commonwealth and shall be available for reasonable inspection by any unit owner . . . during regular business hours and . . . shall include the right to photocopy said records at the expense of the person or entity making the request." *Id.* § 10(c).

[89] *See, e.g.*, McKenzie, *supra* note 26. Section 3-118 of the UCIOA addresses the subject of association records. *See* UNIF. COMMON INT. OWNERSHIP ACT § 3-118 (UNIF. L. COMM'N 2021). Section 3-118(a) covers the types of records that need to be retained with greater specificity than G.L. chapter 183A, section 10(c)(4). *Compare id.* § 3-118(a) *with* MASS. GEN. LAWS ch. 183A, § 10(c)(4). Section 3-118(b) requires prompt and reasonable access to those records by an owner for examination and copying. *See* UNIF. COMMON INT. OWNERSHIP ACT § 3-118(b). Section 3-118(c) limits the kinds of records that can be withheld from owner inspection and copying. *See id.* § 3-118(c). Section 3-118(d) provides that an association may only charge "a reasonable fee" for providing record copies or for supervising an owner's record inspection. *Id.* § 3-118(d). The comments accompanying section 3-118 explain how the 2008 UCIOA amendments improved on the original "minimalist" version of this provision to "address the significant issues of records maintenance that have arisen since UCIOA was first promulgated 25 years ago." *Id.* § 3-118 cmts. 1–2.

[90] *See* McKenzie, *supra* note 26. By contrast, section 107(1) of the Sample Model Statute of the AARP Bill of Rights provides that an owner's request for association records need not include "a statement of purpose or reason." AARP BILL OF RIGHTS, *supra* note 16, at 45.

[91] *See* McKenzie, supra note 26. *But see* AARP BILL OF RIGHTS, *supra* note 16, at 45 (providing that an owner requesting records may only be charged "for actual copying costs").

Owners and prospective buyers may be unaware that important association documents, such as Transition[92] and Reserve Studies,[93] even exist if those documents have only been discussed in closed executive board meetings. As previously noted, board meeting minutes are not even required in Massachusetts,[94] and they can be skillfully written to mask references to any matters or documents that the board prefers not to share with owners. Owners cannot reasonably be expected to request access to

[92] A CIC Transition Study typically occurs when control of the association is being passed from the developer to an owner-elected governing body. *See Best Practices: Transition from Developer Control*, FOUND. FOR CMTY. ASS'N RSCH. 5 (2017), https://foundation.caionline.org/wp-content/uploads/2017/06/bptransition.pdf [https://perma.cc/37LM-9PVD]. The Transition Study is generally performed by a professional engineer or engineering company to assess the financial condition of the community and to evaluate whether the structural status of the buildings, facilities and other parts of the community have been completed in conformance with design documents, architectural plans, engineering plans, or other specifications. *See id.* at 9. It also identifies areas with substandard workmanship. The Transition Study helps the association understand the condition of the property and generate a "punch list" of items that the developer needs to complete or correct. *See id.* at 21; John Rod, *Understanding the Community Association Transition Process*, KIPCON ENG'G (July 14, 2022), https://kipconengineering.com/community-association-transition-process [https://perma.cc/32TT-SB6U]; *Transition Studies: What are They and Why are They Important for HOA Communities?*, CRITERIUM-BENNETT ENG'RS, https://criterium-bennett.com/transition-studies-what-are-they-and-why-are-they-important-for-hoa-communities/ [https://perma.cc/K47X-DZDL].

[93] A CIC Reserve Study is an assessment of an association's assets and a vital capital planning tool. *See Best Practices: Transition from Developer Control, supra* note 92, at 20. The Reserve Study uses periodic on-site inspections to calculate the estimated remaining life of the association's various common elements and the projected cost of repairing or replacing them. *See id.* Based on these estimates and projections, the Reserve Study provides guidance for implementing a capital funding plan to ensure that the association will have the money it will need for such maintenance and repairs when they become necessary. *See* John Thiboutot, *A Perfect Trio: Reserve Studies, Building Condition Assessments, and Preventive Maintenance*, CONDOMEDIA 20–23 (Dec. 2021). As one publication says: "Without a reserve study . . . an HOA is flying blind into its future." RSRV. ADVISORS, *What is a Reserve Study and Why is It Important?*, https://www.reserveadvisors.com/resources/blog/what-is-a-reserve-study-and-why-is-it-important/ [https://perma.cc/W9QX-7K2B]. The CAI website provides a state-by-state guide and a color-coded map showing "Reserve Requirements and Funding" for each state. *See Reserve Requirements and Funding*, CMTY. ASS'NS INST., https://www.caionline.org/advocacy/advocacy-priorities-overview/reserve-requirements-and-funding/ [https://perma.cc/H4L7-3QH4]. These several publications clearly describe the importance of making these non-confidential studies known and readily available to CIC owners and prospective buyers.

[94] *See* MASS. GEN. LAWS ch. 183A, § 10(c)(3) (including a requirement that the organization of unit owners keep a complete copy of "the minute book . . . to the extent such minutes are kept . . . ").

records they do not even know exist.[95] Burying important association records in difficult-to-navigate, access-restricted community websites can be another effective secrecy tactic, especially if owners have not been alerted to the importance and availability of those records.[96] For these reasons, without open executive board meetings, CIC owners may be unable to meaningfully exercise their legal rights to access important, non-confidential association financial, and other, records.

F. Secrecy and the Example of Phased CIC Developments

To illustrate how the combination of CIC secrecy policies and legislative inaction can penalize owners, this section reviews a set of Massachusetts cases involving the increasingly common developer practice of phased CIC developments. This occurs when a CIC project that includes multiple buildings is completed in phases extending over many years. Under Massachusetts case law, however, delay in owner access to association records during the extended development period is a death knell to many subsequent owner lawsuits. Since at least 1981, Massachusetts courts have commented on the difficulty of applying simplistic 1960s-era condominium law to evermore complex CIC legal structures such as phased developments.[97] But these judicial calls for legislative reform have largely gone unanswered.

In *Barclay v. Deveau*,[98] Judge (later to become Supreme Judicial Court Justice) Greaney in his dissenting opinion called G.L. chapter 183A "a primitive, first generation condominium statute."[99] Continuing, he said: "Its draftsmen probably did not anticipate phased condominiums, mixed use condominiums, commercial condominiums, or any of the other mutations which creative real estate lawyers have contrived."[100] In a related footnote, Judge Greaney observed that G.L. chapter 183A could be "usefully contrasted with the more sophisticated . . . later statutes . . . for example, [the] Uniform Condominium Act."[101]

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[95] *See supra* notes 45–53 and 72–77 and accompanying text.

[96] *See id.* For example, some association owner communication and records platforms make it easier than others to extract and reformat association financial data into a more user-friendly form, like an Excel spreadsheet, for purposes of routine analysis, and trending and historical comparisons.

[97] *See infra* notes 98–118 and accompanying text.

[98] 415 N.E.2d 239 (Mass. App. Ct. 1981), *superseded by sub nom.*, Barclay v. De Veau, 429 N.E.2d 323 (Mass. 1981).

[99] *Id.* at 245 (Greaney, J., dissenting).

[100] *Id*.

[101] *Id*. at 240 n.4.

Sixteen years later, another phased condominium case came before the Massachusetts Appeals Court. In *Viola v. Millbank II Associates*,[102] Judge (later to become Supreme Judicial Court Justice) Lenk authored another dissenting opinion lamenting the absence of legislative guidance on the issue before the court.[103] Quoting from Judge Greaney's dissenting opinion in *Barclay*, she said: "With this case we reach the limits of what our 'primitive, first generation condominium statute' can accommodate . . . for phased condominiums. Our statute is largely silent on this now commonplace reality and our case law on the subject of phased development also remains remarkably sparse."[104]

Further commenting on the inadequacies of the statute, Judge Lenk continued: "The shortcomings of c. 183A are no secret. The Legislature has from time to time addressed certain of its perceived deficiencies, but has not chosen to do so by enacting [comprehensive reform] legislation such as the Uniform Condominium Act or the Uniform Common Interest Ownership Act."[105]

In 2020 (an unbelievable 23 years after *Viola* and 39 years after *Barclay*), the disastrous consequences for CIC owners of the Legislature's continued inaction were driven home in *D'Allesandro v. Lennar Hingham Holdings*.[106] This time, Justice Lenk authored the court's unanimous opinion interpreting Massachusetts's Statute of Repose in the context of phased condominium developments.[107] The disappointing Supreme Judicial Court holding in this case of first impression was that the six-year Statute of Repose[108] was triggered upon completion of each building in a multi-

[102] 688 N.E.2d 996 (Mass. App. Ct. 1997).

[103] *See id.* at 999–1004.

[104] *Id*. at 999.

[105] *Id*. at 1003.

[106] 156 N.E.3d 197 (Mass. 2020).

[107] *See id.*

[108] *See* MASS. GEN. LAWS ch. 260, § 2B (establishing a six-year limit on lawsuits alleging defects in the design and construction of Massachusetts condominium developments). Unlike the analogous Statute of Limitations, such as for product defects, the Statute of Repose is not tolled, but rather continues to run, even if the construction defects were hidden and not reasonably detectable during the six-year period. *See id.* Thus, the court in *D'Allesandro* said: "Accordingly, we have consistently enforced § 2B's statute of repose, as we have other statutes of repose, 'according to [its] plain terms, despite the hardship [it] may impose on plaintiffs,' and we have held that '[u]nlike statutes of limitation, statutes of repose . . . cannot be 'tolled' for any reason." 156 N.E.3d at 203. In a 2023 decision involving breach of warranty and contractual indemnification claims, the Massachusetts Appeals Court said: "While the statute [of repose] applies specifically to actions of tort, a plaintiff

phase development.[109] Accordingly, claims against the developer and others for serious design and construction defects were time-barred with respect to those buildings completed more than six years before suit was filed.[110]

Justice Lenk acknowledged that the Supreme Judicial Court's holding "may present some difficulty for plaintiffs . . . where the developer retains control of the association of unit owners of a condominium for a period of time after some or all of the condominium's buildings are open to use or substantially complete and occupied."[111] Quoting from an earlier Supreme Judicial Court decision, Justice Lenk wryly observed that "developers are not likely to agree to sue themselves."[112] Nevertheless, she insisted: "This concern, however, is appropriately addressed to the Legislature."[113] She also did not comment on how association secrecy policies, both during and after the period of developer control, can effectively prevent timely owner access to important association records.[114]

Unlike many other states, Massachusetts does not regulate the timing of the transition from developer to unit owner control.[115] As Justice Lenk noted, this could mean that the developer retains control of the association, and therefore access to critical construction and financial information, even after all of the buildings in a phased development are completed.[116] This control is an invitation to developer abuse. The governing documents

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may not escape the consequences of the statute by recasting a negligence claim in the form of another claim." U. of Mass. Building Authority v. Adams Plumbing & Heating, Inc., No. 22-P-426, 2023 WL 307432, at *3 (Mass. App. Ct. Jan. 19, 2023).

[109] *See D'Allesandro*, 156 N.E.3d at 202.

[110] *Id*. at 203–04.

[111] *Id*. at 203.

[112] *Id.* (quoting Trs. of Cambridge Point Condo. Tr. v. Cambridge Point, LLC, 88 NE.3d 1142, 1149 (Mass. 2018)).

[113] *Id*.

[114] *See supra* Parts II.A.–E.

[115] Because Massachusetts does not specify any triggering event (such as a percentage of owner-owned units) for transition to owner control, developers typically insert provisions in the governing documents that allow them to maintain control as long as possible. The courts have held that when there is no specific time limit for termination of developer control, the transition time period is a "reasonable" one. *See, e.g.*, Howard S. Goldman, *Transitioning to an Independent Condominium Board*, GOLDMAN & PEASE: LEGAL BLOG https://goldmanpease.com/transitioning-to-an-independent-condominium-board/ [https://perma.cc/4Z8L-BFLW] (last visited Jan. 12, 2026 at 14:49 EST).

[116] *See D'Allesandro*, 156 N.E.3d at 203.

for CICs are often drafted to afford the developer the option of later deciding to add additional project phases.[117] Such a decision could then further delay the transition to owner control and owner access to association records. In theory, a developer of a phased community might choose to disregard shoddy workmanship on early-phase buildings, redirect some of the savings to better-constructed later-phase buildings, and rely on the Statute of Repose to insulate him from liability on the earlier buildings.[118]

Of course, open executive board meetings alone are not a panacea that will solve all of the many Massachusetts CIC legal issues. But using the Massachusetts Open Meeting Law to open CIC executive board meetings to owners can be a bridge either to limited owner rights legislation (like CORA) or to more comprehensive legislative reform (like the UCIOA).

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[117] The issue in the *Viola* case, for example, was whether the developer could proceed with phases II and III of the condominium development without the consent of all of the phase I unit owners. *See* 688 N.E.2d at 997. The phase I owners argued that adding additional condominium units would dilute their respective ownership interests in violation of G.L. chapter 183A, section 5(b)(1), which requires: "The percentage of the undivided interest of each unit owner in the common areas and facilities as expressed in the master deed shall not be altered without the consent of all unit owners whose percentage of the undivided interest is affected . . . ." *Id.* at n.4 (quoting MASS. GEN. LAWS ch. 183A, § 5(b)(1)). The trial court found in favor of the phase I owners. *See id.* at 997. On appeal, the Appellate Court reversed in a 2-1 decision, reasoning that the phase I owners should have understood that their respective interests in the common areas would be diluted if the developer elected to exercise the reserved right to proceed with phases II and III. *See id.* at 999. But in her dissent, Judge Lenk insisted that the language of the master deed "flies directly in the face of what § 5(b) . . . requires," and so, she said, "the statute is violated." *Id.* (Lenk, J. dissenting). Later, in the *D'Allesandro* case, Justice Lenk observed: "We note that at the outset of the condominium development here, the total number of phases and buildings was indeterminate. The master deed contemplated the construction of additional buildings beyond the first phase, but only committed the developer to completing the first phase." 156 N.E.3d at 202 n.14.

[118] A Transition Study, which would identify construction defects and poor workmanship, does not occur until the time of transition from developer to association control. *See supra* note 92. Thus, by adding additional development phases, a developer can delay the transition date and the related Transition Study.

III. CIC OWNERS' RIGHTS LEGISLATION AND THE CONTRACT MYTH

A. Expanding Owner Rights Outside Massachusetts

Since 2000, CIC owner rights have been expanding across the country.[119] In a few instances, enlightened courts have rethought the community association-unit owner relationship in more owner-friendly ways. Although the decision was reversed on appeal, in the 2006 *Twin Rivers*[120] case the New Jersey Appellate Court recognized that social change had preceded legal change, observing:

> It follows that fundamental rights exercises, including free speech, must be protected as fully as they always have been, even where modern societal developments [like CICs] have created new relationships or have changed old ones. Expressive exercises, especially those bearing upon real and legitimate community issues, should not be silenced or subject to undue limitation because of changes in residential arrangements, such as where lifestyle issues are governed or administered by community associations in addition to being regulated by governmental entities.[121]

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[119] *See infra* notes 122–161 and accompanying text. For a good summary of recent state and federal legislative initiatives to improve transparency and expand homeowner rights in HOA, condominium, and cooperative communities, see Deborah Goonan, *2025 HOA-Related Housing Bills, Legislative Tracking*, INDEP. AM. CMTYS. (May 25, 2025), https://independentamericancommunities.com/2025/05/25/2025-hoa-related-housing-bills-legislative-tracking-2/ [https://perma.cc/AQ7K-BRCX]. This summary also describes how industry trade groups, especially state/regional chapters of the CAI, have opposed these recent reform efforts, as discussed more fully in Part III.D. of this Article.

[120] Comm. for a Better Twin Rivers v. Twin Rivers Homeowners' Ass'n, 890 A.2d 947 (N.J. Super. Ct. App. Div. 2006), *rev'd*, 929 A.2d 1060 (N.J. 2007).

[121] *Id.* at 960 (citations omitted); Paula A. Franzese & Steven Siegel, *The Twin Rivers Case: Of Homeowners Associations, Free Speech Rights and Privatized Mini-Governments*, 5 RUTGERS J. L. & PUB. POL'Y 729, 732–33 (2008).

Mostly, however, expanded owner rights have depended on states enacting modern CIC legislation. In New England, the states of Connecticut,[122] Maine,[123] New Hampshire[124] and Vermont[125] currently require open executive board meetings. Connecticut[126] and Vermont[127] have adopted versions of the UCIOA, and Maine may soon follow.[128] The significance of Maine's prospective adoption of the UCIOA was explained by Attorney Joseph G. Carleton, a fellow of the prestigious CAI College of Community Association Lawyers (CCAL) and former Maine legislator, in the February 2025 issue of CondoMedia magazine.[129] He wrote: "The Maine Legislature is on the brink of [enacting the Maine Common Interest Ownership Act (MCIOA)] . . . a crucial bill that, if passed, will bring about a much-needed modernization of existing laws."[130]

In discussing Maine's proposed bill, Attorney Carleton noted: "The bill has been drafted to balance the sometimes-conflicting interests of interested parties . . . ."[131] He also observed that, like Massachusetts:

> The current [Maine] laws governing these [common interest] communities go back to 1965-1981 and predate modern technology and societal changes . . . . Citizen rights, such as free speech and due process, guaranteed by state and federal constitutions generally do not apply to community associations, but today,

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[122] *See* CONN. GEN. STAT. § 47-250.

[123] *See* ME. REV. STAT. ANN. tit. 33, § 1603-118 (adding to Maine's condominium law effective September 2011).

[124] *See* N.H. REV. STAT. ANN. § 356-B:37. This statute's revisions significantly overhauled the state's condominium law in 2016 to provide greater owner transparency. *Id.* The revisions requires giving owners at least 10 days' advance notice of board meetings, opening those meetings to owners, and providing owners with an opportunity to comment. *See id.* The revisions additionally prohibit board members from using incidental or social gatherings to evade the new open meeting requirements. *See id.*

[125] *See* VT. STAT. ANN. tit. 27A, § 3-108(b).

[126] *See* CONN. GEN. STAT. §§ 47-200 to -295 (adopting the UCIOA in 2010).

[127] *See* VT. STAT. ANN. tit. 27A, §§ 1-101 to 4-120 (adopting the UCIOA in 2014).

[128] *See* Joseph G. Carleton, *An Important Decision: Maine Common Interest Ownership Act*, CONDOMEDIA 32–33 (Feb. 2025).

[129] *See id.* at 32. Attorney Carleton's remarks about the importance of CIC owner rights legislation are especially significant in view of his professional credentials as a former Maine legislator and former chair of the CAI-Maine Legislative Action Committee, an organization that has not typically been receptive to CIC owner rights. *See infra* Part III.D.

[130] Carleton, *supra* note 128, at 32.

[131] *Id*.

> community members increasingly insist on them. To exist, owner rights must be in statutes.[132]

Echoing the theme of this Article, Attorney Carleton further observed: "Common interest communities are like small municipalities; they have elected leaders, pass budgets, enact and enforce rules, and collect taxes (assessments). MCIOA would extend rights that are familiar to citizens in a municipality to members of [Maine's] common interest communities."[133]

Many other states/jurisdictions also currently require open CIC board meetings, including Arizona,[134] California,[135] Colorado,[136] the District of Columbia,[137] Florida,[138] Hawaii,[139] Idaho,[140] Illinois,[141] Iowa,[142] Kansas,[143] Louisiana,[144] Maryland,[145] Nevada,[146] New Jersey,[147] Ohio,[148]

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[132] *Id*.

[133] *Id*. at 33.

[134] *See* ARIZ. REV. STAT. ANN. §§ 33-1248, 33-1804(A).

[135] *See* CAL. CIV. CODE § 4925; CAL. CIV. §§ 4900–4955.

[136] *See* COLO. REV. STAT. § 38-33.3-308(2.5)(a).

[137] *See* D.C. CODE § 42-1903.03.

[138] *See* FLA. STAT. § 718.112(2)(c) (discussing condominiums); FLA. STAT. § 720.303(2)(a) (discussing homeowner associations).

[139] *See* HAW. REV. STAT. § 514B-125(a).

[140] *See* IDAHO CODE § 55-3204(1).

[141] *See* 765 ILL. COMP. STAT. 605/18(a)(9)(A); 765 ILL. COMP. STAT. 160/1-40(b)(5); *see also* Palm v. 2800 Lake Shore Drive Condo. Ass'n, 10 N.E.3d 307, 326 (Ill. App. Ct. 2014) (holding that so-called board "working sessions" must be open to owners).

[142] *See* IOWA CODE § 21.3.

[143] *See* KAN. STAT. ANN. § 58-4612.

[144] *See* LA. STAT. ANN. § 9:1141.26(B)(1) (providing for open board and committee meetings, except for executive sessions).

[145] *See* MD. CODE ANN. REAL PROP. §§ 11-109(c)(6), 11-109.1 (discussing condominiums); MD. CODE ANN. REAL PROP. § 11B-111 (discussing homeowners associations).

[146] *See* NEV. REV. STAT. §§ 116.3108, 31085.

[147] *See* N.J. STAT. ANN. § 46:8B-13(a).

[148] *See* OHIO REV. CODE ANN. § 5311.08(A)(3) (discussing condominiums); OHIO REV. CODE ANN. § 5312.04 (discussing planned communities).

Oregon,[149] Texas,[150] Utah,[151] Virginia,[152] Washington[153] and Wisconsin.[154] There are some meeting differences among these states. For example, in Ohio, open board meetings are required unless that is modified by an association's declaration or bylaws.[155] Oregon requires open board meetings, but not open committee meetings.[156] By contrast, Arizona,[157] Colorado,[158] and some other states mandate open board and committee meetings "notwithstanding any provision in the [association documents]."[159] Some of these states (for example, Florida[160] and Utah[161]) also require that owners have an opportunity to speak during an open board meeting, while others (for example, New Jersey) do not. Notice and agenda provisions also vary from state to state.

B. The CIC Contract Myth

The importance of modern CIC legislation like the UCIOA, however, extends far beyond open CIC board meetings. CICs have been recognized as new and legally distinctive "hybrid" forms of property ownership that do not easily fit into traditional molds.[162] Early (1950s–1970s) state condominium legislation, grounded in traditional property principles, failed to

[149] *See* OR. REV. STAT. § 100.420.
[150] *See* TEX. PROP. CODE ANN. § 209.0051; TEX. GOV'T CODE ANN. § 551.002.
[151] *See* UTAH CODE ANN. § 57-8a-226(3)(a).
[152] *See* VA. CODE ANN §§ 55.1-1816, 55.1-1949.
[153] *See* WASH. REV. CODE §§ 64.38.035(4), 64.90.445(2)(a).
[154] *See* WIS. STAT. § 703.15.
[155] *See* OHIO REV. CODE ANN. § 5311.08(A)(3).
[156] *See* OR. REV. STAT. § 100.420.
[157] *See* ARIZ. REV. STAT. ANN. §§ 33-1248, 33-1804(A).
[158] *See* COLO. REV. STAT. § 38-33.3-308(2.5)(a).
[159] *Id.* § 38-33.3-106.5(1).
[160] *See* FLA. STAT. § 718.112(2)(c)(3).
[161] *See* UTAH CODE ANN. § 57-8a-226(3)(a).
[162] *See* Berish v. Bornstein, 770 N.E.2d 961, 971 (Mass. 2002); Gregory S. Alexander, *Dilemmas of Group Autonomy: Residential Associations and Community*, 75 CORNELL L. REV. 1, 5–7 (1989-1990). Professor Alexander observed, for instance: "Recent cases reflect judicial awareness of the group character of residential life in common unit developments. The sense that emerges from these cases is that courts regard these arrangements as new forms of residency, fundamentally different from both traditional fee ownership of the detached house and apartment living." *Id.* at 11.

anticipate and provide for the many unique CIC legal and owner rights challenges that would emerge.[163]

This legislative vacuum was filled by early court cases that tried to address this new hybrid form of property ownership.[164] In the absence of legislative guidance, a prevailing view emerged that the owner-association relationship should be treated as a freely negotiated contract,[165] in some ways analogous to the traditional and familiar tenant-landlord relationship.[166] The master deed, declaration, or covenants, conditions, and restrictions (CC&R) documents filed with the state to establish a CIC were treated as servitudes imposed on, and running with, the property.[167] This viewpoint led to the presumption that CIC owners voluntarily surrendered their legal rights and consented to be governed by the association's rules,

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[163] *See, e.g.*, McKenzie, *supra* note 26; Noble v. Murphy, 612 N.E.2d 266, 269 (Mass. App. Ct. 1993) (citing Hidden Harbour Ests., Inc. v. Norman, 309 So.2d 180, 182 (Fla. Dist. Ct. App. 1975)) ("Central to the concept of condominium ownership is the principle that each owner, in exchange for the benefits of association with other owners, 'must give up a certain degree of freedom of choice which he might otherwise enjoy in separate, privately owned property.'"); Franklin v. Spadafora, 447 N.E.2d 1244, 1247 (Mass. 1983).

[164] *See* Jeffery A. Goldberg, *Community Association Use Restrictions: Applying the Business Judgement Doctrine*, 64 CHI.-KENT L. REV. 653 (1988); *Judicial Review of Condominium Rulemaking*, 94 HARV. L. REV. 647 (1981).

[165] *See, e.g.*, Johnson v. Keith, 331 N.E.2d 879, 882 (Mass. 1975); Tosney v. Chelmsford Vill. Condo. Ass'n., 493 N.E.2d 488, 491 (Mass. 1986); Compiano v. Kuntz, 226 N.W.2d 245, 249 (Iowa 1975)(asserting that "restrictive covenants [are] agreements or promises and therefore contractual."). In *Noble*, the court noted the "defendants do not contend that there is any fundamental public policy or constitutional provision guaranteeing the right to raise, breed, or keep pets in a condominium." 612 N.E.2d at 271. It is one thing, however, to voluntarily contract away one's freedom to keep pets, to choose paint colors, or to choose how to decorate the outside of one's home in the interest of preserving community policy and aesthetics. It is a very different matter, however, to argue that CIC owners should be regarded as having implicitly contracted away their constitutional rights to open and participatory government.

[166] When two or more parties simultaneously hold an interest in the same property, such as a landlord and tenant, they are considered to be in "horizontal privity." This contract construction of the owner-association relationship is suggested by the fact that CIC owners share "an undivided interest [as tenants in common together with all the other unit owners] in the common areas." *Berish*, 770 N.E.2d at 971 (alteration in original).

[167] *See, e.g.*, Woodside Vill. Condo. Ass'n v. Jahren, 806 So. 2d 452, 457 (Fla. 2002); Katharine Rosenberry, *The Application of the Federal and State Constitutions to Condominiums, Cooperatives, and Planned Developments*, 19 REAL PROP., PROB. & TR. J. 1, 28–30 (1984).

however onerous, regardless of whether they had actual knowledge of those rules when they signed their closing documents.[168]

The "contract" construction of the owner-association relationship is the foundational touchstone that empowers association governance. This construction is, of course, highly favorable to CIC developers who, with their attorneys, draft at its formation for their own benefit the master deed, declaration, or CC&R documents, as well as the initial association rules.[169] But this fictitious "contract" perspective also effectively disenfranchises unit owners who may not have read, understood, or, in some cases, even had access to those governing documents and rules prior to making their purchases.[170] Regarding the CIC secrecy policies previously discussed, associations typically do not put in writing that their board meetings are closed to owners, that they use excessively broad confidentiality agreements or secret settlement agreements, or that they erect obstacles to owner document access.[171] Why then should owners be bound by such rules? After purchase, however, unit owners often discover that they face virtually insurmountable barriers to modifying even extremely unfair and arguably abusive association governance.

An example of the hypocrisy and absurdity of this approach to the owner-association relationship comes from comparing the 2016 Massachusetts Appeals Court decision in *Bettencourt v. Trustees of Sassaquin Village Condominium Trust*[172] with the 2018 Massachusetts Supreme Judicial Court decision in *Trustees of Cambridge Point Condominium Trust v. Cambridge Point, LLC*.[173] In the *Bettencourt* case, the

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[168] *See, e.g.*, Robert G. Natelson, *Consent, Coercion and "Reasonableness" in Private Law: The Special Case of the Property Owners Association*, 51 OHIO ST. L.J. 41 (1990); Boyack, *supra* note 28, at 782–83.

[169] *See* Boyack, *supra* note 28, 782–83.

[170] *Id*; *see also Judicial Review of Condominium Rulemaking*, *supra* note 164, at 650–51 (arguing that because most buyers ignore or misunderstand disclosure statements, a presumption of validity based on the owners' knowledge of the condominium purchase documents rests on a practical fiction); *see also* Boyack, *supra* note 28, at 791 ("If contracts are not voluntary, the liberty and efficiency justifications for their enforcement evaporate.").

[171] In *Johnson v. Keith*, the court based its decision against the unit owner on its finding that "[s]he had knowledge of all of the terms of the master deed and the by-laws when she received her unit deed, which subjected her property to the provisions of the master deed and the by-laws." 331 N.E.2d 879, 882 (Mass. 1975). This reasoning, however, would not apply to the unwritten association secrecy practices discussed earlier in this Article. *See* discussion *supra* Parts II.A–E.

[172] No. 15-P-1478, 2016 WL 5328493 (Mass. App. Ct. Sept. 22, 2016).

[173] 88 N.E.3d 1142 (Mass. 2018).

plaintiffs/owners challenged a provision in their association's governing documents that required the consent of 80% of the unit owners as a prerequisite to an owner having standing to sue the Board.[174] The Appeals Court acknowledged that this requirement made it difficult if not functionally impossible for an owner to ever sue the Board because it would necessitate at least some of the trustees consenting to sue themselves.[175] Nevertheless, the court refused to apply the unconscionability doctrine to temper the myth that the owners had "knowingly and voluntarily agreed to the consent requirement when they purchased their units."[176]

In the *Cambridge Point* case, the Association was trying to overcome a similar 80% owner consent-to-sue requirement in order to sue the developer for construction defects.[177] Because the developer still controlled more than 20% of the Cambridge Point units, like in *Bettencourt*, achieving the 80% requirement was a practical impossibility.[178] But because this was an association-developer dispute, not an owner-association dispute, the Massachusetts Supreme Judicial Court approached this case in a very different way than the Massachusetts Appeals Court did in *Bettencourt*.[179]

The Massachusetts Supreme Judicial Court rejected the Association's first contention that the statute prohibits a bylaw requirement for unit owner consent prior to filing suit.[180] The court was much more receptive, however, to the Association's public policy arguments.[181] The court acknowledged, even apart from the developer's 20% interest, the practical difficulties of ever obtaining 80% owner consent.[182] Then turning to the enforceability of the association bylaw at issue, the Supreme Judicial

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[174] *See Bettencourt*, 2016 WL 5328493, at *1.

[175] *See id.* at *2–3.

[176] *Id*. at *2.

[177] *See Cambridge Point*, 88 N.E.3d at 1145.

[178] *Compare id.* at 1149 (recognizing the bylaws provisions make it effectively impossible for trustees to sue developers), *with Bettencourt*, 2016 WL 5328493, at *2–3 (stating that plaintiffs asserted it was mathematically impossible to obtain the required consent).

[179] *Contrast Cambridge Point*, 88 N.E.3d at 1150–52 (discussing policy concerns with the ability to hold developers liable), *with Bettencourt*, 2016 WL 5328493, at *3 (finding plaintiffs failed to show unconscionability of the consent provision against owners).

[180] *See Cambridge Point*, 88 N.E.3d at 1149.

[181] *See id.* at 1149–52.

[182] *See id*. at 1150 ("Second . . . any unit owner who fails to respond to the request for written consent is treated as if he or she refused such consent, regardless of whether the unit owner is ill, has rented out the unit and is presently unavailable, or is simply unwilling to make a decision.").

Court said: "We have long recognized that 'the public interest in freedom of contract is sometimes outweighed by public policy, and in such cases [a] contract will not be enforced.'"[183]

Because of the "contract myth," CIC owners unfortunately do not seem to be entitled to this long-recognized public policy principle. The impact of the contract doctrine on owners has been further exacerbated by the view that association governing documents are not just ordinary contracts, but rather constitute servitudes that run with the property and are thus considered to bind all subsequent buyers, not just the original purchasers.[184] In addition, this legal construction is considered to also obligate CIC owners to adhere to later rule changes, even changes that might not have been anticipated at the time of purchase.[185]

Court decisions denying owner challenges to association governance frequently reference the illusory premise that the owners have voluntarily contracted away their rights to complain.[186] In many other legal areas, courts have questioned the "voluntariness" of certain so-called "contracts of adhesion" where one of the parties obviously lacked any real bargaining power.[187] Harsh enforcement outcomes in cases of grossly disproportionate bargaining power were often tempered by application of equity and

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[183] *Id.* (quoting Beacon Hill Civic Ass'n v. Ristorante Toscano, Inc., 662 N.E.2d 1015, 1017 (Mass. 1996)) (alteration in original). The Massachusetts Supreme Judicial Court added that "if a bylaw were to provide that the unit owners waive all claims against the developers . . . we would surely declare such a bylaw void as contravening public policy to the extent that it sought to waive the unwaivable claims . . . ." *Id.* at 1152.

[184] *See* Evan McKenzie, *Private Covenants, Public Laws, and the Financial Future of Condominiums*, 52 UIC L. REV. 715 (2019); RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 4.1 (A.L.I. 2000). Because these CIC covenants are treated as servitudes, they enjoy duration and specific enforceability privileges that exceed ordinary contract rights. *See, e.g.*, Stewart E. Sterk, *Freedom from Freedom of Contract: The Enduring Value of Servitude Restrictions*, 70 IOWA L. REV. 615, 654–56 (1985).

[185] *See generally* Sterk, *supra* note 184, at 617–18 (highlighting the issues when servitudes are not allowed to run with the land).

[186] *See, e.g.*, Trs. of Cambridge Point Condo. Tr. v. Cambridge Point, LLC, 88 N.E.3d 1142 (Mass. 2018); Bettencourt v. Trs. of Sassaquin Vill. Condo. Tr., No. 15-P-1478, 2016 WL 5328493 (Mass. App. Ct. Sept. 22, 2016); *see also* Boyack, *supra* note 28, at 782 ("The rhetoric of freedom of contract is often used as the primary justification for upholding CIC regulations and restrictions."); Russell A. Hakes, *Focusing on the Realities of the Contracting Process–an Essential Step to Achieve Justice in Contract Enforcement*, 12 DEL. L. REV. 95, 100–01 (2011) (discussing the realities of "freedom of contract" theory in an era of form contracts with standard, non-negotiable terms).

[187] Hakes, *supra* note 186, at 102, 118–19; *see* Todd D. Rakoff, *Contracts of Adhesion: An Essay in Reconstruction*, 96 HARV. L. REV. 1173, 1190 (1983); Rakoff, *supra* note 86, at 1235 (2006).

unconscionability doctrines.[188] In CIC law, however, some courts—such as in the *Bettencourt* case—have continued to apply the illusion of a voluntary contract between an owner and an association in deciding cases, and they have refused to accept equity or unconscionability arguments.[189] Courts have reasoned that dissatisfied CIC owners can either band together to modify association governance or they can sell their units and move; but they have not seriously considered the harsh realities of either of these options, especially in view of "supermajority" voting requirements and the owner secrecy practices previously discussed.[190] The contract construction

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[188] *See* Rakoff, *Contracts of Adhesion*, *supra* note 187, at 1191.

[189] *See, e.g.*, Bettencourt v. Trs. Of Sassaquin Vill. Condo. Tr., No. 15-P-1478, 2016 WL 5328493, at *3 (Sept. 22, 2016); Boyack, *supra* note 28 at 791–98. A good discussion of Massachusetts law on contract unconscionability is found in the Massachusetts Supreme Judicial Court decision in *Miller v. Cotter*, a case involving enforceability of an arbitration clause. *See* 863 N.E.2d 537, 540 (Mass. 2007). The court said: "Historically, a contract was considered unconscionable if it was 'such as no man in his senses and not under delusion would make on the one hand, and as no honest and fair man would accept on the other.'" *Id.* at 545 (quoting Hume v. United States, 132 U.S. 406, 411 (1889)). Quoting from two Massachusetts Appeals Court decisions, the Massachusetts Supreme Judicial Court alternatively stated the test for when a contract becomes unenforceable because of unconscionability is when "the sum total of its provisions drives too hard a bargain for a court of conscience to assist." *Id.* (quoting Waters v. Min Ltd., 587 N.E.2d 231, 233 (1992)). Referencing the Massachusetts Supreme Judicial Court's decision in *Commonwealth v. Gustafsson*, the court added that particular attention should be given to "whether, at the time of the execution of the agreement, the contract provision could result in unfair surprise and was oppressive to the allegedly disadvantaged party." *Id.* (citing Commonwealth v. Gustafsson, 346 N.E.2d 706 (Mass. 1976)). As previously discussed, the contention that CIC buyers have knowingly agreed to community secrecy practices that were never reduced to writing or available for inspection should be deemed to be both procedurally and substantively unconscionable according to these Massachusetts Supreme Judicial Court standards.

[190] *See* Boyack, *supra* note 28 at 805-13. In *Common-Interest Housing in the Communities of Tomorrow*, McKenzie compares this situation to that described in Albert C. Hirschman's classic work *Exit, Voice, and Loyalty* (1970). *See* McKenzie, *supra* note 26, at 228. The difference, McKenzie argues, is that:

> In cities, the constitutional guarantees of political liberty and due process of law . . . allow cities to adapt and grow in their ability to satisfy citizens' preferences. But in CIDs, civil liberties and due process need not apply and rules are frozen in time at the moment of creation. Requirements for changing recorded CC&Rs are often onerous . . . [and r]estrictions on voice mean that CIDs have a limited ability to rectify mistakes . . . or adapt to changing circumstances . . . .

McKenzie, *supra* note 26, at 228–29. In *Johnson v. Keith*, the Massachusetts Supreme Judicial Court said: "Furthermore, because restrictions in the master deed and in the by-laws may be amended by the unit owners, they resemble municipal by-laws more than private deed restrictions." 331 N.E.2d 879, 882 (Mass. 1975). But CIC residents in

of the owner-association relationship is completely inconsistent with those owner secrecy practices.

C. Eroding the CIC Contract Myth

In a powerful 2014 law review article, Professor Andrea Boyack analyzed and strongly criticized the contract construction of the owner-association relationship as a "myth."[191] Boyack said: "Courts unrealistically presume that purchasing property within a CIC is in itself an adequate manifestation of assent to be bound to CIC governing provisions."[192] But she continued: "Such covenants do not necessarily represent voluntary owner assent . . . [Furthermore, these] covenants are perpetual, non-negotiable contracts of adhesion, bundled with one of the most personal, expensive, and complicated purchases an individual will ever make—the purchase of a home."[193] After reviewing the origins of the CIC "contract myth," the traditional judicial treatment of private community governance, and the ways that CIC covenants differ from ordinary contracts, Boyack proposes addressing these challenges through a combination of more comprehensive pre-purchase disclosure to prospective CIC buyers—including a specific CIC rules consent document separate from the standard purchase and sale documents—together with judicial limits on the scope of CIC governance and new owner rights legislation.[194]

Some of Boyack's reform recommendations have indeed been reflected in recent CIC legislation. A few states, such as Maryland, have modified the traditional CIC servitude doctrine (in other words, that a CIC buyer is charged with constructive notice of an association's recorded—

Massachusetts do not enjoy the same open municipal government and Constitutional protections as other citizens, which limits their ability to amend the rules they are expected to live by.

[191] *See* Boyack, *supra* note 28, at 767–44.

[192] *Id.* Boyack added: "In addition, the terms of a community's laws are not self-imposed; instead, they are crafted by developers and driven by the requirements of lenders and governments." *Id.* at 770.

[193] *Id.* Boyack further observed: "The only escape from a given CIC governance scheme is sale of one's home." *Id.* at 770–71.

[194] *Id*. at 827–28, 839. Boyack said: "Third, in addition to mandating a higher threshold for owner consent and judicially limiting the scope of servitude provisions, states should act to protect important owner and occupant rights through legislation." *Id.* at 842.

and sometimes even unrecorded—documents) by mandating timely minimum buyer disclosures.[195] The mandated disclosures, which in Maryland take the form of a "Resale Package" and a "Resale Disclosure Certificate," assure that a prospective CIC buyer actually receives the information needed to make an informed decision about whether to proceed well before the scheduled closing date.[196]

The Maryland Condominium Act provides that a contract for resale of a condominium unit is not enforceable unless "the unit owner furnishes to the purchaser not later than 15 days prior to closing: (1) A copy of the declaration . . . ; (2) The bylaws; (3) The rules or regulations of the condominium; [and] (4) A certificate containing [statements attesting to certain of the association's finances, governance and operating practices.]"[197]

Under the Act, the seller is responsible for obtaining and providing the purchaser with the required resale documents.[198] The seller would obtain these documents from the association or the association's management company, commonly by paying a fee to download an electronic copy from the association's restricted-access website.[199] But what if the association failed to post complete and up-to-date governing documents resulting in a purchaser not having pre-purchase access to some of the association's rules and practices? A Maryland CIC attorney discussed the likely outcome of such an owner-association dispute under the current Maryland statute.[200]

In this attorney's opinion, those undisclosed association rules would not be enforceable against the new owner because the association would

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[195] *See* MD. CODE ANN. REAL PROP. §§ 11-101 to -143. These provisions go well beyond UCIOA § 3-106 "Bylaws." *See* UNIF. COMMON INT. OWNERSHIP ACT § 3-106 (UNIF. L. COMM'N 2021). The Comment on this section reads: "Because the Act does not require the recordation of bylaws, it is contemplated that unrecorded bylaws will set forth only matters relating to the internal operations of the association and various 'housekeeping' matters . . . ." *Id.* at cmt. 1. Association attorneys and management companies commonly counsel their associations to minimize disclosures to buyers and others involved in the purchase transaction to reduce potential liability risks for mistakes or omissions.

[196] *See* MD. CODE ANN. REAL PROP. § 11-135; Stewart A. Sutton, *Maryland Condominium Act Requires That the Buyer Receive All of the Condominium Association's Operating Documents*, LAW OFFICE OF STEWART A. SUTTON, LLC (Apr. 21, 2017), https://stewartsutton.com/maryland-condominium-act-requires-that-the-buyer-receive-all-of-the-condominium-associations-operating-documents [https://perma.cc/LC7Y-6RAU].

[197] MD. CODE ANN. REAL PROP. § 11-135(a)(1)–(4).

[198] *See* Sutton, *supra* note 196.

[199] *Id*.

[200] *See id*.

have violated the Maryland Condominium Act as well as the Maryland Consumer Protection Act by failing to provide the seller (and therefore the purchaser) with a complete and accurate "Resale Package."[201] This attorney further observed:

> [T]he requirement that the buyer receive all of the condominium association's operating documents as part of the "Resale Package" in order to make an informed decision as to whether or not to purchase the condominium unit would be nullified if the buyer could [nevertheless] be charged with constructive or imputed notice of the [undisclosed association rules].[202]

Maryland condominium law could thus serve as a model for legislative reform in other states to address the CIC "contract myth" dilemma. Furthermore, a court could use its equitable jurisdiction to apply this commonsense approach to CIC governance even absent a statutory requirement for a comprehensive Resale Package as in Maryland.[203]

Of particular interest for the purpose of this Article is Boyack's analysis of the legitimate scope of an association's authority to make and enforce rules that impinge on the constitutional rights of community residents.[204] It is one thing to assume that CIC buyers knowingly and willingly contract away their personal choices regarding matters like community aesthetics or keeping pets.[205] That article argues, however, that it is a very different matter to assume under the "contract myth" that CIC buyers have

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[201] *See id*.

[202] *Id*.

[203] Equitable jurisdiction empowers Anglo-American courts to decide cases based on principles of fairness and justice when a common law remedy is not available or is deemed to result in injustice. *See* SIR HENRY SUMNER MAINE, ANCIENT LAW 24 (10th ed. 1884). It is time that courts recognize the realities of a typical CIC purchase transaction, as explained in the Boyack article, *supra* note 28, and stop enforcing common law servitudes on CIC buyers when the association's operating rules were not timely provided, or even accessible, to the buyer. Providing association documents to buyers only at or shortly prior to closing should not be deemed adequate notice.

[204] *See generally* Boyack, *supra* note 28.

[205] In *Hidden Harbour Estates, Inc. v. Norman*, the court observed that CIC rule enforcement should promote "the health, happiness, and peace of mind of the majority of the unit owners since they are living in such close proximity and using facilities in common . . . ." 309 So.2d 180, 181–82 (Fla. Dist. Ct. App. 1975). But that reasoning would not apply to closed board meetings or other excessive CIC secrecy policies. *See* Todd Brower, *Communities Within the Community: Consent, Constitutionalism, and Other Failures of Legal Theory in Residential Associations*, 7 J. LAND USE & ENV'TL L. 203, 242 (1992).

knowingly contracted away their fundamental constitutional rights to open government, or that public policy should allow such an implied waiver of rights, especially when those secrecy practices (like closed board meetings) were also kept secret.[206]

The issue of constitutional rights in CICs most commonly arises in the context of free speech rights in connection with political signs or religious displays.[207] As Boyack pointed out, these cases require striking the proper balance between different owners because those signs and displays could be offensive to another community resident.[208] One way to address what she called this "constitutional conundrum" would be to treat CICs as "state actors," an approach discussed in Part IV.B. of this Article.[209] But, as Boyack acknowledged, the jurisprudence on "state action" is sparse and somewhat inconsistent.[210] Alternatively, and preferably, Boyack proposed a legislative solution in the form of a "Bill of Rights" for homeowners in

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[206] *See* Boyack, *supra* note 28, at 771. Boyack concludes, "The subject matter scope of CIC governance should be limited based on servitude law principles." Those servitude law principles are also discussed in *Nahrstedt v. Lakeside Vill. Condo. Ass'n*, 878 P.2d 1275, 1279–89 (Cal. 1994). But Boyack also added: "Public policy and constitutional constraints on the substance of CIC covenants are quite limited, and in the vast majority of cases, covenants are upheld." Boyack, *supra* note 28, at 787. An example is the case of *D.H. Overmyer Co., Inc. v. Frick Co.*, where the U.S. Supreme Court upheld the validity of a contractual waiver of Constitutional due process rights. *See* 405 U.S. 174, 187–88 (1972). However, the Court emphasized that the standard for such a waiver of Constitutional rights to be enforceable in a civil proceeding was the same high standard as for a criminal proceeding—namely, "that it be voluntary, knowing, and intelligently made." *Id*. at 185. Furthermore, the Court emphasized: "This is not a case of unequal bargaining power or overreaching . . . [and it] was not a contract of adhesion." *Id.* at 186 (alteration to original). None of these factors, however, apply in the case of the alleged waiver of CIC owner constitutional rights resulting from the purchase of a CIC property.

[207] *See* Boyack, *supra* note 28, at 785.

[208] *Id.* at 788.

[209] *See id.* at 837. For example, Illinois statute section 18.4(h) bars condominium boards from adopting rules that "impair any rights guaranteed by the First Amendment to the Constitution of the United States," without regard to whether condominiums are "state actors." 765 ILL. COMP. STAT. 605/18.4(h); *see also* Boucher v. 111 East Chestnut Condo. Ass'n, 117 N.E.3d 1123 (Ill. App. Ct. 2018) (involving fines against a unit owner for expressing his opinions about condominium management).

[210] *See* Boyack, *supra* note 28, at 786.

CICs, similar to the previously referenced AARP Bill of Rights.[211] Such legislation would supersede any conflicting association rules.[212]

Although the legislative approach certainly seems preferable, as discussed in the next Article section that route is often blocked by powerful and well-financed industry interests.[213] This Article proposes using state Open Meeting Laws to circumvent that legislative roadblock, at least with respect to opening CIC board meetings to owners in states/communities that do not already do so. This could be an important step toward more comprehensive legislative reform.

Part IV.B. of this Article presents the "state action" approach as one of three arguments that could support extending Open Meeting Laws to CICs. As Boyack pointed out, however, the case law on treating CICs as "state actors" is not very encouraging.[214] But this case law is distinguishable because it does not relate to CIC secrecy practices like closing board meetings to owners.[215] As previously discussed, these secrecy practices do not fall under any of the traditionally recognized categories for CIC servitudes that run with the land, and they also do not qualify for treatment as equitable servitudes because they are not disclosed to prospective CIC buyers.[216]

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[211] *Id*. at 837; AARP BILL OF RIGHTS, *supra* note 16. Boyack also discussed how the traditional "touch and concern" rule that once limited the scope of CIC covenants has been "watered down" in recent years. *See* Boyack, *supra* note 28, at 802–03. She discussed how courts have failed to rigorously and consistently apply the "reasonableness" test for assessing the validity of CIC governance. *See id.* at 803. She then argued for a reinvigorated application of the "touch and concern" doctrine. *See id.* at 834–35.

[212] *See* Boyack, *supra* note 28, at 837–38.

[213] *See infra* Part III.D. The different perspectives of CIC owners and management companies regarding owner rights is highlighted by a posting by Condo Control of recent survey results. *See* Kim Brown, *Community Managers Say These are the Top Issues Impacting Their Associations*, CONDO CONTROL (Apr. 9, 2025), https://www.condocontrol.com/blog/community-managers-say-these-are-the-top-issues-impacting-their-associations/ [https://perma.cc/8LEV-2X48]. These CIC managers identified new laws that reduce the decision-making powers of boards and "provide more freedoms to individual homeowners" as a growing problem for management companies. *See id.* It is unfortunate and ironic that expansion of CIC owner rights is perceived as a threat to the interests of industry trade groups that would not exist without common interest communities. A better balance between basic owner rights and legitimate industry interests would eliminate many of the problems and criticism of the CIC model.

[214] *See* Boyack, *supra* note 28, at 785-86.

[215] *See id*. at 785–86; *supra* notes 13, 165, and 206 and accompanying text.

[216] *See supra* note 13 and accompanying text; *see also* Boyack, *supra* note 28, at 833 ("CIC intrusion into illegitimate spheres—such as those that impact important personal

Unlike the political sign and religious display cases, invalidating excessive CIC secrecy practices does not impinge on the rights of other owners and, indeed, would likely be welcomed.[217] This distinction puts closed board meetings and other CIC secrecy practices in a completely different category for purposes of assessing the legitimate scope of an association's rule/policy making authority under the "contract myth."[218]

D. Impediments to CIC Owners' Rights Legislation in Massachusetts

CIC legislative reform in Massachusetts has been strongly influenced, and recent owners' rights initiatives have been impeded, by the lobbying activities of the Massachusetts and New England chapter of the CAI.[219] CAI is the dominant umbrella trade organization for CIC associations, management companies, and service providers, including contractors, insurance companies, engineering firms, lending institutions, attorneys,

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freedoms or are not justified by neighbors' economic interests—should be disallowed."); Hannaman, *supra* note 15, at 723 ("Board powers must be limited to those absolutely necessary to manage common property and protect owners' interests."). Equity is based on fairness by balancing the respective interests of the parties. Therefore, even if prospective CIC buyers were made aware of association secrecy practices prior to purchase, the importance of transparency in association finances and governance should be deemed to outweigh insulating boards and management companies from inconvenience, embarrassment or possible legal liability for mistakes or misdeeds.

[217] *See* Boyack, *supra* note 28, at 784–85.

[218] *See id*. at 771–72.

[219] *See supra* note 51 and accompanying text; *infra* note 235 and accompanying text. In addition to the CAI, other influential real estate trade groups that actively lobby legislators in support of their members' business interests include the National Association of Home Builders (NAHB) and the National Association of Realtors (NAR). By comparison, the few CIC owner rights organizations scattered across the country are mostly small, local, and not well funded. *See e.g.*, CHARM Maryland, https://www.charm-md.org [https://perma.cc/W8CA-836Y]; New Jersey Common-Interest Homeowners Coalition, https://www.c-ihc.org/resources [https://perma.cc/K3AC-PAX8]; Colorado HOA Forum, https://coloradohoaforum.com/home-14/ [https://perma.cc/3D8Z-T7XE]; CT Coalition of Property Owners (CCOPO), https://ccopo.com [https://perma.cc/VG92-9MGZ; Arizona Homeowners Coalition, https://hoatruth.com [https://perma.cc/LV8C-7V9B]. Furthermore, some CIC owners are hesitant to join these organizations or will do so only anonymously out of fear of retaliation. This is definitely not a level playing field for CIC owners.

accountants, and others.[220] The CAI comprises an expansive national/international organization with a network of affiliated regional/state chapters.[221]

Among its many diverse activities, the national CAI and its regional/state chapters maintain legislative action committees (LACs) staffed by attorneys who function as influential lobbyists at the state and national levels on issues of importance to their clients and other CAI members.[222] In the same way that so many other legal fields have bifurcated into attorneys and law firms that mostly or exclusively represent industry clients or alternatively represent the "little guys," CIC attorneys typically represent developers, associations, or management companies ("industry-side" attorneys) or, instead, unit owners ("owner-side" attorneys)—but rarely both.[223] Furthermore, the CAI legislative action committees seem to

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[220] Each issue of CondoMedia magazine lists the following categories of CAI-affiliated providers of CIC services: accountants/accounting services; attorneys; carpentry; disaster restoration; duct/dryer vent cleaning; election services; engineers/engineering services; fences/railings/decks; financial services; insurance/agents & carriers; management companies; painting contractors; paving/seal coating; plumbing/plumbing products; roofing contractors; siding; and water & weatherproofing/masonry. *See e.g., Guide to Legal Services*, CONDOMEDIA 51 (May 2025).

[221] *See About CAI,* COMM. ASS'NS INST., https://www.caionline.org/about-cai/ [https://perma.cc/Y52F-WQTV].

[222] The LACs also frequently file amicus briefs in legal cases considered important to the interests of CAI members. A recent article lists the LAC chairs for each of the five New England states, and their roles are described as follows:

> Legislative Action Committees (LACs) in all CAI New England Chapter member states . . . are CAI's official voice with legislators and regulators in their respective states . . . Guided by CAI public policies, LACs speak with one voice on legislative and regulatory matters that affect community associations, community association managers and CAI business partners.

CAI Legislative Action Committees: Working for Community Associations Around New England, NEW ENG. REAL EST. J. (May 02, 2025), https://nerej.com/cai-legislative-action-committees-working-for-community-associations-around-new-england [https://perma.cc/VLG2-JEXL]. Note, however, that there is no reference in this list to the CIC owners who reside in these communities and whose daily lives are impacted at least in part by the "legislative and regulatory matters" that the LACs lobby to support or oppose. *Id.*; *see infra* notes 232–257 and accompanying text (describing the seeming dichotomy between the somewhat more owner-friendly principles espoused by the national CAI and recent actions of the Massachusetts LAC (MALAC) in opposing owner rights legislation).

[223] For the leading work on segmentation in the legal profession generally, see JOHN P. HEINZ & EDWARD O. LAUMANN, CHICAGO LAWYERS: THE SOCIAL STRUCTURE OF THE BAR 203–19 (Nw. Univ. Press ed. 1994). Because of conflict-of-interest concerns and fear of offending their more lucrative industry clients, industry-side attorneys may refuse to represent owners in owner-association disputes, thereby limiting the pool of experienced CIC attorneys available to aggrieved owners.

be dominated by the attorneys who serve industry interests, not the individual CIC owners.[224]

On its website, the national CAI says that it "advocates for the adoption of [the UCIOA],"[225] which, as previously noted, requires open board meetings.[226] That CAI website includes a color-coded map showing which states have adopted a version of the UCA, UCIOA, or another one of the model CIC codes.[227] The national CAI also publishes a collection of "Best Practices Reports" for community associations that are said to be based on "recommendations from industry experts."[228] Report Number 2 "Governance" includes a section on "Governance and Resident Involvement."[229] This section states: "Inclusiveness—the involvement of as many residents of the community as possible—is a critical element in fostering a sense of

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[224] *See CAI Legislative Action Committees, supra* note 222 and accompanying text. The *Legislative Action Committee (LAC) Operational Guidelines* state: "LACs exist to represent the interests of . . . CAI members regarding state legislative, regulatory, and amicus curiae activities of relevance to the creation and operation of community associations." CMTY. ASS'N INST. 7 (2022), https://www.caionline.org/getmedia/17c1885f-e1b0-4f20-870b-5bf2ad271c0a/lac-operational-guidelines-2022.pdf [https://perma.cc/3UNN-NC5H]. Although CAI membership is open to individual unit owners, annual dues cause membership to be predominantly comprised of associations, management companies, and service providers (including CAI-affiliated attorneys/law firms), for whom the dues are a tax-deductible business expense. LAC member obligations include commitments of time, fundraising, donations, and/or providing the LAC with "key contacts with legislators." *Id.* at 12. Furthermore, the *Guidelines* provide: "LAC delegates who take a public position that is at odds with CAI public policy statements, or a position adopted by the LAC are subject to immediate removal." *Id*. Consequently, CIC owner rights advocates rarely, if ever, serve on CAI LACs, and the entire advocacy structure is biased to favor industry over owner interests.

[225] *Support for the Uniform Acts (UCA and UCIOA)*, COMM. ASS'NS INST. (last visited Oct. 29, 2025), https://www.caionline.org/advocacy/public-policies/support-for-the-uniform-acts/ [https://perma.cc/UED5-ESLZ]. This endorsement of the UCIOA is qualified, however, by the accompanying statement: "In those states where it is not . . . possible to adopt [the act in its entirety], CAI supports and recommends consideration of appropriate portions of [this] law." *Id.*

[226] *See* UNIF. COMMON INT. OWNERSHIP ACT § 3-108(b) (UNIF. L. COMM'N 2021). As previously mentioned, pre-2008 versions of the UCIOA did not provide for open board meetings. *See supra* note 54 and accompanying text. The CAI website does not clarify which version of the UCIOA they advocate in favor of. *See Support for the Uniform Acts*, *supra* note 225.

[227] *See Support for the Uniform Acts*, *supra* note 225.

[228] *See Best Practices: Governance*, FOUND. FOR CMTY. ASS'N RSCH. 3 (2014), https://foundation.caionline.org/wp-content/uploads/2017/06/bpgovernance.pdf [https://perma.cc/5JSV-3W87].

[229] *Id.* at 4.

community."[230] One element of community involvement is stated to be that "[o]wners may attend board meetings, except when the board meets in executive session."[231] Thus, the national CAI seems to espouse the principle of open board meetings.

The Massachusetts/New England CAI chapter (CAI-NE), however, does not seem to be on the same page as the national CAI regarding owner rights generally and, specifically, on the issue of open board meetings. In 2024, the CAI Massachusetts LAC (MALAC) lobbied hard and successfully for amending the Massachusetts Condominium Act to allow CICs to conduct electronic meetings and voting without the need to amend their governing documents.[232] This legislation could have facilitated electronically opening all association meetings to unit owners, but it fails to do so. Instead, section 24(a) of the amendment to G.L. chapter 183A provides that "the governing body of the organization of unit owners may conduct regularly scheduled or special meetings by telephonic or video conference call or other interactive electronic communication process."[233] On the other hand, section 24(b) provides that the "governing body shall notify all unit owners of such [electronic] meetings and provide access information," but this provision only applies to "annual or special meetings," not to board meetings.[234] These separate provisions could have been consolidated into a single, simplified provision requiring that *all* association

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[230] *Id*. at 5.

[231] *Id*. (alteration to original).

[232] *See* 2024 CAI MASSACHUSETTS LEGISLATIVE SESSION REPORT, COMM. ASS'NS INST. (2024) (reporting MALAC's success in drafting and shepherding through to passage the legislation (filed as H. 1338 and S. 900) to allow for conducting CIC meetings and voting by electronic means without the need for associations to amend their governing documents); *see also* MASS. GEN. LAWS ch. 183A, § 24 (2024) (adding §§ 24(a)–(c) to the Condominium Act). The MALAC Report noted that this legislation had been "a top priority for the MALAC." 2024 CAI MASSACHUSETTS LEGISLATIVE SESSION REPORT, *supra* at 1. Avoiding the need for associations to amend their governing documents was a key element of this legislation because such amendments typically require approval by a super-majority of the unit owners and the MALAC acknowledged that this is "often difficult to obtain." *Id.*

[233] MASS. GEN. LAWS ch. 183A, § 24(a).

[234] *Id.* § 24(b) (alteration to original). On September 6, 2024, the MALAC issued a news release declaring: "CAI Secures Major Win for Massachusetts Condominium Associations: Electronic Meetings and Voting Bill Passes." *CAI Secures Major Win for Massachusetts Condominium Associations: Electronic Meetings and Voting Bill Passes*, NEW ENG. REAL EST. J. (Sep. 6, 2024), https://nerej.com/cai-secures-major-win-for-condo-associations [https://perma.cc/5F7C-CPJY]. In an October 2025 conversation with the author, Attorney Matthew Gaines, chair of the MALAC, said that he intentionally drafted

meetings, including board meetings (except for "executive sessions"), afford owner notice and access. But the MALAC apparently did not favor such a simplification.

The MALAC also has not favored a limited version of CIC owners' rights reforms that has been pending before the Massachusetts legislature.[235] The Condominium Owners Rights Act (CORA) would amend sections of G.L. chapter 183A to correct some of the statute's most glaring deficiencies and provide for certain essential owner rights, including with regard to meeting practices.[236] In this respect, CORA mirrors previously referenced portions of the UCIOA.[237]

For example, section 6(c) of the 2025 version of CORA provides in part: "All regularly scheduled meetings shall be open to all unit owners for the entirety of the meeting, except for executive sessions."[238] Other parts of section 6(c) define the permissible scope of executive sessions consistent with the UCIOA,[239] and they provide that no final votes be taken during executive sessions.[240]

Section 6(d) of CORA provides additional transparency for owners not attending an association meeting by requiring: "Governing bodies shall create and maintain accurate minutes of all meetings, . . . including . . . a list of documents and other exhibits used at the meeting, the decisions made and the action taken at each meeting, including the record of all votes."[241]

Other important CORA provisions (sections 2 and 3) expand on G.L. chapter 183A, section 10(c)(4) to assure reasonable owner access to non-confidential association documents and records.[242] These provisions were

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the Massachusetts electronic meeting legislation to differentiate among different types of CIC meetings because boards and management companies did not want to open regular board meetings to unit owners.

[235] *See* Matthew W. Gaines, *2024 CAI Massachusetts Legislative Session Report*, CONDOMEDIA 26–27 (Dec. 2024); Gary M. Daddario, *Hamstringing the Board: A Disturbing Legislative Trend*, CONDOMEDIA, May 2025, at 40–41 (discussing CAI-New England (CAI-NE) opposition to several CIC owner rights initiatives in New Hampshire that were seen as hamstringing association boards).

[236] *See* S.B. 2498, 193d S., Reg. Sess. (Mass. 2023-24). A revised version of CORA was filed in the current 194th legislative session. *See* S.B. 980 and H.B. 4826, 194th Gen. Ct., Reg. Sess. (Mass. 2025).

[237] *See supra* notes 54–62 and accompanying text.

[238] S.B. 980 § 6(c), 194th Gen. Ct., Reg. Sess. (Mass. 2025).

[239] *See id*.

[240] *See id*.

[241] *Id*. § 6(d) (alteration to original).

[242] *See id*. §§ 2, 3.

modified from an earlier version of CORA in an effort to address some objections raised by the MALAC.[243]

CORA also includes provisions intended to help level the playing field in owner-association disputes and to address some of the inequities identified in the AARP Bill of Rights for Homeowners in Associations.[244] Corresponding to Article II of the AARP Bill of Rights, section 6(a) of CORA provides: "A condominium organized under chapter 183A of the General Laws must have in its by-laws an internal dispute resolution procedure to address disputes between a governing body and a unit owner . . . ."[245] This section additionally provides: "This internal dispute resolution procedure shall take place in a neutral, unbiased forum using neutral, unbiased individuals."[246]

Section 7(a) of CORA further provides: "There shall be an Office of the Condominium Ombudsman within the Office of the Attorney General."[247] Section 7(b) provides: "The Attorney General shall establish a statewide condominium ombudsman program for the purpose of receiving, investigating and resolving, through administrative action, complaints received from a condominium unit owner . . . ."[248]

The idea of a state Office of Ombudsperson for Homeowners is drawn from Article X of the AARP Bill of Rights.[249] Several states around the country have implemented such CIC ombudsman positions.[250] Delaware

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[243] *See supra* note 235 and accompanying text.

[244] *See* AARP BILL OF RIGHTS, *supra* note 16 and accompanying text.

[245] S.B. 980 § 6(a), 194th Gen. Ct., Reg. Sess. (Mass. 2025).

[246] *Id*. This corresponds with the basic protections that an individual charged with either a crime or a civil offense would enjoy in any municipal, state, or federal court.

[247] *Id*. § 7(a).

[248] *Id*. § 7(b).

[249] *See* AARP BILL OF RIGHTS, *supra* note 16, at 12, 61–65. The purpose of this provision is to assure the following: "Homeowners shall have fair interpretation of their rights through the state Office of Ombudsperson for Homeowners. The ombudsperson will enable state oversight where needed, and increases available information for all concerned." AARP BILL OF RIGHTS, *supra* note 16, at 12.

[250] *See Government Intervention in Association Disputes*, COMM. ASS'NS INST. (last visited Oct. 30, 2025), https://www.caionline.org/advocacy/advocacy-priorities-overview/alternate-dispute-resolution/ [https://perma.cc/UA9W-XM7Z]. The states of Colorado, Delaware, Florida, Illinois, Minnesota, Nevada, South Carolina, Utah, and Virginia have established condominium/HOA ombudsman positions, and other states (like Maryland) are considering doing so. *See id.* But the CAI says on its website: "CAI does not support the creation of new ombudsman or similar programs and instead advocates for education of homeowners rights and responsibilities and community-led solutions that best meet the unique needs of each association." *Id.*

describes the role of its Ombudsperson's Office as follows: "An ombudsperson . . . is someone, such as a government official, who receives, reports on, and investigates complaints and tries to deal with problems fairly."[251]

In explaining its objections to the 2024 version of CORA, the MALAC stated: "The LAC also took issue with the bill's dispute resolution language, burdensome meeting procedure regulations, and establishment of an ombudsman's office."[252] But, in view of the similarity of these CORA provisions to corresponding portions of the UCIOA and the AARP Bill of Homeowner Rights,[253] the MALAC objections to CORA do not seem substantial and could be corrected if the MALAC was inclined to do so.

The selective lobbying of the MALAC on legislative reform—supporting certain reform measures seen as beneficial to industry interests while opposing even a limited set of owner rights reforms—may be attributable to the multitude of different CIC constituencies that the CAI organization is trying to serve.[254] An influential 1996 book, *Privatopia:*

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[251] Christopher J. Curtin, Fraud & Consumer Prot. Div., *Office of the Ombudsperson for the Common Interest Community*, DEL. DEP'T OF JUST. (last visited Oct. 30, 2025), https://attorneygeneral.delaware.gov/fraud/cpu/ombudsperson/ [https://perma.cc/2QWK-PHFK].

[252] Gaines, *supra* note 235. An argument raised by the MALAC to certain of the CORA provisions is that, unless they would be applied prospectively only to new CICs, existing CICs would have to amend their governing documents to accommodate the changes—which, as the MALAC acknowledged, is difficult to accomplish. *See* 2024 CAI MASSACHUSETTS LEGISLATIVE SESSION REPORT, *supra* note 232. However, because the excessive CIC secrecy practices addressed in this Article were likely never included in the governing documents, abandoning those practices would not necessitate any amendment of those documents.

[253] *See supra* notes 16–20 and accompanying text.

[254] *See supra* notes 220 and 224 and accompanying text. The CAI *Legislative Action Committee (LAC) Operational Guidelines* state:

> LACs shall strive to ensure that they do not . . . take positions on legislation or regulations proposed by others that would be in conflict with [CAI's Public Policies] . . .
>
> . . .
>
> Except as noted below, a LAC must notify [the CAI Government & Public Affairs] Department as far in advance as possible if it believes it may need to consider or adopt any legislative or regulatory position that would be in conflict with CAI's Public Policies. Such notification should include why the LAC believes it may be necessary to deviate from such policies.

Legislative Action Committee (LAC) Operational Guidelines, *supra* note 224, at 22–23 (alteration to original). It is therefore difficult to reconcile apparent CAI national support for the UCIOA and open board meetings with the MALAC's opposition to owner rights. *See supra* notes 225–231 and accompanying text.

Homeowner Associations and the Rise of Residential Private Government by Professor Evan McKenzie,[255] which is cited in the Introduction to the AARP owner Bill of Rights,[256] contains a critical appraisal of the CAI. The book argued in part that there had been a "sweeping reorganization [of the CAI] . . . that reduced homeowner influence" in the organization, shifting control to developers and industry beneficiaries such as lawyers and community association managers.[257]

This continuing dichotomy between CIC owner interests and CAI industry interests seems to be accommodated today by the reality that state and regional CAI chapters often act independently of the more owner-friendly principles espoused by the national CAI. The catalyst for overcoming these obstacles to CIC legislative reform could be a holding that at least some CICs should be treated as quasi-public bodies subject to open meeting laws.

IV. CICS CAN QUALIFY AS "QUASI-PUBLIC BODIES" UNDER OPEN MEETING LAWS

There are three different, though overlapping, approaches to the central theme of this Article—namely, that at least some CICs should be treated as "quasi-public bodies" that are within the scope of the Massachusetts Open Meeting Law.[258] The first approach is the "Totality of the Factors" approach. The second approach is the "State Action" approach. The third approach is a hybrid approach that integrates elements of the other two approaches.

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[255] *See* McKenzie, *supra* note 26. McKenzie's book, *Privatopia: Homeowner Associations and the Rise of Residential Private Government,* was the 1994 winner of the American Political Science Association's Best Book on Urban Politics Award. *See Privatopia: Homeowner Associations and the Rise of Residential Private Government* EVAN C. MCKENZIE (last visited Oct. 30, 2025), https://www.evancmckenzie.com/privatopia [https://perma.cc/F4AG-YKWE].

[256] *See* AARP BILL OF RIGHTS, *supra* note 16, at 4–5.

[257] *See* McKenzie, *supra* note 26, at 136.

[258] MASS. GEN. LAWS ch. 30A, §§ 18–25. For example, the Senior Deputy Attorney General in charge of Open Meeting Law enforcement in the Nevada Office of the Attorney General said: "Whether private entities are subject to state public access and disclosure laws is an issue that courts have considered and continue to face because privatization of governmental functions is a feature of modern government. These decisions are based on the totality of factors and the individual context. No one factor is determinative . . . ." Mesquite Regional Business, Inc., Attorney General File No. 13-021, OMLO No. 2014-01 at 9 (Nev. Att'y Gen. 2014).

A. The "Totality of the Factors" Approach

Several states recognize by statute, court decision, or state Attorney General opinion that a private, non-profit corporation, trust, or similar entity (potentially including a CIC) can be a quasi-public body that is subject to the state's open meeting law when it performs functions that are normally entrusted to municipalities and those services are funded by public (or unit owner?) money.[259] The factors used to assess whether a private entity qualifies as a quasi-public body, and how those factors are weighted, varies from state to state.[260]

Wisconsin is an example of a state that specifically includes "quasi-governmental corporations" in its Open Meeting Law,[261] but the statute does not define that term. In the 2008 case *Wisconsin v. Beaver Dam Area Development Corp.*,[262] however, the Wisconsin Supreme Court applied a "totality of the circumstances" analysis to interpreting quasi-governmental corporation. The court said:

> [T]his opinion should be read as setting forth the circumstances when an entity so resembles a governmental corporation, that it is treated as a quasi-governmental corporation for purposes of open meetings and public records laws . . . . Each case has to be decided

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[259] *See* Mesquite Regional Business, *supra* note 258, at 14. As part of this lengthy and thorough analysis of the circumstances that govern when a private, nonprofit entity should be subject to public access and public disclosure laws, the Nevada Attorney General opinion added:

> The totality of factors test is widely followed by courts in other jurisdictions. The Connecticut Supreme Court, in a decision widely followed by other jurisdictions, adopted a four-factor test culled from federal case law to determine whether an entity is the functional equivalent of a public body. The factors are: (1) whether the entity performs a governmental function; (2) the level of government funding; (3) the extent of government involvement or regulation; and (4) whether the entity was created by government.

Id. at 11 (citing Bd. of Trs. of Woodstock Acad. v. Freedom of Info. Comm., 436 A.2d 266, 270–71 (Conn. 1980)).

[260] *Id.* at 11 (citing Bd. of Trs. of Woodstock Acad. v. Freedom of Info. Comm., 436 A.2d 266, 270–71 (Conn. 1980)) ("The *Woodstock* Court considered each factor, balancing the factors by giving appropriate weight to each one based on the context, a procedure followed by most states that have adopted the functional equivalency test.").

[261] *See* WIS. STAT. §§ 19.31, 19.81(1) (declaring open government purpose of the public records law).

[262] 752 N.W.2d 295 (Wis. 2008).

> on the particular facts presented. We must examine the totality of the circumstances.[263]

As part of its detailed analysis, the Wisconsin Supreme Court noted that the state's public records law similarly extended to quasi-governmental corporations.[264] The court cited the American Heritage Dictionary of the English Language definition of "quasi": "Having a likeness to something; resembling." [265] The court also referenced earlier Wisconsin Attorney General opinions that applied a totality of the circumstances approach.[266] The court then applied five factors in deciding that the appellee, Beaver Dam, was indeed a quasi-governmental corporation subject to the state's Open Meeting Law.[267] But, because Wisconsin's Condominium Act provides separately for open CIC board meetings,[268] it has not been necessary for a Wisconsin court to decide whether the totality of the circumstances approach applies to Wisconsin community associations. This situation appears to be true for several other states where open meeting requirements for their community associations have been enacted separately from their open meeting laws.[269]

If a private entity has the essential attributes of a municipality, however, it can be a quasi-public body under open meeting laws even without express statutory authority as in Wisconsin.[270] For example, Question 4 of the official 2025 revised guide to Louisiana's Open Meeting Law, which is presented in an FAQ format, asks: "When is a private non-profit entity a public body for purposes of the Open Meetings Law?"[271] In response, the guide cites a Louisiana Attorney General opinion: "Jurisprudence has made it clear that the mere fact that an entity is a private non-profit does

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[263] *Id*. at 298 (alteration to original).

[264] *See id*. at 301.

[265] *Id*. (citing *American Heritage Dictionary of the English Language*, 1482 (3d ed. 1992)).

[266] *See id*. at 302–03.

[267] *See id*. at 307-10.

[268] *See* WIS. STAT. § 703.15.

[269] *See, e.g.,* ARIZ. ATT'Y GEN. GRANT WOODS, I97-012 (R97-018) (1997) (asserting that CIC board meetings are not subject to their state's respective open meeting laws, while simultaneously acknowledging that separate state legislation requires these meetings to be open to owners); discussion *infra* notes 301–305 and accompanying text (discussing a case where this situation was present).

[270] *See* Wisconsin v. Beaver Dam Area Dev. Corp., 752 N.W.2d 295, 315 (Wis. 2008).

[271] OPEN MEETING LAW FAQ, LA. LEGIS. AUDITOR, at 6 (2025), https://app.lla.state.la.us/llala.nsf/baadb2991272084786257ab8006ee827/$file/open%20meetings%20law%20faq.pdf [https://perma.cc/23KV-A32V].

not mean that it can never be a public body for purposes of the Open Meetings Law . . . ."[272] The answer explains that the factors to be considered in determining whether a private non-profit entity is subject to the Open Meeting Law are as follows:[273] "(1) whether the entity performs a government function or performs a function which, by law, is entrusted to other public bodies; (2) whether the entity is funded by public [unit owner] money; and (3) whether the entity exercises policy-making, advisory, and administrative functions."[274]

This set of three factors appears to establish a somewhat lower bar than the five-factor approach of the earlier Wisconsin *Beaver Dam* case.[275] But, like the Wisconsin courts, the Louisiana courts have never specifically addressed whether to extend the totality of the factors approach to community associations.[276] That is now unlikely to happen because effective January 1, 2025, Louisiana became the latest state to adopt a version of the UCIOA, including the requirement of open board meetings.[277]

These principles, moreover, should not apply equally to every community association. CICs come in many different varieties.[278] CICs may be organized as condominiums, cooperatives, homeowner associations, or

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[272] *Id*. (citing LA. ATT'Y GEN. OP. NO. 13-0043 (Aug. 9, 2013)).

[273] Additionally, the Overview states: "The determination of whether a private, non-profit entity is a public body for the purpose of the Open Meetings Law is a fact specific question that must be answered on a case-by-case basis." *Id.* at 6.

[274] *Id.* In an answer to Q.5, "How should the Open Meetings Law be interpreted?," the Overview answers:

> According to R.S. 42:12(A), the Open Meetings Law should be construed liberally. This means that if there is a question as to interpretation of a provision the entity should provide as much access/openness as possible. The Open Meetings Law operates with a general premise that all meetings of public bodies should be open to the public.

Id. at 7. In an answer to Q.3, "What is a public body?," the Overview broadly defines "a village, town, and city governing authority" using as a touchstone whether "the body possesses policy making, advisory, or administrative functions." *Id.* at 5–6. This specifically includes a "board of a political subdivision" that has such functions. *Id.* at 5. Giving this statute a liberal construction could include at least some community associations.

[275] *See Beaver Dam Area Dev. Corp.*, 752 N.W.2d at 307-10.

[276] *See* OPEN MEETING LAW FAQ, *supra* note 271.

[277] *See* LA. STAT. ANN. § 1141.26(B)(1) (corresponding to section 3-108(B)(1) of the UCIOA); UNIF. COMMON INT. OWNERSHIP ACT § 3-108(b) (UNIF. L. COMM'N 2021).

[278] *See supra* note 26 and accompanying text; STEPHEN E. BARTON & CAROL J. SILVERMAN, COMMON INTEREST COMMUNITIES: PRIVATE GOVERNMENTS AND PUBLIC INTEREST 3-7 (1994).

another form of planned community.[279] They may be incorporated, unincorporated, or organized as condominium trusts.[280] CICs range in size from very small (two living units) to very large (hundreds, or even thousands, of living units).[281] In fact, some CICs have larger populations than some municipalities in the states in which they are located.[282] CICs may be found in urban, suburban, or rural locations.[283] Some CICs are high rise buildings, while others consist of multiple town house-style units or collections of single-family homes.[284] Some CICs include extensive outdoor spaces requiring upkeep, while others have little or no outdoor space.[285]

Accordingly, the totality of the factors analysis needs to be applied to CICs on a case-by-case basis. This application will lead to different outcomes for different varieties of CICs. Still, some CICs seem to meet all three factors of the Louisiana test for being treated as quasi-public bodies that should be subject to Open Meeting Laws.[286] Some CICs include networks of privately managed roads connecting the various living units and community facilities with each other and with adjacent public roadways.[287] These CICs are commonly responsible for maintaining these CIC roads—for example, providing snowplowing, repaving, street

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[279] *See* BARTON & SILVERMAN, *supra* note 278, at i.

[280] *See* Hyatt & Rhoades *supra* note 10, at 919-20. In some states, some types of CICs may be organized as not-for-profit corporations which are then governed by the state's corporations laws. *See, e.g.,* MASS. GEN. LAWS ch. 180, § 6A. For example, the Massachusetts Nonprofit Corporation Act addresses the requirements for meetings of the boards of directors of nonprofit corporations, which can include condominium associations and homeowner associations if they are organized as nonprofit corporations. *See id.* However, most Massachusetts condominiums are organized as condominium trusts created by a master deed. *See RE12R07: Condominiums, Cooperatives and Timeshares*, MASS.GOV: EXEC. OFF. OF ECON. DEV., https://www.mass.gov/info-details/re12r07-condominiums-cooperatives-and-timeshares [https://perma.cc/J8UP-SHAW] (last visited Feb. 1, 2026 at 08:38 EST).

[281] *See* BARTON & SILVERMAN, *supra* note 278, at 4.

[282] *See infra* note 418 and accompanying text; McKenzie, *supra* note 26, at 205.

[283] *See* McKenzie, *supra* note 26, at 205.

[284] *See id*.

[285] BARTON & SILVERMAN, *supra* note 278, at 4.

[286] See *supra* notes 271–274 and accompanying text.

[287] *See* BARTON & SILVERMAN, *supra* note 278, at 4; McKenzie, *supra* note 26, at 204.

lighting, and enforcing speed limits and parking rules—which are ordinarily municipal functions.[288]

Some CICs provide trash collection services—another traditional municipal function.[289] Some CICs even own, operate and maintain municipal-scale wastewater treatment facilities—all paid for with unit owners' monthly fees.[290] CIC monthly fees are analogous to municipal property taxes and municipal water and sewage fees.[291] Additionally, CIC rulemaking and rule enforcement, especially the ability to assess court-enforceable fines for rule violations, certainly resembles the exercise of governmental

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[288] *See Housing Experts Project Another Year of Modest Growth for U.S. Condominiums and Homeowners Associations in 2025*, FOUND. FOR CMNTY. ASS'N RSCH. (Dec. 18, 2024), https://foundation.caionline.org/research/industry-data/ [https://perma.cc/MR7G-PVHQ] ("Planned communities also give local municipalities the ability to transfer the obligation of providing services such as trash and recycling pickup, snow removal, sidewalk and street maintenance and lighting, stormwater management, and more to homeowners."); *Massachusetts Community Associations Facts & Figures*, CMTY. ASS'NS INST. (2024), https://foundation.caionline.org/wp-content/uploads/2024/06/MassachusettsStateFactsFiguresOnePagers2024.pdf [https://perma.cc/8E8T-54EB] (reporting that "[Massachusetts] residents pay nearly $3.3 billion a year to maintain their communities. These costs would otherwise fall to the local government." (alteration to original)); *see also supra* note 26 and accompanying text. Thomas M. Skiba, former long-term CEO of the CAI, said that common interest communities are becoming more typical because they provide a financial benefit *for* local governments. *See* Ana T. Solá, *Here's What the Rise of Homeowners Associations Means for Buyers*, CNBC (Dec. 2, 2024, 2:26 p.m.) (quoting former long-term CAI CEO Thomas M. Skiba: "They don't have to plow the street anymore [or] do all that maintenance and they still collect the full property tax value.") (alteration in original).

[289] *See* Solá, *supra* note 288.

[290] *See id*. Professor Boyack has compared CICs to municipalities and association assessments to property taxes. *See* Andrea J. Boyack, *Community Collateral Damage: A Question of Priorities*, 43 LOY. U. CHI. L.J. 53, 121 (2011). In 1994 when Arizona legislated open meeting requirements for the boards of its homeowners associations and other planned communities, the entities subject to the new CIC open meeting requirements were specifically defined as those having "the power under the declaration to assess association members to pay the costs and expenses incurred in the performance of the association's obligations under the declaration." ARIZ. REV. STAT. ANN. § 33-1802(1)(a). This is an example of state legislative recognition that community associations that assess residents to pay for municipal-like services should be subject to the same open meeting requirements as the municipalities they are standing in the shoes of.

[291] *See* Franzese & Siegel, *supra* note 121, at 731 ("Many CICs maintain streets and parks, provide curbside refuse collection, operate water and sewer service, regulate land use and home occupancy, impose rules of general applicability on constituent homeowners, and collect fees from homeowners that are in many ways the functional equivalent of property taxes.") (citing U.S. ADVISORY COMM'N ON INTERGOV'TL RELS., RESIDENTIAL CMNTY. ASS'NS: PRIVATE GOV'TS IN THE INTERGOV'TL SYSTEM? 12–14 (1989)).

legislative and police power.[292] For all of these reasons, at least some CICs could reasonably be regarded as quasi-public bodies based on the totality of the factors analysis of the Louisiana Open Meeting Law.[293]

Ann Taylor Schwing's comprehensive treatise, *Open Meeting Laws 3d* similarly adopts a totality of the factors approach in recognizing that some CICs should qualify as quasi-public bodies under state open meeting laws.[294] Section 4.114-9 of the treatise is directed at "Homeowner Associations."[295] The opening paragraph of this treatise section states: "Homeowner associations present open meeting issues because they typically do not fall within the definition of a public body in the state open meeting law, *yet they operate as mini-governments in the subdivision or development over which they have jurisdiction*."[296] A later paragraph in this treatise section then explains:

> A separate analysis arises when the homeowner's association is potentially subject to open meeting requirements governing public entities because the association . . . is standing in the shoes of the public entity . . . . For example, a homeowner's association that [performs] governmental functions such as road maintenance . . . may be held to satisfy the open meeting requirements that would otherwise apply to the county.[297]

Thus, Schwing's analysis of when open meeting laws should apply to homeowner associations is consistent with the framework of the Louisiana Open Meeting Law guide.[298]

There are also court decisions that apply a totality of the factors approach to judging whether a CIC comes within the scope of a state's Open Meeting Law. Those cases are not specifically in the context of opening CIC board meetings to unit owners; but, nonetheless, they closely parallel the analysis used in the Wisconsin *Beaver Dam*[299] case and the Louisiana Open Meeting Law guide.[300] For example, *Damon v. Ocean*

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[292] *See, e.g.*, Walker v. Briarwood Condo Ass'n, 644 A.2d 634, 638 (N.J. Super. Ct. App. Div. 1994) (asserting that the power to levy fines is a "governmental power").

[293] *See* OPEN MEETING LAW FAQ, supra note 271, at 6.

[294] *See generally* SCHWING, *supra* note 4, at § 4.100(I).

[295] *See id.* at § 4.114-9.

[296] *Id.* (emphasis added).

[297] *Id*. (alteration to original).

[298] *See supra* notes 271–274 and accompanying text.

[299] Wisconsin v. Beaver Dam Area Dev. Corp., 752 N.W.2d 295 (Wis. 2008).

[300] *See supra* notes 271–274 and accompanying text.

Hills Journalism Club[301] involved interpreting the statutory language "a place open to the public or in a public forum" in the context of California's anti-SLAPP statute.[302] The alleged defamatory statements were made at the association's board meetings.[303] Quoting from an earlier California case, the *Damon* court observed: "A homeowners association board is in effect 'a quasi-government entity paralleling in almost every case the powers, duties, and responsibilities of a municipal government.'"[304] Continuing, the court said:

> Because of a homeowners association board's broad powers and the number of individuals potentially affected by a board's actions, the Legislature has mandated that boards hold open meetings . . . these provisions parallel California's open meeting laws . . . . Both statutory schemes mandate open governance meetings, with notice, agenda and minutes requirements, and strictly limit closed executive sessions. The Board here played a critical role in making and enforcing rules affecting the daily lives of Ocean Hills residents.[305]

Accordingly, there is statutory authority, case law, and scholarly commentary supporting the totality of the factors approach to deciding whether a particular entity, such as a CIC, should be regarded as a quasi-public body for purposes of open meeting laws.

B. The "State Action" Approach and the Free Speech Cases

A second approach to assessing whether a CIC is a quasi-public body is to look at the extensive, if somewhat inconsistent, jurisprudence on what constitutes "state action."[306] The state action doctrine holds that a private

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[301] 102 Cal. Rptr. 2d 205 (Ct. App. 2000).

[302] *Damon*, 752 N.W.2d at 209.

[303] *See id*.

[304] *Id.* at 210 (quoting Cohen v. Kite Hill Cmty. Ass'n, 191 Cal. Rptr. 209, 214 (Ct. App. 1983)).

[305] *Id*.; *see also* Golden Eagle Land Inv., L.P. v. Rancho Santa Fe Ass'n, 227 Cal. Rptr.3d 903, 916 (Ct. App. 2018) (citing *Damon*, 102 Cal. Rptr. 2d 205). As previously noted, the *Cambridge Point* case referenced a totality of the circumstances approach to invalidating a CIC bylaw "because it contravenes public policy." Trs. of Cambridge Point Condo. Tr. v. Cambridge Point, LLC, 88 N.E.3d 1142, 1145 (Mass. 2018).

[306] *See, e.g.*, David J. Kennedy, *Residential Associations as State Actors: Regulating the Impact of Gated Communities on Nonmembers*, 105 YALE L.J. 761 (1995); G. Sidney Buchanan, *A Conceptual History of the State Action Doctrine: The Search for Government Responsibility*, 34 HOU. L. REV. 333 (1997); Rosenberry, *supra* note 167.

entity can be treated as a state actor subject to constitutional rights restrictions when it relies on a governmental body (for example, a court) to enforce its privately created rules.[307] Case law on the state action doctrine has almost exclusively involved attempts to enforce private entity restrictions on free speech rights or to enforce racially restrictive housing covenants. But perhaps the time has come to extend the state action doctrine to CIC practices that unreasonably restrict the freedom of speech, press, and assembly rights of their residents.

As previously noted, the argument that CICs should be treated as state actors has not found much support in case law or scholarly commentary.[308] None of this jurisprudence or legal literature, however, has focused specifically on CIC secrecy practices—particularly closed CIC board meetings—as violating constitutional guarantees to open and participatory government, including at the community association level.[309] Neither has case law nor scholarly commentary addressed whether enforcing a contractually implied waiver of a CIC owner's fundamental citizen rights to open government is consistent with public policy.[310]

The leading U.S. Supreme Court decision concerning private restrictions on free speech rights is *Marsh v. Alabama*.[311] This 1946 case involved a so-called "company town." The Court held that the Gulf Shipbuilding Corporation had assumed virtually all of the responsibilities of local government in the Mobile, Alabama suburb of Chickasaw.[312] The Court therefore concluded that the guarantees of the First and Fourteenth Amendments applied with full force to the company-owned town.[313] Two

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[307] *See supra* note 306; Deborah Goonan, *What if Homeowners Associations had to Respect Owners and Residents Constitutional Rights?*, INDEP. AM. CMTY. (Jan. 20, 2022), https://independentamericancommunities.com/2022/01/20/what-if-homeowners-associations-had-to-respect-owners-and-residents-constitutional-rights/ [https://perma.cc/2GAV-K5P5].

[308] *See, e.g.*, Boyack, *supra* note 28; *see generally* Rosenberry, *supra* note 167. Katharine Rosenberry is a law professor and former CEO of the Community Associations Institute.

[309] *See generally* Boyack, *supra* note 28.

[310] *See generally id*. Scholars have observed that the "historic path of free speech" had led from downtown business districts to privately-owned shopping centers, and they asked whether the time had come for that "historic path" to move on from public municipalities to private homeowner associations. *See* Franzese & Siegel, *supra* note 121, at 751.

[311] 326 U.S. 501 (1946).

[312] *See id.* at 502.

[313] *See id.* at 509–10. Specifically, the Court held that a company-owned town possessing all of the characteristics of a municipality and providing full access to the public

years later, in *Shelley v. Kraemer*,[314] the U.S. Supreme Court cited *Marsh* in holding that a community organization's attempt to judicially enforce a racially restrictive property covenant similarly amounted to state action for constitutional purposes.[315]

Most courts and commentators, however, have strictly limited *Marsh* and *Shelley* to the special facts of those cases.[316] For example, in the 1996 case of *Midlake on Big Boulder Lake Condominium Ass'n v. Cappuccio*, the Pennsylvania Superior Court specifically rejected extending *Shelley* to a CIC.[317] The condominium association in this case appealed a lower court decision enjoining Midlake from enforcing a section of the Association's Declaration that prohibited owners from posting signs on their properties without "prior written permission of the Executive Board."[318]

On appeal, Midlake raised the specific question: "Should *Shelley v. Kra[e]mer* be extended so that judicial enforcement of a condominium restriction constitutes state action subject to constitutional scrutiny?"[319] After what the Pennsylvania Superior Court described as "a thorough review of the relevant federal law," the court answered the question as follows:

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of its facilities, including its shopping district, is subject to the First Amendment as a state actor. The Court added: "Many people in the United States live in company-owned towns . . . there is no more reason for depriving these people of the liberties guaranteed by the First and Fourteenth Amendments than there is for curtailing these freedoms with respect to any other citizen." *Id.* at 508. The company town in *Marsh* can be compared with several very large community associations such as the Irvine Ranch community in California (controlled by the Irvine Company), the Reston Association in Virginia, and the Columbia Association in Maryland. *See* McKenzie, *supra* note 26, at 205 ("[M]any planned communities include such a wide range of what would otherwise be municipal facilities and services that they resemble private cities."). A particularly thorough review of the case law referencing the state action doctrine of *Marsh* up to 1980 appears in *New Jersey v. Schmid*, 423 A.2d 615, 624 (N.J. 1980) (determining that no state action was involved in this case and observing that "First Amendment principles as applied to the owners of private property are still evolving").

[314] 334 U.S. 1 (1948).

[315] *See id*. at 22.

[316] *See, e.g.,* Midlake on Big Boulder Lake Condo. Ass'n v. Cappuccio, 673 A.2d 340 (Pa. Super. Ct. 1996); Lisa J. Chadderdon, *No Political Speech Allowed: Common Interest Developments, Homeowners Associations, and Restrictions on Free Speech*, 21 J. LAND USE & ENV'TL. L. 233 (2006).

[317] *See Midlake*, 673 A.2d at 341.

[318] *Id*. at 341–42

[319] *Id*. at 341.

> Where a state court enforces the right of private persons to take actions [regarding private covenants], there is no state action for constitutional purposes in the absence of a finding that racial discrimination is involved as existed in the *Shelley* case.[320]

By contrast, the 1991 case of *Gerber v. Longboat Harbour North Condominium, Inc*.[321] took a different approach. The condominium association argued for dismissal of the free speech complaint arguing that "since [the condominium association] is not a governmental entity and has not assumed substantially all of the functions of a governmental entity, the provisions of the First Amendment . . . simply do not apply."[322] But the U.S. District Court did not agree. It said:

> This Court cannot agree with Defendant[']s contention, and by applying the principles enumerated in *Shelley v. Kraemer,* this Court found and continues to find that judicial enforcement of private agreements contained in a declaration of condominium constitutes state action and brings the heretofore private conduct within the scope of the [Constitutional] . . . guarantee of free speech . . . .[323]

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[320] *Id*. at 342. The court also rejected the argument that *Midlake* was comparable to the company town in *Marsh*. *See id.* Although the trial court had called Midlake a "mini municipality," the court noted that "[w]hile there is sewer service, private streets, and private maintenance, Midlake provides no facilities for community public use that are typically found in a municipality, such as schools, libraries, and other public functions." *Id.*

[321] 757 F. Supp. 1339 (M.D. Fla. 1991).

[322] *Id*. at 1341.

[323] *Id*.; *cf.* Boucher v. 111 East Chestnut Condo. Ass'n, 117 N.E.3d 1123, 1129 (Ill. App. Ct. 2018), *reh'g denied,* No. 123807, 2018 III. LEXIS 925 (Sept. 26, 2018). *Boucher* involved the interpretation of section 18.4(h) of the Illinois Condominium Act, which bars condominium boards from adopting rules that "impair any rights guaranteed by the First Amendment to the Constitution of the United States." *Id.* The lower court interpreted section 18.4(h) to only apply "when a government actor, like a municipality, controls the board of directors for a condominium" because "only state action can violate the first amendment, and the association did not qualify as a state actor." *Id.* at 1129–30. But the Illinois Appellate Court reversed the lower court's dismissal and held that "a plaintiff states a cause of action against an association for violation of his right to free speech by alleging that the association precluded him from expressing his political opinion or that the association penalized him for expressing his opinions." *Id.* at 1131. The association appealed this adverse decision, but the Illinois Supreme Court declined to hear that appeal. *See* Boucher v. 111 East Chestnut Condo. Ass'n, No. 123807, 2018 III. LEXIS 925 (Sept. 26, 2018).

Gerber has been called a "one off" case that is inconsistent with prior jurisprudence.[324] Since about 2010, however, several other cases have held that CIC governing bodies cannot unreasonably restrict the free speech rights of their residents, although without explicitly referencing the state action doctrine as in *Gerber*. An example is the frequently cited 2012 New Jersey Supreme Court case of *Mazdabrook Commons Homeowners' Ass'n v. Khan*,[325] where the New Jersey Supreme Court upheld an owner's free speech right to post political signs touting his own candidacy for a local political position on the inside window and door of his townhome, contrary to Association rules.[326]

The Association's arguments included the fact that Khan had signed a document on purchasing his unit advising him of the sign prohibition.[327] But the 5-1 majority opinion authored by the Chief Justice squarely rejected the Association's position that Khan had contractually waived his constitutional right to free speech simply because "he bought his unit with full knowledge of the sign restrictions."[328] *Mazdabrook*, however, was primarily decided on the basis of the New Jersey Constitution,[329] which

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[324] *See, e.g.*, Goldberg v. 400 E. Ohio Condo. Ass'n, 12 F. Supp. 2d 820 (N.D. Ill. 1998); Boyack, *supra* note 28 at 785 n.62, 786 n.67. *But see* Fox v. Hamptons at Metrowest Condo. Ass'n, 223 So. 3d 453 (Fla. Dist. Ct. App. 2017). In that case, Florida's Fifth District Court of Appeal overturned the trial court's order upholding an association's prohibition against association-related postings on the internet and holding that the prohibition on Fox's online speech was an unconstitutional prior restraint on free speech. The *Fox* case mirrored the federal district court's decision in *Gerber* in finding that the action of an association seeking judicial injunctive relief for an alleged rule violation constitutes state action even if the party seeking the injunction is not a governmental actor. *See id.*; *Gerber*, 757 F. Supp at 1341. The *Fox* case also has particular relevance to the legitimate scope of an association's rulemaking authority. *See Fox*, 223 So. 3d at 457. In the more commonly litigated CIC free speech cases involving signs, courts struggled to balance the constitutional rights of the sign-posting owners against the rights of their neighbors to be free of potentially offensive political messaging. *See, e.g.*, *infra* notes 325–351 and accompanying text. By contrast, no owner was forced to look at Fox's online association-related postings, so there was no arguable harm to any owners. Similarly, no CIC owner is harmed in any way by ending excessive CIC secrecy practices.

[325] 46 A.3d 507 (N.J. 2012).

[326] *See id.* at 522; *cf.* Glovsky v. Roche Bros. Supermarkets, Inc., 17 N.E.3d 1026 (Mass. 2014) (holding that the right to gather signatures in connection with a political campaign in privately-owned supermarket parking lots and common areas is protected under Article 9 of the Massachusetts Declaration of Rights).

[327] *See Mazdabrook*, 46 A.3d at 510, 521.

[328] *Id.* at 521.

[329] *See id*. at 522.

protects against impairment of free speech rights even by a non-governmental actor,[330] so the state action doctrine was not directly involved.

Two years after *Mazdabrook*, the New Jersey Supreme Court reaffirmed CIC free speech rights in New Jersey in *Dublirer v. 2000 Linwood Ave. Owners, Inc.*[331] In this case, the Association tried to stop an owner in a high-rise cooperative apartment building from circulating leaflets door to door that were critical of the building's management.[332] Noting that the Board used the same leafleting method to "praise its achievements and harshly criticize its opponents," the court held that New Jersey law does not permit "a group in power to attack its opponents yet bar them from responding in the same way."[333] Again, however, there was no need to invoke the state action doctrine.

Two Massachusetts lower court decisions, however, arguably embrace the principle that community association enforcement of excessively broad free speech restrictions constitutes state action that violates Constitutional protections. The 2011 case of *Board of Managers of Old Colony Village Condominium v. Preu*[334] involved "the applicability of the First Amendment to the United States Constitution to a claim that a condominium unit owner's speech and expressive conduct constitute a violation of [the association's bylaws and rules]."[335] The Massachusetts Appeals Court held that "the First Amendment does . . . apply to such a claim."[336]

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[330] *See id*. at 517.

[331] 103 A.3d 249 (N.J. 2014).

[332] *See id.* at 251.

[333] *Id*. at 259; *cf.* Schneider v. New Jersey, 308 U.S. 147 (1939). *Schneider* consolidated four similar First and Fourteenth Amendment cases involving police enforcement of municipal ordinances alleged to violate Constitutional freedom of speech and freedom of the press rights. In the Massachusetts case, *Commonwealth v. Nichols*, the Supreme Judicial Court had affirmed a conviction and sentence against a group of Jehovah's Witnesses for distributing handbills on public streets and door-to-door in violation of a local ordinance. *See* 18 N.E.2d 166 (Mass. 1938), *rev'd sub nom.*, Schneider v. State, 308 U.S. 147 (1939). The U.S. Supreme Court reversed, holding that the municipal goal of keeping the streets clean was an insufficient reason to support infringement of Constitutional rights. *See Schneider*, 308 U.S. 147.

[334] 956 N.E.2d 258 (Mass. App. Ct. 2011).

[335] *Id.* at 259; *cf.* Nyer v. Munoz-Mendoza, 430 N.E.2d 1214 (Mass. 1982) (refusing to allow a landlord to enjoin a tenant from posting signs in her apartment or on the outside of her apartment door to protest conversion of her building to a condominium, citing violations of the First Amendment of the U.S. Constitution and of Article 16 of the Declaration of Rights of the Massachusetts Constitution).

[336] *Preu*, 956 N.E.2d at 259.

Citing the U.S. Supreme Court decision in *Cohen v. Cowles Media Co.*,[337] the Massachusetts Appeals Court said that "the application of state rules of law in state courts in a manner alleged to restrict First Amendment freedoms constitutes 'state action' under the Fourteenth Amendment."[338] Furthermore, the Massachusetts Appeals Court observed that "the relationship between a unit owner and the common area of a condominium is not the same as that between a member of the public and some third party's private property."[339]

In the 2021 case of *Jess v. Summer Hill Estates Condominium Trust*,[340] the association rules stated that signs or decorations expressing "patriotic, civic, moral, political or other views" could not be placed in the common areas without the prior written permission of the Trustees.[341] However, there were already unit owner signs expressing support for graduating high school seniors, front line medical workers, and military service members.[342] But when Jess placed a "Black Lives Matter" sign in the common area garden in front of her unit she was ordered to remove the sign or face severe daily fines.[343] The ACLU, on behalf of Jess, challenged the condominium rules as violating the Massachusetts Declaration of Rights, which provides that "the right of free speech shall not be abridged" and prevents restrictions on free speech by private actors (such as community associations).[344] The ACLU argued that there was precedent in Massachusetts for

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[337] 501 U.S. 663 (1991).

[338] *Id.* at 261 (citing Cohen v. Cowles Media Co., 501 U.S. 663, 668 (1991)).

[339] *Id.* The Court continued, saying that "a condominium association does not have as free a hand in restricting the speech of unit owners in the common areas in which those owners share an undivided property interest as another property owner might in dealing with a stranger on his or her property." *Id.*

[340] No. 2080-CV-00117 (Mass. Super. Ct. 2021), https://www.aclum.org/en/cases/jess-v-summer-hill-estates-condominium-trust [https://perma.cc/74Y8-MX7J].

[341] Complaint at 2, Jess v. Summer Hill Est. Condo. Tr., No. 2080-CV-00117 (Mass. Super. Ct. 2021), https://www.aclum.org/cases/jess-v-summer-hill-estates-condominium-trust/?document=Oct-2020-Complaint [https://perma.cc/8GL2-6DYG].

[342] *See id.* at 6-9.

[343] *See id.* at 5-6.

[344] *Id.* at 12. The Massachusetts Declaration of Rights is an amendment to the Massachusetts Constitution that generally corresponds to the U.S. Bill of Rights, and it specifically guarantees the rights to freedom of speech (article 16) and freedom of assembly (article 19). *See* MASS. CONST. art. 16, 19. Posting of signs has been recognized as an important means of free expression. For example, in *City of Ladue v. Gilleo*, the U.S. Supreme Court said:

protecting free speech under the Massachusetts Constitution as much as under the First Amendment, including protecting the expression of one's political views at one's home.[345]

It was also argued that any effort to restrict the exercise of this right should be subject to a "strict scrutiny" test as to whether the restriction was justified by a compelling interest and narrowly tailored to serve that interest.[346] Without these standards, there would be no guardrails to prevent arbitrary restrictions on free speech. Eventually, the two sides entered a final judgment requiring the Association to allow unit owners to post non-commercial, constitutionally protected signs at or near their respective units without prior permission of the Board.[347] The *Preu* and *Jess* cases can thus be read as pragmatic recognition by the Massachusetts courts that CICs are quasi-governmental entities—not quite state actors, but also not the same as ordinary private citizens. These cases can therefore be seen as supporting the theme of this Article—namely, that for some purposes, at least some Massachusetts CICs (and those in other states) should be considered quasi-public bodies that are subject to the Massachusetts Declaration of Rights and the Open Meeting Laws of their respective states.

Furthermore, as previously discussed, the case for invalidating excessive CIC secrecy practices like closed board meetings is even stronger than the case for limiting CIC free speech restrictions.[348] While free speech restrictions may serve a legitimate purpose of minimizing something that could be offensive to some community residents, excessive CIC secrecy

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> Residential signs are an unusually cheap and convenient form of communication. Especially for persons of modest means or limited mobility, a yard or window sign may have no practical substitute. Even for the affluent, the added costs in money or time of taking out a newspaper advertisement, handing out leaflets on the street, or standing in front of one's house with a hand-held sign may make the difference between participating and not participating in some public debate.

512 U.S. 43, 57 (1994). These same considerations apply to residents of CICs.

[345] *See* Complaint at 13, Jess v. Summer Hill Est. Condo. Tr., No. 2080-CV-00117 (Mass. Super. Ct. 2021).

[346] *See id.* at 14. In the *City of Ladue* case, the Court added: "The elimination of a cheap and handy medium of expression is especially apt to deter individuals from communicating their views to the public . . . ." 512 U.S. at 57 n.15.

[347] *See* Final Judgment, Jess v. Summer Hill Est. Condo. Tr., No. 2080-CV-00117 (Mass. Super. Ct. 2021), https://www.aclum.org/cases/jess-v-summer-hill-estates-condominium-trust/?document=Jan-2021-Final-Judgment [https://perma.cc/Z4AS-JFDF]. In *Pruneyard Shopping Center v. Robins*, the U.S. Supreme Court explained that a state constitution may protect individuals from the actions of private actors even when the U.S. Constitution would not apply. *See* 447 U.S. 74 (1980).

[348] See *supra* notes 13 and 206 and accompanying text.

practices serve no legitimate purpose and do not benefit owners in any way. Accordingly, these secrecy practices arguably exceed an association's scope of authority.[349]

Free speech and openness in government go hand in hand. Free speech rights are worthless in the absence of access to the information needed to support that speech. People kept in the dark about the operations of their federal, state, local, or CIC governments cannot express informed opinions about those governments or intelligently choose their elected representatives. In the 1945 case of *Thomas v. Collins*,[350] the U.S. Supreme Court observed that the rights to freedom of speech, assembly, and press "though not identical, are inseparable."[351] Thus, in this author's opinion, enforcement of CIC rules or policies that unreasonably restrict access to association information that the CIC owners are rightfully entitled to could plausibly be deemed a state action. In the context of a common interest community where there is no independent, uncensored community news reporting, open board meetings could be considered the functional equivalent of a free press.

C. The Hybrid Approach – Due Process Cases

A 2012 law review article by Aaron R. Gott, *Ticky Tacky Little Governments? A More Fruitful Approach to Community Associations Under the State Action Doctrine*, brought together additional constitutional arguments for treating CICs as state actors, including the totality of the factors approach.[352] Gott's approach to the state action doctrine added Fourteenth Amendment due process considerations to the First Amendment free speech cases previously discussed.[353] The Fourteenth Amendment provides in part: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law . . . ."[354]

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[349] *See supra* notes 13, 206, and 324 and accompanying text.

[350] 323 U.S. 516 (1945).

[351] *Id.* at 530; *see also* Genevieve Lakier, *The Non-First Amendment Law of Freedom of Speech*, 134 HARV. L. REV. 2299 (2021).

[352] *See* Aaron R. Gott, *Ticky Tacky Little Governments? A More Fruitful Approach to Community Associations under the State Action Doctrine*, 40 FLA. ST. U. L. REV. 201 (2012).

[353] *See id.*

[354] U.S. CONST. amend. XIV § 1. Some commentators have read *Marsh* as only extending First Amendment free speech protections to communities that are open to the

Gott identifies three categories of Fourteenth Amendment cases where the courts considered whether the state action doctrine applies to an alleged due process deprivation: first, the "public function" cases; second, the "entanglement" cases; and third, the "enforcement" cases.[355] He raises the question of whether the case law for each of these categories, standing alone, would support extending due process protections to the residents of community associations.[356] His answer is probably not, but he contends that in combination they might.[357]

The first category Gott looks at is public function cases "in which a private entity exercises power characteristic of the state in a manner that results in a constitutional deprivation."[358] He observes that this category of due process rests on the proposition that a state should not be able to "free itself from the limitations of the Constitution in the operation of its governmental functions merely by delegating certain functions to otherwise private individuals,"[359] which could certainly include community associations.

Gott argues, however, that the public function case law is inconsistent and not generally supportive of extending this principle to community associations.[360] He contrasts the promising 1968 U.S. Supreme Court decision in *Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza, Inc.*,[361] allowing peaceful picketing in a private shopping center parking lot, with subsequent decisions in the *Lloyd Corp. v. Tanner*[362] and *Hudgens v. National Labor Relations Board*[363] cases refusing to allow, respectively, handbill distribution or picketing inside private shopping centers.

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public (such as mixed use CICs with both residential and commercial components). *See* Franzese & Siegel, *supra* note 121, at 750. This distinction presents an added hurtle to extending Fourteenth Amendment due process rights under the state action doctrine to CICs that are not mixed-use communities.

[355] *See* Gott, *supra* note 352, at 206–11.

[356] *See id.* at 205.

[357] *See id.*

[358] *Id*. at 205–207.

[359] *Id*. at 206; *cf.* Red & Black Publ. Co., Inc. v. Bd. of Regents, 427 S.E.2d 257 (Ga. 1993) (holding that because the University of Georgia had delegated its judicial authority over student affairs to a student-run Organization Court, that student-run court was subject both to Georgia's Open Meetings Act and Open Records Act).

[360] *See* Gott, *supra* note 352, at 206–07.

[361] 391 U.S. 308 (1968).

[362] 407 U.S. 551 (1972).

[363] 424 U.S. 507 (1976).

Gott also references several community associations cases that reject the public function approach. In *Tansey-Warner, Inc. v. East Coast Resorts, Inc.*,[364] the Delaware Chancery Court held that a private entity must have all the attributes of, and function like, a municipality to be subject to due process requirements. In *Brock v. Watergate Mobile Home Park Ass'n, Inc.*,[365] a Florida appellate court said that "the services provided by a homeowners association, unlike those provided in a company town, are merely a supplement to, rather than a replacement for, those provided by local government."[366] It should be remembered, however, that all of these were pre-2000 cases, and much has changed since then.

Next, Gott turns to the "entanglement" approach to due process, "in which the state and the private party charged with a [due process] deprivation enjoy a close relationship such that the state is a joint participant."[367] Gott's analysis suggests that the potential of this approach to due process rights for community association residents has not yet been fully realized.

In *Burton v. Wilmington Parking Authority*,[368] the U.S. Supreme Court said that the state can "so far insinuate[] itself into a position of interdependence with [a private entity] that it must be recognized as a joint participant in the challenged activity . . . ."[369] Additionally, in *Evans v. Newton*,[370] the U.S. Supreme Court said that "conduct that is formally 'private' may become so entwined with governmental policies or so impregnated with a governmental character" that it amounts to state action.[371]

In support of this approach, Gott notes that CICs have become inextricably entangled with governmental entities.[372] He points out that CICs are created and empowered to act by state legislation, just like municipalities.[373] He also argues that local governments work hand-in-

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[364] Civ. Ac. No. 720, 1978 WL 22460 (Del. Ch. Nov. 27, 1978).

[365] 502 So. 2d 1380, 1382 (Fla. Dist. Ct. App. 1987).

[366] *Id.*

[367] Gott, *supra* note 352, at 205, 207–08.

[368] 365 U.S. 715 (1961).

[369] *Id.* at 725 (alteration to original).

[370] 382 U.S. 296 (1966).

[371] *Id.* at 299.

[372] *See* Gott, *supra* note 352, at 215; *see also supra* notes 287–291 and accompanying text; McKenzie, *supra* note 26 (arguing that many local governments have effectively been "captured" by the money and power wielded by real estate developers and their attorneys, which validates Gott's entanglement argument.).

[373] *See* Gott, *supra* note 352, at 215.

hand with CIC real estate developers to establish planned communities with highly profitable mutual benefits.[374] Increasingly, municipalities are conditioning approval of plans for new residential developments on those developments being organized as planned communities specifically so that these municipalities can off-load the associated community maintenance responsibilities.[375] It has become difficult to find any new home construction not encumbered with a community association.

Gott explains: "This symbiotic relationship provides an 'increase in the local tax base which occurs without a proportionate increase in costs to local government,'"[376] This benefit results from CICs using unit owner monthly fees to pay for resident services that would otherwise have to be funded by local government, in some cases even leading to a property tax break for the CIC's owners.[377]

Gott's third due process category is the "enforcement" cases "in which the state enforces private agreements or explicitly sanctions private party conduct that results in a [due process] deprivation."[378] This approach

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[374] *See id.* at 215–16; *see also* Boyack, *supra* note 28, at 780 ("Because of this ability to privatize public function, local governments have actively encouraged the spread of [the] CIC form as a way to privately finance community services. Municipalities have even required new residential developments to be structured as CICs in order to generate revenue rather than as non-CICs which demand more municipally funded infrastructure and upkeep.") (alteration to original).

[375] *See* Gott, *supra* note 352, at 216–17. Minnesota's pending 2025 legislation aims to curb this practice; H.B. 1268, 94th Leg., Reg. Sess. (Minn. 2025); S.B. 1750, 94th Leg., Reg. Sess. (Minn. 2025). Other legislation proposes to amend MINN. STAT. § 394.25 by providing in part: "(a) A county must not condition approval of a residential building permit . . . on the: (1) creation of a homeowners association; (2) inclusion of any service, feature, or common property necessitating a homeowners association . . . ." S.B. 2655 § 1, 94th Leg., Reg. Sess. (Minn. 2025). Another provision within the same proposed legislation applies the same prohibitions to a Minnesota "municipality, joint planning board, or public corporation." *Id.* § 2; *see generally* Daniel R. Mandelker, *New Perspectives on Planned Unit Developments*, 52 REAL PROP., TR. & EST. L. J. 229 (2017); Franzese & Siegel, *supra* note 121, at 755–56.

[376] Gott, *supra* note 352, at 216; *see also* Boyack, *supra* note 28, at 779–80 ("The possibility for shared private contribution to the costs of community amenities and upkeep through CIC ownership structures proved popular with local governments. Municipalities quickly perceived the benefit of creating taxable housing that provided its own community maintenance framework (including snow removal, paving, and in some cases[,] even fire and safety.").

[377] *See* Jason Sorens, *Against YIMBY Leninism*, THE DAILY ECONOMY (July 29, 2024), https://thedailyeconomy.org/article/against-yimby-leninism/ [https://perma.cc/MMC4-32VV] (noting that states like New Jersey and Texas allow HOA members to receive a property tax credit for HOA dues they pay for infrastructure).

[378] Gott, *supra* note 352, at 205, 208–11.

builds on the Fourteenth Amendment principles set forth in *Shelley v. Kraemer*: "The judicial action in each case bears the clear and unmistakable imprimatur of the state. We have noted that . . . judicial action is not immunized from the operation of the Fourteenth Amendment simply because it is taken pursuant to the state's common-law policy."[379]

In support of this approach, Gott argues that "courts have elevated community associations to governmental status, giving broad deference to associations in their efforts to restrict property owners' freedom."[380] But Gott acknowledges that the "enforcement approach" case law following *Shelley* has been sparse and somewhat inconsistent.[381] Therefore, he does not regard this approach by itself to be an adequate foundation for the due process rights of community association residents.[382] For these reasons, Gott proposes an alternative that he argues can be a "more faithful approach" to extending Fourteenth Amendment due process rights to CIC residents.[383] He bases this new approach on the U.S. Supreme Court case of *Edmonson v. Leesville Concrete Co.*[384] The initial inquiry under *Edmonson* is whether an association violated state law in taking a challenged action; and, if so, no further inquiry is needed.[385]

If there is no association legal violation, however, a court next considers: "[(1)] the extent to which the actor relies on governmental assistance and benefits, [(2)] whether the actor is performing a traditional governmental function, and [(3)] whether the injury caused is aggravated in a unique way by the incidents of governmental authority."[386] Gott says that these factors "are a rough recasting" of his three due process categories.[387] This analysis, in effect, is a hybrid approach that uses a totality of the factors analysis to support a finding that a private entity (for example, a community association) should, under certain conditions, be treated as a state actor subject to due process requirements.[388] Gott concludes that

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[379] Shelley v. Kraemer, 334 U.S. 1, 20 (1948).

[380] Gott, *supra* note 352, at 216.

[381] *See id.*

[382] *See id.* at 202.

[383] *Id.* at 213.

[384] 500 U.S. 614 (1991).

[385] *See id.* at 616.

[386] Gott, *supra* note 352, at 215.

[387] *Id*.

[388] *See supra* Part IV.A. Gott justifies his hybrid approach to the state action doctrine as follows:

"courts should follow the *Edmonson* formulation and recognize community associations for what they are: pervasive private governments that may seriously undermine fundamental liberties if not properly held to account."[389]

V. THE MASSACHUSETTS OPEN MEETING LAW – A BRIDGE TO CIC OWNER RIGHTS?

Massachusetts courts have not yet recognized that a private, non-profit entity, specifically a community association, can qualify as a quasi-public body for purposes of the Open Meeting Law. Also, as discussed above, Massachusetts has lagged behind other states in New England and across the country in modernizing its Condominium Act.[390] For more than forty years, Massachusetts courts have identified deficiencies in the current statute and called for the Legislature to act.[391] In the meantime, however, some CIC buyers and unit owners in Massachusetts have been, and continue to be, seriously victimized by industry practices that are facilitated at least in part by excessive secrecy in their communities.[392]

A. The Importance of Open Community Meetings

The importance of open community meetings in our system of government, and their inseparable connection to First Amendment rights, is forcefully expressed in the unanimous 2023 Massachusetts Supreme Judicial Court opinion in *Barron v. Kolenda*.[393] In this case involving meetings of the Southborough Board of Selectmen, the court addressed aspects of the Massachusetts Open Meeting Law as well as the Massachusetts

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> Put another way, company towns, segregated restaurants leasing public property, and racially restrictive covenants have little practical significance today, and the contemporary replacements for these actors are not replicas; [CICs] represent innovations in law and society that implicate state action in a way that cannot be ascertained through side-by-side comparisons to institutions abandoned long before these new threats [to personal liberties] came.

Gott, *supra* note 352, at 214.

[389] Gott, *supra* note 352, at 220.

[390] *See supra* notes 21–23 and accompanying text.

[391] *See, e.g.*, *supra* Part II.F.

[392] *See supra* Part II.F. *See generally* LUKE S. CARLSON, BAD HOA: THE HOMEOWNER'S GUIDE TO GOING TO WAR AND RECLAIMING YOUR POWER (April 2025); MICHAEL B. KUSHNER, HOA HELL: CALIFORNIA HOMEOWNERS' DEFINITIVE GUIDE TO BEATING BAD HOAS (Dec. 2025). Although these books by experienced California owner-side CIC attorneys focus on California law, they address commonplace CIC governance abuses found nationwide, including in Massachusetts.

[393] 203 N.E. 3d 1125 (2023).

Declaration of Rights and the Massachusetts Civil Rights Act.[394] The characterization of the Southborough Select Board as just "a group of volunteers" or "'public servants' who 'do their best'" did not temper the court's decision against the Board.[395]

The court said that articles 16 (freedom of speech) and 19 (freedom of assembly) of the Massachusetts Declaration of Rights "provide for a robust protection of public criticism of governmental action and officials."[396] Continuing, the court said that the Massachusetts Declaration of Rights "expressly envisions a politically active and engaged, even aggrieved and angry, populace."[397] The court referenced the writings of significant historical figures such as Samuel and John Adams and Alexis de Tocqueville in support of the importance of active public participation in town governance.[398]

If modern CICs—in some cases communities with hundreds or thousands of residents—had existed in the eighteenth century, it seems likely that the Adams cousins and de Tocqueville would have regarded them as "towns" within the scope of their political writings. But for the persistent myth that CICs are based on informed, voluntary contracts, it also seems likely that community association board meetings would be seen as similar to town meetings. Thus, this recent additional layer of CIC government should similarly be subject to the Open Meeting Laws.[399] There are many

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[394] *See id*. at 1130.

[395] *Id*. at 1132.

[396] *Id*. at 1130.

[397] *Id.* at 1134. The court added: "The provision [article 19] also has a distinct, identifiable history and a close connection to public participation in town government . . . art. 19 reflects the lessons and the spirit of the American Revolution." *Id.* (alteration to original).

[398] *See id*. at 1135; *see also* Batchelder v. Allied Stores Int'l, Inc., 445 N.E.2d 590 (Mass. 1983) (involving a person's right under article 9 of the Massachusetts Declaration of Rights to collect signatures and distribute materials relating to ballot access in a privately-owned shopping mall).

[399] The *Barron* court additionally said:

> Here, the town expressly provided a place for public comment: the meeting of the board . . . . Barron presented her grievances at the established time and place. The town nonetheless then sought to control the content of the public comment, which directly implicates and restricts the exercise of the art. 19 right of the people to request "redress of the wrongs done them, and of the grievances they suffer." The content sought to be prohibited – discourteous, rude, disrespectful, or personal speech about governmental officials and governmental actions – is clearly protected by art. 19 and thus the prohibition is impermissible.

instances in which states with CIC open meeting laws have turned to their case law and attorney general opinions under the analogous open meeting laws governing public bodies to interpret corresponding CIC open meeting requirements.[400] As one prominent Massachusetts CIC attorney observed in response to a question about open meetings: "Keep in mind that [association] board meetings are like selectmen meetings . . . ."[401]

B. Legal Fictions as a Bridge to Expanding the Open Meeting Law and Legislative Reform

When overdue legislative reform of outdated laws is stymied, Anglo-American courts have invoked legal fictions and equity in appropriate cases to pave the way for eventual legislative change.[402] For example,

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203 N.E.3d at 1136–37. How much more of a breach of the principles of article 19 is it then to deny the residents of Massachusetts CICs even the right to attend and respectfully participate in the deliberations of their elected CIC board members?

[400] *See supra* notes 301–305 and accompanying text; *see also* WOODS, *supra* note 269, at 3. The Arizona Attorney General responded to Arizona State Representative Jerry Overton, interpreting the Arizona open meeting laws applicable to homeowner associations, ARIZ. REV. STAT. ANN. § 33-1804, and community associations, ARIZ. REV. STAT. ANN. § 33-1248, in the context of informal board meetings at which the board does not vote. WOODS, *supra* note 269, at 1. But because these laws did not define "meeting" or give any direction about when a gathering of board members constitutes a "meeting," the Attorney General said he needed to "look elsewhere for guidance." *Id.* at 3. The place he looked was ARIZ. REV. STAT. ANN. §§ 38.431 to 431.09, Arizona's Open Meeting Law for public bodies. *See* WOODS, *supra* note 269, at 3. Referencing an earlier Arizona Supreme Court decision, the Attorney General said "statutes with the same general purpose should be construed together, even if the statutes do not reference one another or are in different chapters of the A.R.S." *Id.* (citing State ex rel. Larson v. Farley, 471 P.2d 731, 734 (Ariz. 1970)).

[401] Stephen Marcus, *Q&A: Can Everyone Attend Meetings?*, NEW ENGLAND CONDO. (Aug. 2017), https://newenglandcondo.com/article/qa-can-everyone-attend-meetings [https://perma.cc/99F5-WZX8] ("While not required in Massachusetts, we encourage [CIC] boards to have open meetings. It eliminates suspicions that the board is acting in secret. . . . Keep in mind that board meetings are like selectmen meetings . . . .") (alteration to original). In a "Practice Note," two attorneys in a prominent Massachusetts CIC law firm recently wrote that "Condominiums are like mini municipalities…." *See* Christopher S. Malloy & Katherine G. Brady, *Condominium Ownership and Operation in Massachusetts*, MORIARTY BIELAN & GAMACHE LLC (Oct. 25, 2022), https://www.mbmllc.com/condominium-ownership-operation-massachusetts.html [https://perma.cc/2NRC-GFCS].

[402] *See* SIR HENRY SUMNER MAINE, ANCIENT LAW 24 (10th ed. 1884) (arguing that the English courts sometimes used legal fictions or equitable principles to reach the "right" outcomes in appropriate cases where overdue legislative reform had been blocked or delayed. These judicial sleights of hand can promote legislative action by drawing attention to the gaps between evolving social needs and the legal status quo.); *see also Legal Fiction*,

opposition to adoption of the Uniform Commercial Code (U.C.C.)[403] in the 1950s–60s was overcome in part by creative legal fictions.[404] In *Greenberg v. Lorenz*,[405] the New York Court of Appeals used an obvious legal fiction—that a father was acting as the agent of his minor daughter when he purchased a defective can of salmon containing metal shards—to circumvent another contract myth,[406] namely, the long-criticized "privity of contract" legal doctrine.[407]

BLACK'S LAW DICTIONARY (2d. ed. 1910) (defining a legal "fiction" as "a rule of law which assumes as true, and will not allow to be disproved, something which is false, but not impossible").

[403] All 50 states eventually adopted versions of the U.C.C. *See* Daniel Liberto, *What is the Uniform Commercial Code (UCC)? Key Articles and Purpose,* INVESTOPEDIA (Aug. 27, 2025), https://www.investopedia.com/terms/u/uniform-commercial-code.asp [https://perma.cc/2YZP-WX3D]. But early on, there was strong opposition to the U.C.C., especially to Article 2 – Sales. *See* W. Harold Bigham, *Tennessee Law and the Sales Article of the Uniform Commercial Code*, 17 VAND. L. REV. 873 (1964). Bingham noted, "Article 2–Sales . . . has precipitated perhaps more criticism than any of the other articles of the Code," citing what he called the "more vo[c]iferous critics." *Id*. at n.2. Bigham cites GOODRICH & WOLKIN, A STORY OF THE A. L. I. (1961), and a lengthy list of articles commenting on Article 2 of the U.C.C. *See id.*, n.3; Robert Braucher, *The Legislative History of the Uniform Commercial Code*, 2 AM. BUS. L. J. 137 (1964).

[404] See *infra* notes 403–410 and accompanying text.

[405] 173 N.E.2d 773 (N.Y. 1961).

[406] *See id.* at 775. The trial court in this case found in favor of the father and daughter plaintiffs based on warranty theory, noting "the trend away from such [privity of contract] decisions as *Chysky v. Drake Bros. Co* . . . ." *Id.* at 774. The Appellate Term affirmed in a 2-1 split decision, with the majority holding that "the old cases were no longer controlling." *Id.* But on appeal to the Appellate Division, the Appellate Term decision was reversed in another split decision, holding that privity of contract was still law in New York State and that it "forbids a recovery on warranty breach to anyone except the purchaser." *Id.* In this case, the purchaser was the father, but his damages would have been limited to the purchase price. *See id.* The salient question in this case was whether the injured daughter could recover for her injuries. *See id.*

[407] *See id.* The privity of contract doctrine is based on the myth that a contract only concerns the actual parties to the agreement, and therefore third parties (for example, the injured daughter in *Greenberg*) have no legal rights under the agreement. *See* William L. Prosser, *The Assault Upon the Citadel (Strict Liability to the Consumer)*, 69 YALE L.J. 1099, 1099–03 (1960); William L. Prosser, *The Fall of the Citadel (Strict Liability to the Consumer)*, 50 MINN. L. REV. 791, 795 (1966). However, on further appeal from the Appellate Division, the New York Court of Appeals in *Greenberg* clearly recognized the dilemma it faced:

> Our difficulty is not in finding the applicable rule but in deciding whether or not to change it. The decisions are clear enough. There can be no warranty, express or implied, without privity of contract. . . . Therefore, as to food or other merch-

A concurring opinion in the *Greenberg* case argued for limiting this unusual holding to the facts of the case, noting: "However much one may think liability should be broadened, that must be left to the Legislature."[408] That reasoning is similar to Justice Lenk's comments in the *D'Allesandro* case.[409] But the *Greenberg* legal fiction seemingly did the job of prompting overdue legislative change. One year later, the New York State Legislature enacted the U.C.C.,[410] which finally eliminated the obsolete privity of contract doctrine.[411]

In the present instance, Massachusetts has a similar opportunity to use the legal fiction of a quasi-public body to circumvent the outdated CIC contract myth that CIC owners knowingly and voluntarily relinquish their rights to open, participatory CIC governance.[412] Applying the Open Meeting Law to at least some CICs because they are quasi-public bodies that operate as mini governments would also effectively sidestep industry

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andise, there are no implied warranties of merchantability or fitness except as to the buyer . . . .

173 N.E.2d at 774. The court noted, however, that there were cases where a husband and wife had been deemed to be each other's agents for privity purposes, but this fiction had never been extended to a dependent child. *See id.* at 774–75. Nevertheless, in view of the unfairness of the privity doctrine and its many critics, the New York Court of Appeals held that it would not be "just or sensible to confine the warranty's protection to the individual buyer. At least as to food and household goods, *the presumption should be that the purchase was made for all the members of the household*." *Id.* at 776 (emphasis added).

[408] *Id.*

[409] *See* D'Allesandro v. Lennar Hingam Holdings, LLC, 156 N.E.3d 197, 200 (Mass. 2020).

[410] *See generally* Walter F. Weldon Jr., et al., *Uniform Commercial Code*, 3 B.C. INDUS. & COM. L. REV. 254, 256 (1962) (citing Hogan & Penney, *Annotations of the Uniform Commercial Code to the Statutory and Decisional Law of New York State* (1961)) (explaining that New York's Commission on Uniform State Laws would recommend enactment of the U.C.C. in 1962).

[411] U.C.C. section 2-315 provides:

> Where the seller at the time of contracting has reason to know any particular purpose for which the goods are required and that the buyer is relying on the seller's skill or judgment to select or furnish suitable goods, there is . . . an implied warranty that the goods shall be fit for such purpose.

U.C.C. § 2-315 (A.L.I. & UNIF. L. COMM'N 2022). This provision ended the privity of contract doctrine by stating that the warranty runs with the goods irrespective of the purchaser or user. Thus, there was no longer the need for the artifice of a legal fiction as in *Greenberg*.

[412] *See* Nahrstedt v. Lakeside Vill. Condo. Ass'n, 878 P.2d 1275, 1279–83 (Cal. 1994); Johnson v. Keith, 331 N.E.2d 879, 882 (Mass. 1975); Tosney v. Chelmsford Vill. Condo. Ass'n, 493 N.E.2d 488, 491 (Mass. 1986); Boyack, *supra* note 28, at 771, 787.

opposition to owner rights legislation in this narrow but important aspect of CIC governance.

The 2017 Massachusetts *Open Meeting Law Guide* was issued by the Office of Attorney General Maura Healey (now Governor).[413] The introduction to the *Guide* states: "The Open Meeting Law requires that most meetings of public bodies be held in public . . . ."[414] In the "Overview" section, the *Guide* says: "The purpose of the Open Meeting Law is to ensure transparency in the deliberations on which public policy is based."[415]

In explaining what constitutes a public body, the *Guide* says:

> While there is no comprehensive list of public bodies, *any multi-member board* . . . within the executive or legislative branches of state government, or within any county, district, city, region or town, *if established to serve a public purpose*, is subject to the law. The law . . . also includes *the governing board of any local housing or redevelopment authority, and the governing board or body of any authority established by the Legislature to serve a public purpose*.[416]

CICs in Massachusetts were established and empowered "by the Legislature" when it enacted G.L. chapter 183A (the Massachusetts Condominium Act), and it arguably did so "to serve a public purpose."[417]

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[413] *See* OPEN MEETING LAW GUIDE AND EDUCATIONAL MATERIALS, *supra* note 30.

[414] *Id*. at 3.

[415] *Id*. at 4.

[416] *Id*. at 5 (emphasis added). This language is largely drawn from Massachusetts statutes. *See* MASS. GEN. LAWS ch. 30A, §§ 18–25.

[417] There is no statutory definition of what constitutes an "authority established by the Legislature to serve a public purpose," but the *Guide* says that "Boards of selectmen . . . are certainly subject to the Open Meeting Law . . . ." *Id.* at 3. As previously noted, CIC boards are, in almost every respect, the functional equivalents of municipal boards of selectmen. In the case of *Connelly v. School Comm. of Hanover* (decided under the earlier version of the Open Meeting Law), the Massachusetts Supreme Judicial Court concluded that a committee appointed by the school superintendent to assist him in nominating a candidate for a school principal position was not subject to the Open Meeting Law because "it is not constituted or regulated *by statute* . . . and because it was *informally appointed* to assist the superintendent." 565 N.E.2d 449, 462 (Mass. 1991) (emphasis added). By contrast, a CIC "organization of unit owners" is empowered by G.L. chapter 183A, section 1 to "manage and regulate the condominium" (that is, "by statute"), and board members are elected, not "informally appointed." *See* MASS. GEN. LAWS ch. 183A, § 1. Accordingly, the *Connelly* case is readily distinguishable from CIC boards.

A CIC with a population comparable to some Massachusetts municipalities,[418] which performs substantial municipal functions funded with unit owner fees, and which additionally exercises policymaking and rule enforcement authority over its residents is functionally equivalent to a "local housing authority," which is specifically included in the Attorney General's explanation of a "public body." It would be a very small jump to treat this kind of CIC as a quasi-public body subject to the Open Meeting Law.

Arizona history illustrates how even an Attorney General's Opinion denying an Open Meeting Law inquiry, if done the right way, can become a catalyst for legislative reform.[419] In 1988, responding to a request from an Arizona state legislator, the Arizona Attorney General considered whether a particular Arizona community association came within the scope of Arizona's Open Meeting Law.[420]

The Attorney General's Opinion took the conventional approach of noting that the "Open Meeting Law applies to public bodies," and then turned to the statutory definition of a public body.[421] Although that statutory definition of a public body was quite comprehensive, it did not specifically include community associations.[422] After considering each element of the statutory definition, the Attorney General concluded: "Consequently, the Council, which is in effect, a large homeowner's association . . . is not a 'public body' and is not subject to Arizona's Open Meeting Law."[423]

The Attorney General's Opinion did not address whether the Council might have been considered a quasi-public body, and it is not clear if this argument was even raised. To be sure, in 1988, the concept of a community association being treated as a quasi-public body was still virtually

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[418] The ten smallest towns in Massachusetts range in size from about five hundred residents (Tolland) down to as few as about seventy-five residents (Gosnold). *See* Michael Rock, *The 10 Smallest Towns in Massachusetts*, FUN 107 (Oct. 30, 2020), https://fun107.com/the-10-smallest-towns-in-Massachusetts/ [https://perma.cc/6GL2-JZ3E]. Many Massachusetts CICs have larger populations than some or all of these ten municipalities. *See* Boyack, *supra* note 28, at 77.

[419] *See* ARIZ. ATT'Y GEN. ROBERT CORBIN, I88-055 (R88-036) (1988).

[420] *See id*.

[421] *Id*.

[422] *See id.*

[423] *Id*.

unknown.[424] But the Arizona Attorney General laid the foundation for extending the Open Meeting Law to community associations.[425] Even though he had determined that the Council was not within the literal scope of the Arizona Open Meeting Law, the Attorney General added the following paragraph to the end of his Opinion:

> Nonetheless, we believe the council should be strongly encouraged *to always conduct public meetings which are properly noticed*. Because it is obvious that the council has a great deal of influence on community affairs, we believe the public should always be invited to attend, observe and even participate in the Council's deliberations.[426]

That 1988 Corbin Opinion spotlighted the legal gap between the kind of open government enjoyed by most Arizona citizens and the more limited rights of those citizens residing in community associations, where they were subject to an additional layer of often secretive and largely unaccountable community government.[427] Six years later, however, that legal gap was closed when Arizona became one of the first states to enact comprehensive CIC owner rights legislation, specifically mandating CIC governing bodies to conduct open meetings.[428]

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[424] One of the earliest judicial references to treating a common interest community as a quasi-public or quasi-government body was in *Cohen v. Kite Hill Community Ass'n*, 191 Cal. Rptr. 209 (Ct. App. 1983). The *Cohen* court referenced the article by Hyatt & Rhoads, *Concepts of Liability in the Development and Administration,* which commented on the increasingly quasi-governmental nature of community associations and called such an association a "mini-government." *See* Hyatt & Rhoads, *supra* note 10, at 915.

[425] *See* CORBIN, *supra* note 419.

[426] *Id.* This parallels the statement of the California Court of Appeals in *Damon* concerning the "critical role" that a CIC board plays in "making and enforcing rules affecting the daily lives" of the residents. Damon v. Ocean Hills Journalism Club, 102 Cal. Rptr. 2d 205, 210 (Ct. App. 2000).

[427] *See, e.g.*, Uriel Reichman, *Residential Private Governments: An Introductory Survey*, 43 U. CHI. L. REV. 253, 268 (1976) ("[T]he residential private government [in CICs] comprises yet another layer of day-to-day regulation that further reduces those personal liberties defined in terms of property rights.") (alteration to original).

[428] *See* ARIZ. REV. STAT. ANN. § 33-1804 (requiring in 1994 that "all meetings of the association and the board of directors are open to all members of the association . . . ."; *see also* ARIZ. REV. STAT. ANN. § 33-1802(1) (defining an "association" subject to the open meeting requirements of this legislation as "a nonprofit corporation or unincorporated association of owners that is created pursuant to a declaration to own and operate portions of a planned community and which has the power under the declaration to assess association members to pay the costs and expenses incurred in the performance of the

Since 1988, many forms of CICs have exploded across the country, including in Massachusetts. In 2025, the Foundation for Community Association Research reported that 77.1 million Americans live in 369,000 CICs, [429] and more than 11,500 of those CICs with over 1,500,000 residents are in Massachusetts.[430] The number of Massachusetts citizens who are subject to that added layer of opaque and largely unaccountable community association government has thus grown dramatically. Accordingly, the Arizona Attorney General's remarks in 1988 about why community associations should always have open board meetings are even more relevant to Massachusetts CICs today.

VI. CONCLUSION

This Article began by identifying some of the most frequent secrecy practices employed in CICs to keep important, non-confidential association information from unit owners and prospective buyers. These secrecy practices largely serve the interests of CIC developers, management companies, and other industry entities. At the top of the list is the practice of closing the decision-making meetings of the association's governing body to unit owners. This Article discussed how these secrecy practices are inimical to the best interests of unit owners. Additionally, a set of Massachusetts cases illustrated how excessive secrecy harms owners.

The Article then discussed how these secrecy practices are enabled by a combination of outdated CIC legislation, lobbying by industry interests to thwart owner rights reforms, and the reluctance of courts to critically reexamine what one legal scholar labeled as the CIC "contract myth." Updated CIC legislation, such as adoption of the UCIOA, has modernized CIC law in some states. But the "contract myth" remains the foundation for CIC governance in many states, including Massachusetts.

Analogizing CICs to "mini governments," this Article then argued that open meeting laws and public records acts that govern public bodies should be extended to at least some CICs because they function as quasi-public bodies intimately linked with, and operating almost identically to,

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association's obligations under the declaration."). Referring to the 1988 Corbin Opinion, Att'y Gen. Grant Woods observed: "The Legislature's subsequent enactment in 1994 of the laws requiring planned communities' associations and their Boards to hold open meetings bolstered our [earlier] advice that meetings of such groups should be open to the public." WOODS, *supra* note 269, at 5.

[429] *See HOA Growth Expected*, *supra* note 32.

[430] *See Massachusetts Community Associations Facts & Figures*, *supra* note 287.

municipalities. Several legal approaches were discussed in support of treating CICs as quasi-public bodies.

Massachusetts Governor Healey said in her introduction to the Attorney General's *Open Meeting Law Guide*: "*Every* resident of Massachusetts should be able to access and understand the reasoning behind the government policy decisions that affect our lives."[431] That statement should include the many Massachusetts citizens who reside in, and thus are effectively governed by, Massachusetts CICs. These citizens never knowingly and willingly contracted away their legal rights to open and participatory community government.[432] Section 23(a) of the Massachusetts Open Meeting Law authorizes the Attorney General to "interpret and enforce the open meeting law."[433] The time has come for the Massachusetts Attorney General's Division of Open Government[434] to formally recognize that at least some Massachusetts CICs are quasi-public bodies that operate as mini-governments, and therefore should come within the scope of the Open Meeting Law.

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[431] OPEN MEETING LAW GUIDE AND EDUCATIONAL MATERIALS, *supra* note 30, at i (emphasis added).

[432] *See supra* notes 13, 164–211 and accompanying text. For example, in *Cambridge Point*, the Massachusetts Supreme Judicial Court ruled that public policy considerations could outweigh "the public interest in freedom of contract." Trs. of the Cambridge Point Condo. Tr. v. Cambridge Point, LLC, 88 N.E.3d 1142, 1150 (Mass. 2018). The court added, "Public policy in this context refers to a court's conviction, grounded in legislation and precedent, that denying enforcement of a contractual term is necessary to protect some aspect of the public welfare." *Id.* (citing Beacon Hill Civic Ass'n v. Ristorante Toscano, Inc., 662 N.E.2d 1015 (Mass 1996)). *Barron v. Kolenda* supports the critical importance of open and participatory government in Massachusetts and the United States generally. *See* 203 N.E.3d 1125 (Mass. 2023). These public policy considerations should therefore outweigh any CIC contract myth that permits CIC boards to close their meetings to community residents.

[433] MASS. GEN. LAWS ch. 30A, § 23(a); *see also* MASS. GEN. LAWS ch. 30A, § 25(a) ("The attorney general shall have authority to promulgate rules and regulations to carry out enforcement of the open meeting law."); MASS. GEN. LAWS ch. 30A, § 25(b) (vesting the attorney general with authority "to interpret the open meeting law and to issue written letter rulings or advisory opinions . . . .").

[434] MASS. GEN. LAWS ch. 30A, § 19(a) provides: "There shall be in the department of the attorney general a division of open government under the direction of a director of open government."