# CAN WE DO THAT?
# DEFINING THE SCOPE OF RULEMAKING AUTHORITY IN OREGON'S COMMON INTEREST DEVELOPMENTS

## PART I:
## STATUTORY SCOPE OF AUTHORITY

*by*
*Bruce Lepore**

*Common interest developments (primarily homeowner and condominium associations) are governed by boards of directors chosen from among the membership. In nearly all cases, board members are volunteers, and they frequently have little to no formal training in association governance. Difficulty understanding the precise bounds of board authority is a common source of frustration. This Note, which is the first part in a four-part series, explores in detail one type of board authority—rulemaking authority. Part I examines the provisions of the Oregon Planned Community Act and the Oregon Condominium Act that govern rulemaking authority. Each act contains provisions conferring broad rulemaking authority to boards of directors. However, each act also re-quires a wide range of rules to be included in the declaration or bylaws of the association. The effect of requiring certain rules to be in the declaration or bylaws is to remove those kinds of rules from the board's authority. This Note refers to those requirements as "carve outs." The residual rulemaking authority after operation of the carve outs includes the boards core functions, such as association operations and management of the common property. However, this Note argues that the residual rulemaking authority also includes authority to prohibit illegal uses of individually owned units or lots. This allows associ-ations to uses their authority to levy fines to prevent common law nuisance and to make up for shortcomings in local government enforcement of county and municipal ordinances. Parts II and III will explore the questions of whether*

* Bruce Lepore received his J.D., *summa cum laude*, from Lewis & Clark Law School in 2019. He currently works at Community Association Law Group in Portland, Oregon. Prior to law school, Bruce worked as a community association manager at Fieldstone Management in Bend, Oregon. At that time, he held a CMCA certificate and an Oregon Property Manager's license. Bruce hails from Baltimore, Maryland where he received a B.A. in Writing from Johns Hopkins University. Bruce would like to thank Professor Amy Bushaw for her guidance and insightful comments on this Note and also the editors and members of *Lewis & Clark Law Review*.

*and how the governing documents of an association can confer additional rule-making authority to boards beyond the authority that the statutes confer. Part IV will conclude will conclude this series by offering practical advice and best practices to help boards ensure their rules are properly authorized.*



## INTRODUCTION

Planned communities and condominiums are common forms of property ownership in Oregon. While there is no central database for these types of property developments, government data on non-profit corporations in Oregon suggest there are at least 3,800 such associations actively incorporated.[1] Data on the number of lots or units within each development is difficult to find. The largest planned community in Oregon may be Crooked River Ranch, with 2,646 privately owned lots and over 5,000 residents.[2] At the other end of the spectrum there are numerous very small condominiums, such as The Bungalows at Northwest Crossing, with just 24 units.[3] The Community Association Institute estimated that 24% of homes nationally are within common interest developments (CIDs).[4] Assuming an average of 200

[1] *Active Nonprofit Corporations*, OREGON.GOV, https://data.oregon.gov/Business/Active-Nonprofit-Corporations/8kyv-b2kw/data (last visited Jan. 18, 2019).

[2] *Crooked River Ranch Club and Maintenance Association*, CROOKED RIVER RANCH, http://www.crookedriverranch.com/index.php/member-pages/the-association/ (last visited Feb. 24, 2019).

[3] Jason Boone, *The Bungalows at Northwest Crossing*, BENDPROPERTYSEARCH.COM (May 7, 2013), https://bendpropertysearch.com/2013/05/07/the-bungalows-at-northwest-crossing/.

[4] Mark J. Pesce, *(Un)common Interest Communities: Searching for a Workable Extension of Free Speech Rights to CICs*, 45 SETON HALL L. REV. 877, 878 (2015) (citing FOUND. FOR CMTY. ASS'N RES., NATIONAL AND STATE STATISTICAL REVIEW FOR 2013, at 3 (2013), https://foundation.

residents per association,[5] approximately 20% of Oregonians currently live in CIDs.[6] Even if that assumption is off, undoubtedly a significant portion of Oregon's population currently resides in CIDs.

Despite the apparent popularity of common interest forms of property ownership, the media frequently portrays the associations that administer them in a negative light. The image portrayed is often one of conflict and abuse of authority.[7] The lawyer for a plaintiff in a recent case challenging a homeowners association's (HOA) enforcement of its covenants against a disabled resident stated, "[m]any people who live in HOAs are often frustrated with the amount of power HOAs have over the way they live in their community."[8] In that particular case, the lawyer felt "the HOA perhaps took their power too far."[9]

In reality, the vast majority of people who serve as volunteer board members for the communities in which they live have good intentions.[10] For the most part, board members earnestly focus on preserving the positive qualities that make their communities attractive places to live. When boards do overstep their bounds, the cause is usually a lack of understanding about the precise limits of their authority, rather than malicious intent. That lack of understanding is, well, understandable. The law governing CIDs is murky and, as this Note will demonstrate, the precise limits of rulemaking authority are not entirely knowable.

Take, for example, the case involving a disabled resident mentioned above. There the board faced a difficult decision. On the one hand, an owner with a disabled family member sought an exception to a prohibition on parking recreational vehicles.[11] The Covenants, Conditions, and Restrictions (CC&Rs) expressly prohibited parking recreational vehicles.[12] However, the situation involved genuine

caionline.org/wp-content/uploads/2017/07/2013_statistical_review.pdf).

[5] This assumption is purely speculative.

[6] The total population of Oregon is estimated as 4,142,776. United States Census Bureau, *Quick Facts: Oregon*, CENSUS.GOV, https://www.census.gov/quickfacts/fact/table/OR/PST045216 (last visited Feb. 24, 2019).

[7] *See, e.g.*, Rachel Monahan, *Condo Residents Discover That Home Ownership Is No Guarantee Against Displacement in Portland's Housing Market*, WILLAMETTE WEEK (Sept. 20, 2017), http://www.wweek.com/news/city/2017/09/20/condo-residents-discover-that-home-ownership-is-no-guarantee-against-displacement-in-portlands-housing-market/; Mirah Riben, *Buyer Beware! HOA's Deny Your First Amendment Rights*, HUFFPOST (Sept. 1, 2017), https://www.huffingtonpost.com/mirah-riben/buyer-beware-hoas-deny-yo_b_11779814.html.

[8] Aimee Green, *Homeowners Association Settles RV Dispute for $300k*, THE OREGONIAN (May 12, 2017), http://www.oregonlive.com/pacific-northwest-news/index.ssf/2017/05/hoa_that_forbade_rv_parked_in.html.

[9] *Id.*

[10] The author of this Note previously worked as a manager of community associations. The observations in this paragraph are taken from personal experience.

[11] Kuhn v. McNary Estates Homeowners Ass'n, 228 F. Supp. 3d 1142, 1144 (D. Or. 2017).

[12] *Id.*

questions of applicable law. Does the Fair Housing Amendments Act (FHAA) requirement to provide reasonable accommodations to disabled residents "in the provision of services or facilities in connection with [a] dwelling" apply to a homeowner's association?[13] Was the request to park a recreational vehicle in the driveway reasonably necessary to ameliorate the disability of the family member?[14] To what extent could the association be liable to the other owners who were threatening to sue if the board allowed the exception?[15] A typical volunteer board member without legal training is probably poorly equipped to answer questions like these.

Disputes within CIDs frequently boil down to questions of authority. Individual owners often challenge the board's authority to take some action that they feel infringes upon their rights as property owners. This series examines in detail one particular type of authority: a board of directors' authority to adopt rules that are legally binding upon owners in the association. Governing documents invariably contain rules that owners must abide. Boards of directors have the authority to enforce those rules that are in the governing documents.[16] However, boards of directors also have the authority to adopt and enforce additional rules.[17] The question is how far can a board of directors go when adopting rules? Commentators provide conflicting answers.[18] Relevant Oregon case law is scarce, and cases from other states

[13] *Id.* at 1146 (quoting 42 U.S.C. § 3604(f)(2) (2012)). Although there is an argument that the Homeowners' Association was not involved in the "provision of services or facilities," the court did not address this question and simply presumed the FHAA required the association to make a reasonable accommodation.

[14] *Id.* at 1147 (holding that the request was both necessary and reasonable).

[15] Of course, if the board knew for certain that the FHAA required them to make a reasonable accommodation, they would have had less concern about potential liability to other owners. But, until the lawsuit was decided, that much was not clear. In the absence of certainty on the association's duties under the federal statute, the question of whether the board had a legal duty to enforce the CC&Rs as written depends on the specific wording in the CC&Rs. *See, e.g.*, LeVasseur v. Armon, 246 P.3d 1171, 1177 (Or. Ct. App. 2010).

[16] Usually, the board merely has a discretionary authority to enforce rather than an affirmative duty. *See, e.g.*, *id.*

[17] *See* OR. REV. STAT. § 94.630(1)(a); *id.* § 100.405(4)(a).

[18] *Cf.* KENNETH BUDD, BE REASONABLE: HOW COMMUNITY ASSOCIATIONS CAN ENFORCE RULES WITHOUT ANTAGONIZING RESIDENTS, GOING TO COURT, OR STARTING WORLD WAR III 2–3 (1998) (arguing boards can adopt rules governing individual lots or units so long as the rules are reasonable); CMTY. ASS'N INST., M-100 PARTICIPANT GUIDE: THE ESSENTIALS OF COMMUNITY ASSOCIATION MANAGEMENT 53 (2014) (stating that rules fall into four general categories, including use of the common property and use of individual lots or units); WAYNE S. HYATT, CONDOMINIUM AND HOMEOWNER ASSOCIATION PRACTICE: COMMUNITY ASSOCIATION LAW 49–50 (3d ed. 2000) (arguing that boards can adopt rules governing use of the common areas, but not individually owned lots or units).

are difficult to reconcile.[19] Because specifying the precise scope of rulemaking authority is challenging, guidebooks frequently state that boards of directors should consult an attorney before adopting a rule.[20] While it may be reassuring to board members to have an opinion letter from an attorney indicating that the association has sufficient authority to adopt a rule, opinion letters are not the final word. There is no guarantee that a court will agree.[21]

Incongruous state laws governing rulemaking authority in CIDs exacerbate the problem. States have widely varying statutory schemes.[22] In addition, courts in different states have adopted different standards for reviewing rules. Florida, in a famous case called *Hidden Harbour Estates, Inc. v. Norman*, adopted a reasonableness standard.[23] That is to say, a court will invalidate a rule adopted by a board if it is unreasonable. New York, on the other hand, has adopted a more deferential standard derived from the business judgment rule.[24] That is to say, a court will refrain from invalidating a rule unless there is some showing of bad faith or improper purpose. Because most of the available guidebooks appeal to a broad audience, state-specific analysis of rulemaking authority is lacking. However, state-specific analysis

[19] *Cf.* Elvaton Towne Condo. Regime II, Inc. v. Rose, 162 A.3d 1027, 1042 (Md. 2017) (setting aside rule suspending use of the community pool for owner's delinquent in their assessments); Meadow Bridge Condo. Ass'n v. Bosca, 466 N.W.2d 303, 304 (Mich. Ct. App. 1990) (upholding a rule adopted by the board banning dogs from the property).

[20] *See, e.g.*, CMTY. ASS'N INST., *supra* note 18, at 58 ("It is always a good idea to have your community's attorney review the wording of all rules and regulations . . . ."); NW. HOA LAW CTR., THE OFFICIAL HOA HANDBOOK 12-5 (Richard Vial ed., 3d ed. 2007) ("It is advisable to have an experienced attorney review proposed resolutions that deal with substantive issues.").

[21] *See* HYATT, *supra* note 18, at 51–53 (discussing a number of cases in which courts have set aside rules); *see, e.g.*, Stobe v. 842-848 W. Bradley Place Condo. Ass'n, 48 N.E.3d 310, 313 (Ill. App. Ct. 2016) (setting aside rule restricting owners' right to lease their units); Estates at Desert Ridge Trails Homeowners' Ass'n v. Vazquez, 300 P.3d 736, 740 (N.M. Ct. App. 2013) (setting aside rule prohibiting short-term rentals); Rawlinson Rd. Homeowners Ass'n v. Jackson, 716 S.E.2d 337, 339–42 (S.C. Ct. App. 2011) (setting aside rule prohibiting boats); Holleman v. Mission Trace Homeowners Ass'n, 556 S.W.2d 632, 636–37 (Tex. Civ. App. 1977) (setting aside portion of rule that "extend[ed] to [property] owned in fee simple").

[22] *Cf.* OR. REV. STAT. §§ 94.504–94.989 (2017); WASH. REV. CODE §§ 64.38.005–64.38.090 (2018). New Mexico has not enacted a statute governing homeowners' associations. Six states enacted the 1982 version of the Uniform Common Interest Ownership Act. *Uniform Acts by State*, CMTY. ASS'NS INST., https://www.caionline.org/Advocacy/StateAdvocacy/PriorityIssues/UniformActs/Pages/default.aspx (last visited Jan. 18, 2019).

[23] Hidden Harbour Estates, Inc. v. Norman, 309 So.2d 180, 182 (Fla. Dist. Ct. App. 1975) ("If a rule is reasonable the association can adopt it; if not, it cannot.").

[24] Levandusky v. One Fifth Ave. Apartment Corp., 553 N.E.2d 1317, 1321 (N.Y. 1990) ("We conclude that these goals are best served by a standard of review that is analogous to the business judgment rule applied by courts to determine challenges to decisions made by corporate directors.") (citation omitted).

is necessary in order for board members to understand whether a proposed or adopted rule may be subject to a successful challenge in the courts of their state.

This series attempts to begin to fill that gap in state-level analysis by exploring in detail the scope of rulemaking authority that boards of directors within Oregon's CIDs may exercise. A precise understanding of the scope of rulemaking authority requires both statutory and contractual analysis because authority can be conferred by statute or by language in the governing documents. The analysis requires three steps. Step one is to clarify the scope of rulemaking authority that Oregon's statutory scheme creates. The Oregon Planned Community Act (PCA) and the Oregon Condominium Act (OCA) contain provisions that confer rulemaking authority. Each also contains provisions that limit that rulemaking authority. This step involves analyzing the interplay of those provisions. Once that scope is clarified, step two is to understand how Oregon courts apply contractual analysis to interpret language in governing documents that confer rulemaking authority. The final step is to understand the interplay between the authority-conferring language in the governing documents and authority-limiting language in the statutory scheme. This Note is the first of a four-part series, and takes the first analytical step by exploring in detail the effect of statutory provisions that create and then limit rulemaking authority.

Section I specifies the terminology this Note employs throughout. Commentators often confuse terms such as declaration, covenants, CC&Rs, bylaws, governing documents and others. To avoid confusion Section I sets forth this author's preferred usage of common terms. Section II discusses the background law that governs CIDs generally. The CID concept developed gradually over decades as a product of traditional property law and contract law. More recently commentators have analogized the CID concept to local government, leading some to label CIDs as quasi-governmental agencies. This Note provides a brief exploration of the various legal theories that provide background and inform a proper understanding of the statutes that govern CIDs in Oregon.

Section III provides a detailed exploration of the provisions within Oregon's CID statutes that regulate rulemaking authority. Both the PCA and OCA contain provisions empowering boards of directors to adopt and enforce rules without specifying any substantive limitation.[25] However, each statute also contains provisions in separate sections requiring certain rules to be in the governing documents.[26] These provisions seemingly conflict with each other because of the procedural difference between rules a board adopts by resolution and rules the association adopts by amending the governing documents. On one hand, a mere majority of board members may adopt a rule by resolution.[27] On the other hand, a majority of all

[25] *See* OR. REV. STAT. § 94.630(1)(a); *id.* § 100.405(4)(a).

[26] *See id.* § 94.580; *id.* § 100.415.

[27] *Id.* § 94.630(1)(a) (authorizing a homeowner association to adopt rules and regulations); *id.* § 94.640(1) ("The board of directors of an association may act on behalf of the

owners (in the case of a condominium)[28] or a super-majority of all owners (in the case of a planned community)[29] must approve any rule added to a governing document by amendment. This Note provides a framework for understanding the interplay between these seemingly conflicting statutory provisions. Understanding that interplay requires a detailed consideration of the scope of statutory provisions that reserve certain restrictions and requirements to the governing documents. This Note argues that the restrictions and requirements that are reserved to the governing documents include only those that would impair a member's legal title to their property.

The forthcoming Part II of this series will explore in detail how Oregon courts are likely to interpret provisions within covenants that confer rulemaking authority. That discussion will clarify, as a threshold matter, whether courts will defer to a board's interpretation of governing document provisions or will construe the governing documents as a matter of law. In addition, Part II will explore in detail how Oregon courts' contract-interpretation methodologies will guide a court in deciding whether a particular rule is *ultra vires*.[30] Part III of this series will discuss the interplay between covenants and the relevant statutes. That part will explore how courts will decide an *ultra vires* challenge when a rule is within the scope of authority that the governing documents confer, but ostensibly outside the allowable scope under the relevant statute. The discussion will center on the distinction between general grants of authority[31] and specific grants of authority.[32] Finally, Part IV of this series will offer simple, practical advice for Oregon board members to help them ensure that the rules they adopt are within the scope of their legal authority.

association . . . ."); *id.* § 100.405(4)(a) (authorizing a condominium association to adopt rules and regulations); *id.* § 100.417(1) ("The board of directors of an association of unit owners may act on behalf of the association . . . .").

[28] *Id.* § 100.410(3)–(4) (note that subsection (4) elevates the amendment threshold to a 75% super-majority for amendments pertaining to certain specified restrictions).

[29] *Id.* § 94.590.

[30] *Ultra vires* is Latin for "without authority." *Ultra vires*, WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (unabridged ed. 2002).

[31] For example, the covenants might state simply, "The Board of Directors may adopt rules governing the use of the Property." *See* HYATT, *supra* note 18, at 80.

[32] On the other hand, the covenants might state, for example, "The Board of Directors may adopt reasonable rules governing the parking of vehicles on the public streets within the Association." *See id.* at 82.

## I. NOTE ON TERMINOLOGY

Unfortunately, authors writing about CIDs tend to use different terms to refer to the same things. For example, various law review articles refer to CIDs as common interest communities,[33] residential associations,[34] neighborhood associations,[35] community associations,[36] homeowners associations,[37] and condominium associations.[38] Similarly, references to rules, covenants, restrictions, resolutions, declarations, bylaws, and other documents can be confusing. For the sake of clarity and precision, this section sets forth the definitions of some key terms that this Note employs.

**Common Interest Developments (CIDs):** This term refers collectively to planned communities (as defined in the PCA)[39] and condominiums (as defined in the OCA).[40] This term is preferable to "common interest communities" in that it reflects the distinction between the development as property and the association as the organization that administers the covenants.

**Associations**: While "condominium" and "planned community" refer to forms of ownership of property, the term "association" refers to the organization of owners who have a common interest in the property. When specifically referring to associations governed by the PCA, this Note uses the term "homeowners association."[41] When referring to associations governed by the OCA, this Note uses the term "condominium association."[42]

---

[33] *See, e.g.*, Paula A. Franzese, *Common Interest Communities: Standards of Review and Review of Standards*, 3 WASH. U. J.L. & POL'Y 663, 664 (2000).

[34] *See, e.g.*, Todd Brower, *Communities within the Community: Consent, Constitutionalism, and Other Failures of Legal Theory in Residential Associations*, 7 J. LAND USE & ENVTL. L. 203, 215 (1992).

[35] *See, e.g.*, Robert H. Nelson, *Privatizing the Neighborhood: A Proposal to Replace Zoning with Private Collective Property Rights to Existing Neighborhoods*, 7 GEO. MASON L. REV. 827, 827 (1999).

[36] *See, e.g.*, Grant J. Levine, *This Is My Castle: On Balance, the Freedom of Contract Outweighs Classifying the Acts of Homeowners' Associations as State Action*, 36 NOVA L. REV. 555, 557 (2012).

[37] *See, e.g.*, Sharon L. Bush, *Beware the Associations: How Homeowners' Associations Control You and Infringe Upon Your Inalienable Rights!!*, 30 W. ST. U. L. REV. 1, 1 (2003).

[38] *See, e.g.*, Note, *Judicial Review of Condominium Rulemaking*, 94 HARV. L. REV. 647, 647 (1981).

[39] OR. REV. STAT. § 94.550(20)(a).

[40] *Id.* § 100.005(9).

[41] This is the term used in the PCA. *Id.* § 94.550(15).

[42] The OCA uses the slightly more cumbersome term, "association of unit owners." *Id.* § 100.005(2).

**Covenants:** "Covenant" simply means a promise or agreement. In property law, land-related covenants typically impose restrictions on how land may be used. Covenants are said to "run with the land" because the restrictions transfer from a seller to a subsequent purchaser. This Note uses covenants in this general sense of promises or restrictions running with the land. A covenant may be included in a declaration. A valid covenant that encumbers a parcel of land might not necessarily create or be part of a CID.

**Declaration:** "Declaration" refers to the declaration of covenants, conditions, and restrictions. This document creates a CID by subjecting real property owned by a developer to either a planned community or condominium form of ownership.[43] Many people refer to this document as the CC&Rs. This Note uses the term "declaration" to be consistent with the PCA and OCA.

**Bylaws:** "Bylaws" refers to the document that provides the framework for operation and management of the association.

**Governing Documents:** In this Note, the term "governing documents" refers collectively to the declaration, the bylaws, and the articles of incorporation for an association.[44] This definition departs from the definitions of "governing document" that are included in the PCA and OCA. In both statutory definitions, "governing document" includes rules adopted by resolution of the board.[45] There is an argument that any resolution of the board is also a governing document. However, this Note considers resolutions to be "records" of the association rather than governing documents. This departure from the statutory definition is convenient for the purposes of analyzing rulemaking authority. While a declaration or bylaw may confer rulemaking authority to a board of directors, a board cannot confer that authority to itself by resolution.

**Resolutions:** Resolutions are actions taken by a majority vote of the board of directors. These are typically written documents, but there is no legal requirement that they must be written to be effective. Resolutions that contain rules, however, must be delivered in writing to each member in order to be enforceable under either the PCA or OCA.[46]

---

[43] *Id.* § 94.580; *id.* § 100.100.

[44] This Note does not discuss articles of incorporation because typically that document does not include rules that govern the members. However, many older associations that predate the PCA have rule-laden articles of incorporation that resemble bylaws.

[45] *Id.* § 94.550(13); *id.* § 100.005(17).

[46] *See id.* OR. REV. STAT. § 94.630(1)(n); *id.* § 100.405(4)(k).

**Rules:** This Note discusses at length the meaning of "rules" as that word is used in the PCA and OCA. The reader should not confuse "rules" with "resolutions" of the board. This Note considers "rule" to have its dictionary definition: "a prescribed, suggested, or self-imposed guide for conduct or action."[47] In this sense, rules might be procedural or substantive, and might be restrictive, permissive, or obligatory. A developer typically includes various "rules" in the initial governing documents. Associations may adopt additional rules by amending the governing documents. Associations may also adopt rules by resolution of the board. This latter method is the primary concern of this Note.

## II. BACKGROUND LAW GOVERNING CIDS

In Oregon, developers create CIDs by recording a declaration of covenants, restrictions and conditions that encumbers the specified property.[48] After recording the declaration, the developer forms an association to administer the covenants.[49] The PCA and OCA confer various powers to associations.[50] This Note is primarily an exploration of one of those powers—the power to adopt and enforce rules. Before exploring that power in detail, however, it will be useful to understand the law of covenants in general. The extent of rulemaking authority that the PCA and OCA confer, as well as the limits those statutes impose, derive from the principles and purposes that support legal enforcement of covenants. This section discusses the validity and enforceability of covenants and the legal theories that courts rely upon when enforcing and interpreting covenants.

[47] *Rule*, WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (unabridged ed. 2002).

[48] OR. REV. STAT. § 94.565 ("A person may not convey any lot or unit in a planned community until the planned community is created by the recording of the declaration for the planned community with the county recording officer of each county in which the planned community is located."); *id.* § 100.100 ("In order to submit any property to the provisions of this chapter, the declarant shall record a declaration in the office of the recording officer of every county in which such property is located.").

[49] *Id.* § 94.625(1) ("Except as provided in subsection (2) of this section, not later than the date on which the first lot in the planned community is conveyed, the declarant shall: (a) Organize the homeowners association as a nonprofit corporation under ORS chapter 65."); *id.* § 100.405(1)(a) ("An association of unit owners shall be organized to serve as a means through which the unit owners may take action with regard to the administration, management and operation of the condominium.").

[50] *See id.* § 94.630; *id.* § 100.405.

*A. Validity of Covenants Generally*

Covenants, when properly created, are legally enforceable.[51] Oregon courts have enforced restrictive covenants for decades.[52] Property owners create covenants by agreement, much in the same way as a contract.[53] What distinguishes covenants from contracts is that covenants "run with the land."[54] When parties enter into a contract, the rights and obligations within their agreement generally are binding only upon the parties themselves.[55] A covenant, on the other hand, binds not only the original parties, but subsequent purchasers of the encumbered property as well.[56] It is true that parties to a contract often may assign and delegate their rights and duties to a third party. In that sense, a contract can imitate a covenant in that the agreement remains in place while the parties change. Unlike covenants, however, contracts can usually be terminated by mutual agreement of the current parties.[57] While property, once encumbered by a valid covenant, can often be difficult to un-encumber.[58]

While the question of whether covenants *are* enforceable is uncontroversial, whether courts *should* enforce covenants is a topic of much debate. In one aspect, that debate has centered on the normative discussion of whether allowing property owners to encumber property in perpetuity is consistent with American cultural values.[59] This debate is largely academic, however, because the law has decidedly recognized the enforceability of covenants running with the land. More relevant to understanding the scope of rulemaking authority within CIDs is a debate over the proper legal theory to use in supporting the enforceability of covenants. That is to say, the relevant question to understanding rulemaking authority is not *should* covenants be enforced, but rather, *why* are covenants enforceable? The legal theory that supports the enforceability of covenants is relevant because, as will be discussed below, a literal, face-value reading of the statutory provisions in the PCA and OCA

[51] Ludgate v. Somerville, 256 P. 1043, 1045 (Or. 1927) (an early example of the Oregon Supreme Court confirming the validity of restrictive covenants).

[52] *Id.*

[53] *See, e.g.*, Huff v. Duncan, 502 P.2d 584, 585 (Or. 1972).

[54] *Id.*

[55] Drury v. Assisted Living Concepts, Inc., 262 P.3d 1162, 1166 (Or. Ct. App. 2011).

[56] *Huff*, 502 P.2d at 585.

[57] Massey v. Becker, 176 P. 425, 426 (Or. 1919).

[58] Albino v. Pac. First Fed. Sav. & Loan, 479 P.2d 760, 763 (Or. 1971).

[59] *See* EVAN MCKENZIE, PRIVATOPIA: HOMEOWNER ASSOCIATIONS AND THE RISE OF RESIDENTIAL PRIVATE GOVERNMENT 140-46 (1994) (describing a thorough history of CIDs that is largely critical of homeowner associations). *See generally* GEORGE K. STAROPOLI, THE CASE AGAINST STATE PROTECTION OF HOMEOWNER ASSOCIATIONS (2003) (arguing that restrictive covenants have deleterious effects on American democracy).

that confer rulemaking authority is not plausible. The background principles of law inform a proper reading of these statutes.

In general, commentators have identified three theoretical models supporting the legal authority of CID associations. The first model argues that associations derive authority from covenants as enforceable under precepts of traditional property law.[60] A second model, which appears to be the prevailing theory in modern jurisprudence, is that covenants are contracts.[61] According to this theory, members of CIDs are subject to an association's authority because they have consented to the terms of the covenants.[62] In the third model, some recent commentators have analogized CID associations to quasi-governmental organizations.[63]

It should be noted, however, that in Oregon the debate over which model is most accurate was rendered largely academic by the adoption of the PCA[64] and the OCA.[65] That is to say, in Oregon a declaration of restrictive covenants that is recorded in conformity with the statutory requirements is enforceable because the legislature has deemed it so.[66] Nonetheless, when a court adjudicates a dispute involving a covenant, the court is typically tasked not only with determining the enforceability of the covenant, but also with interpreting the content of the covenant. This task involves statutory interpretation of the provisions on the PCA and the OCA as well as contractual interpretation of the covenant at issue. Oregon courts draw upon precepts of both property law and contract law in accomplishing these tasks.[67] Because understanding the scope of rulemaking authority vested in an association created to administer covenants requires understanding how courts will

[60] *See, e.g.*, Andrea J. Boyack, *Common Interest Community Covenants and the Freedom of Contract Myth*, 22 J.L. & POL'Y 767, 771–72 (2014) ("The foundational structure of [common interest communities] . . . is servitude law.").

[61] *See, e.g.*, Levine, *supra* note 36, at 558 (arguing in favor of a contract theory as opposed to a quasi-governmental theory).

[62] *Id.*

[63] Todd Brower, *Communities within the Community: Consent, Constitutionalism and Other Failures of Legal Theory in Residential Associations*, 7 J. LAND USE & ENVTL. L. 203, 215 (1992) (discussing the various theoretical models for regulation of residential associations).

[64] *See* OR. REV. STAT. §§ 94.504–94.989.

[65] *See id.* §§ 100.005–100.990.

[66] It should be noted that recording covenants in accordance with these two statutes is not the *only* method of creating enforceable covenants in Oregon. Private covenants created in accordance with the traditional requirements under the common law remain enforceable, although not the norm. *See, e.g.*, Drury v. Assisted Living Concepts, Inc., 262 P.3d 1162, 1165 (Or. Ct. App. 2011).

[67] *See, e.g.*, Yogman v. Parrott, 937 P.2d 1019, 1021 (Or. 1997) (the Oregon Supreme Court's paradigmatic case establishing the rules for interpreting restrictive covenants, drawing upon both contract and property law precepts).

interpret the source of that authority—either the relevant statute, the relevant covenant, or both—it will be useful to explore each of the theoretical models in some detail.

### *B. Covenants According to Traditional Property Law*

The first model looks at covenants through the lens of traditional property law. Traditional property law developed around a common understanding that the right to use one's property is fundamental to the concept of property ownership.[68] A commonly repeated phrase in American society is that "a man's house is his castle."[69] As such, the law has traditionally frowned upon private restrictions on the use of property.[70] However, courts have also recognized that restrictions on the use of property can serve useful functions in modern society.[71] In response to this tension between the utility of restrictive covenants and the principles of individual property rights, courts during the eighteenth and nineteenth centuries developed a set of common law elements that a party must prove in order to enforce a restrictive covenant.[72]

The common law requirements to enforce a restrictive covenant were, practically speaking, difficult to establish. In a recent law review article, Marcy Allen described the traditional requirements for covenants to run with the land as:

1. The covenant must relate to something *in esse*, or else assigns must be named if they are to be bound or are to obtain the benefit of the running of the covenant.
2. The covenant must touch or concern the land.
3. There must be privity of estate between the covenanting parties.
4. The requirements of the Statute of Frauds must be satisfied.
5. It must be the intention of the original covenanting parties that the covenant run with the land.[73]

---

[68] JERRY L. ANDERSON & DANIEL B. BOGART, PROPERTY LAW: PRACTICE, PROBLEMS, AND PERSPECTIVES 48–49 (2014).

[69] Levine, *supra* note 36, at 556.

[70] *See, e.g.*, Berger v. 2 Wyndcliff, LLC, 88 N.E.3d 1173, 1175 (Mass. App. Ct. 2017) ("Restrictions on land are generally disfavored."); Walters v. Colford, 900 N.W.2d 183, 191 (Neb. 2017) ("We have said that the law disfavors restrictions on the use of land."); Shepherd v. Conde, 797 S.E.2d 750, 753 (Va. 2017) ("[R]estrictive covenants are disfavored."); Rodgers v. Reimann, 361 P.2d 101, 103 (Or. 1961) (referencing the "constructional preference against restrictions limiting the use of land").

[71] MCKENZIE, *supra* note 59, at 32.

[72] *Id.*

[73] Marcy Allen, *A Touchy Subject: Has the Restatement Replaced the Touch and Concern Doctrine with an Equally Troublesome Test?*, 65 BAYLOR L. REV. 1034, 1035 (2013). For an example of a nineteenth-century Oregon Supreme Court case applying the traditional test, see Brown v. Southern Pacific Co., 58 P. 1104, 1105 (Or. 1899).

The requirements of both horizontal and vertical privity distinguished covenants from contracts and limited the circumstances under which landowners could indefinitely encumber property.[74] Furthermore, an additional requirement beyond those listed above was notice—similar to the bona fide purchaser rule, one "who takes without notice of the covenants is not bound by them."[75] The intent, touch-and-concern, privity, and notice requirements were onerous and made it challenging to create enforceable restrictive covenants.[76]

Over time many courts found the onerous common law test for covenants impractical and developed the doctrine of equitable servitudes as an alternative means of enforcing covenants.[77] Under the equitable servitudes doctrine, courts dropped the privity requirements and enforced covenants so long as the intent, notice, and touch-and-concern requirements were met.[78] As covenants became an increasingly common method for controlling land use throughout the country, some commentators found the touch-and-concern rule overly formalistic. Courts began to allow for covenants that did not directly relate to land use, such as the payment of HOA dues.[79] In 2000, the American Law Institute (ALI) published the Restatement (Third) of Property, which proposed an even more relaxed test that would only find covenants invalid if they violated some public policy.[80]

Oregon, however, has not adopted the Restatement approach, and instead relies on either traditional common law tests or more modern statutory requirements. In a 2011 case, the Oregon Court of Appeals applied the traditional test for covenants, rather than the Restatement test, in a challenge to the validity of a declaration of restrictive covenants.[81] Also in contrast to the Restatement approach, the court pointed out that if the traditional requirements had not been met, the doctrine of

[74] ANDERSON & BOGART, *supra* note 68, at 704–05.

[75] *Id.* at 705.

[76] *See, e.g.*, Houston v. Zahm, 76 P. 641, 646 (Or. 1904) (holding that an agreement to build a highway did not bind a subsequent purchaser because notice and privity requirements were not met).

[77] ANDERSON & BOGART, *supra* note 68, at 706.

[78] *Id.* at 710. *See also* Hudspeth v. E. Or. Land Co., 430 P.2d 353, 354–55 (Or. 1967) ("The benefit of a promise will run with the land only if (1) the promise is one which relates to the use of the land, and (2) the original parties to the promise intended that the promise should run.").

[79] An early landmark case in which a court held that a covenant to pay assessments to an association ran with the land is Neponsit Prop. Owners' Ass'n v. Emigrant Indus. Sav. Bank, 15 N.E.2d 793 (N.Y. 1938).

[80] RESTATEMENT (THIRD) OF PROPERTY: SERVITUDES § 3.1 (AM. LAW INST. 2000).

[81] Nordbye v. BRCP/GM Ellington, 266 P.3d 92, 101 (Or. Ct. App. 2011) ("[F]our requirements must be met: '(1) there must be privity of the estate between the promisor and his successors; (2) the promisor and promisee must intend that the covenant run; (3) the covenant must touch and concern the land of the promisor; and (4) the promisee must benefit in the use of some land possessed by him as a result of the performance of the promise.'").

equitable servitudes was available as an alternative means of enforcement.[82] The covenants at issue in that case, however, were not subject to the PCA.[83] As noted above, the PCA and OCA set forth their own requirements for the validity of a declaration of covenants.[84] In short, in Oregon covenants may validly "run with the land" in only three ways: 1) the traditional test, including the privity and touch-and-concern requirements, 2) the equitable servitude test, or 3) the requirements set forth in either the PCA or OCA.[85] It is worth noting that most of the traditional test elements are included in the statutory requirements set forth in the PCA and OCA, with the possible exception of the touch-and-concern test.[86]

The main point to be taken from the above discussion is that Oregon courts do not share the ALI's view as expressed in the Restatement that courts should err on the side of enforcing covenants.[87] Regardless of whether the traditional test, equitable servitude test, or one of the statutory tests apply, the requirements for enforcing covenants in Oregon are extensive. In short, Oregon courts continue to view restrictive covenants with a certain amount of suspicion. This is not to say courts are unlikely to enforce recorded covenants. But there continues to be a "constructional preference against restrictions limiting the use of land."[88] Courts demonstrate this preference by frequent reliance upon the maxim that "restrictive covenants are to be construed most strictly against the covenant."[89] As will be shown below, board members should bear this in mind when considering whether a proposed rule is within the scope of the association's rulemaking authority.

### *C. Freedom of Contract Theory of CIDs*

In the second model, the freedom of contract theory of CIDs argues that owners within CIDs have agreed, by virtue of purchasing encumbered property, to be

---

[82] *Id.* at 102.

[83] *Id.* (the PCA is not mentioned in the opinion).

[84] *See* OR. REV. STAT. § 94.580 (requirements for recording declaration in planned community); *id.* §§ 100.105–100.115 (requirements for recording declaration in condominium).

[85] Although a court could, in theory, apply both the statutory requirements under the PCA or OCA *and* the traditional common law requirements, no cases have done so. An extensive search did not reveal any case in which the validity of covenants created in accordance with the PCA or OCA was questioned.

[86] *See id.* § 94.580 (requirements for recording declaration in planned community); *id.* §§ 100.105–100.115 (requirements for recording declaration in condominium).

[87] *Compare, e.g.*, Nordbye v. BRCP/GM Ellington, 266 P.3d 92, 101 (Or. Ct. App. 2011), *with* RESTATEMENT (THIRD) OF PROPERTY: SERVITUDES § 3.1 (AM. LAW INST. 2000).

[88] Rodgers v. Reimann, 361 P.2d 101, 103 (Or. 1961).

[89] Yogman v. Parrott, 937 P.2d 1019, 1022 (Or. 1997) (quoting Scott Co. v. Roman Catholic Archbishop for Diocese of Or., 163 P. 88, 90 (Or. 1917). *See also* Hawkins View Architectural Control Comm. v. Cooper, 250 P.3d 380, 383 (Or. App. 2011);.Turudic v. Stephens, 31 P.3d 465, 470 (Or. App. 2001).

bound by the terms of covenants.[90] Although traditional property law resists agreements to restrict the use of land, freedom of contract favors the individual's right to agree to restrictions.[91] Oregon courts invariably interpret the substance of covenants according to the rules of contract interpretation.[92] The paradigmatic case in Oregon setting forth the interpretative approach to contractual documents, including restrictive covenants, is *Yogman v. Parrott*.[93] *Yogman* involved the interpretation of a covenant that limited use of the encumbered property to "residential uses."[94] Without discussing whether covenants are contracts, the court stated that all contractual language (including covenants) must be interpreted according to a three-step process.[95] That covenants might be interpreted in some other way doesn't appear from the language of the opinion to have been even a passing consideration.

Although the Oregon Supreme Court considers covenants to be contracts, some commentators have criticized the application of contract theory to restrictive covenants.[96] Andrea Boyack argues that the freedom of contract theory underpinning restrictive covenants relies upon a legal fiction that is incongruent with reality.[97] The legal fiction posits that property owners assent to the terms of a covenant when purchasing their property.[98] In reality, however, few owners read or understand covenants prior to purchasing.[99] Covenants are "made up of completely nonnegotiable, recorded terms bundled into home acquisition. Developers and lenders generally prescribe the content of such covenants, and they may not reflect community desires or values."[100] Boyack calls for heightened requirements for assent, a revival of the touch-and-concern test, and additional statutory protections for owners within CIDs.[101]

Other commentators have disagreed, arguing in favor of a contract theory of restrictive covenants.[102] Grant Levine points out that the "dividing line" between

[90] Boyack, *supra* note 60, at 772.

[91] *See* Mark Pettit, Jr., *Freedom of Contract, and the "Rise and Fall,"* 79 B.U. L. REV. 263, 264 (1999).

[92] *Yogman*, 937 P.2d at 1021.

[93] *Id.*

[94] *Id.* at 1020.

[95] *Id.* at 1021.

[96] Boyack, *supra* note 60, at 770; David J. Kennedy, *Residential Associations as State Actors: Regulating the Impact of Gated Communities on Nonmembers*, 105 Yale L.J. 761, 763 (1995) ("Courts must move from the domain of the law of contracts and servitudes to grapple with the impact of residential communities on outsiders . . . .").

[97] Boyack, *supra* note 60, at 770.

[98] *Id.*

[99] *Id.* at 797–98.

[100] *Id.* at 771.

[101] *Id.* at 840.

[102] Levine, *supra* note 36, at 566–67; Nelson, *supra* note 35, at 828 ("[P]rivate neighborhood

the opposing views "seems to be drawn between accepting the notion that constructive notice equates to one's voluntary choice of restricting property use, and the view that consent cannot be voluntary where homeowners lack bargaining power to negotiate these restrictive covenants or lack the faculties to understand them or even be cognizant of their existence."[103] In Oregon, the legislature has codified by statute the notice element of the traditional requirements for covenants. Under both the PCA and OCA, covenants must be recorded with the local county or municipal recording office.[104] In addition, a seller of property is required to disclose the existence of any "common interest" encumbrances on the property.[105] While these statutes do not ensure actual notice (one cannot ensure the buyer actually reads and understands the covenants), they amount to constructive notice whenever someone purchases into a CID. Conceptually, constructive notice of covenants is akin to the so-called duty to read that can arise when one party assents to standard contractual terms drafted by another party.[106]

Regardless of where one comes down on the appropriateness of a contract theory for the enforcement of covenants, *Yogman* is decidedly the law in Oregon.[107] Following *Yogman*, courts apply a three-step process to interpret the meaning of covenants. "First, the court examines the text of the disputed provision, in the context of the document as a whole."[108] At this first step, the court may refer to dictionary definitions and will consider the effect that other parts of the document have on the meaning of the disputed language.[109] If the language is ambiguous,[110] then the court will move on to the second step, which "is to examine extrinsic evidence of the contracting parties' intent."[111] Extrinsic evidence can include other writings by the parties to the contract, or actions taken by the parties that indicate what the parties intended by the contract language. If, after seeking the intent of the parties

associations [are] the choice for millions of people for their residential property."); Laura T. Rahe, *The Right to Exclude: Preserving the Autonomy of the Homeowners' Association*, 34 URB. LAW 521, 552 (2002) ("Homeowners' associations are simply one form of contract relating to private property, and they carry with them the benefit of a community among their members.").

[103] Levine, *supra* note 36, at 567.

[104] OR. REV. STAT. § 94.580 (requiring recording declarations in planned communities); *id.* §§ 100.105–100.115 (requiring recording declarations in condominiums).

[105] *Id.* § 105.464.

[106] *See* Atkins v. Vermast, 945 P.2d 640, 643 (Or. Ct. App. 1997).

[107] Yogman v. Parrott, 937 P.2d 1019 (Or. 1997) (Westlaw shows 138 Oregon appellate or supreme court opinions that cite to *Yogman* as authority).

[108] *Id*. at 1021.

[109] *Id*. at 1021–22.

[110] "Ambiguous" is a term of art meaning a term is reasonably susceptible to more than one interpretation. *See id.* at 1021 ("Because of the different possible meanings of 'residential,' this portion of the restrictive covenant is ambiguous.").

[111] *Id.* at 1022.

from extrinsic evidence, the language remains ambiguous, the court moves to the third step, which is to apply the appropriate "maxims of construction."[112] When interpreting restrictive covenants, the maxim that is invariably applied is "that restrictive covenants are to be construed most strictly against the covenant."[113]

Although the *Yogman* "three-step" is seemingly straight forward, there are some important observations that are relevant to the inquiry into the scope of rulemaking authority. First, *Yogman* is applied to determine the meaning of the covenants, not to determine if the covenants are valid in the first place. As mentioned above, establishing the validity of covenants creating CIDs is simply a matter of establishing compliance with the relevant statute. More importantly, under *Yogman*, interpretation of covenants is a matter of law.[114] This means that courts generally will not defer to a board's interpretation of the association's governing documents.[115] In addition, it is useful to note that the goal of the *Yogman* analysis—as in all contract interpretation—is to divine the *intent* of the parties at the time when the covenants were created. In the context of CIDs this means the court attempts to understand what the original developer intended when drafting the governing documents (or what the association as a whole intended in the case of an amendment). Lastly, when the meaning of a covenant is ambiguous, courts will interpret the meaning in a way that allows for the most unfettered use of property.

These observations are more relevant to analyzing the scope of rulemaking authority conferred by language within the declaration itself than to understanding the effect of statutory grants of authority. As such, the forthcoming Part II of this project will discuss more fully the effect of *Yogman* on rulemaking authority. For purposes of this Note, however, it is worth noting here that while the *Yogman* analysis seeks the intent of the *parties*, statutory analysis seeks the intent of the *legislature*.[116] As discussed in Section III(B) below, the Restatement (Third) of Property (Servitudes) arguably confuses these two endeavors by calling for limits on statutory grants of authority that are based on the intent of the parties.

---

[112] *Id.*

[113] *Id.* (quoting Scott Co. v. Roman Catholic Archbishop for Diocese of Or., 163 P. 88, 1022 (Or. 1917)).

[114] Several cases relying on *Yogman* make this assertion explicitly. *See* Hawkins View Architectural Control Comm. v. Cooper, 250 P.3d 380, 383 (Or. Ct. App. 2011) ("[T]he court construes the words of a contract as a matter of law.") (quoting Eagle Indus., v. Thompson, 900 P.2d 479, 479 (Or. 1995)); Andrews v. Sandpiper Villagers, Inc., 170 P.3d 1098, 1103 (Or. Ct. App. 2007) ("[W]e decide the meaning of the provisions as a matter of law.").

[115] There is some conflicting case law on this point. In *Valenti v. Hopkins*, the Oregon Supreme Court did defer to an association's interpretation. Valenti v. Hopkins, 926 P.2d 813, 817 (Or. 1996). The conflict between *Yogman* and *Valenti* will be analyzed in detail in the forthcoming Part II.

[116] *See* State v. Gaines, 206 P.3d 1042, 1047 (Or. 2009).

*D. Associations as Quasi-Governmental Agencies*

Although the law in Oregon clearly views covenants as contractual obligations, it is worth discussing briefly the third model, which asserts that CID associations should rightly be considered quasi-governmental agencies. As CIDs have proliferated in recent decades, some commentators have observed the striking similarities between associations and local governments.[117] In *Privatopia*, Evan McKenzie discusses these similarities at length, pointing out that in many cases associations provide the services that local governments typically provide, such as roads, water, and security.[118] A few courts in states other than Oregon have characterized associations as quasi-governmental in nature.[119] Indeed, an increasing number of local governments are *requiring* developers to create a CID when subdividing land.[120] In Oregon, the subdivision and partition laws do not contain a provision authorizing local governments to require CIDs as a matter of course;[121] however, many local governments require them as conditions to subdivision approval.[122] Although Oregon courts have not adopted the quasi-governmental view of CIDs, Oregon CIDs nonetheless share various commonalities and linkages with local governments.

If courts were to adopt the quasi-governmental view of CIDs, an obvious consequence would be that CIDs, as public entities, would be subject to constitutional restraints that do not apply to private organizations. Courts and commentators who have resisted the quasi-governmental characterization have pointed out that due process, First Amendment, and other constitutional concerns would be problematic because of uncertainty in legal precedents and because such restrictions improperly interfere with the freedom of contract.[123] Others, however, feel that such constitutional restraints would protect homeowners from overreaching boards of directors.[124] Andrea Boyack, for instance, argues that due-process-like protections should

[117] *See generally* MCKENZIE, *supra* note 59.

[118] *Id.* at 122–49.

[119] Cohen v. Kite Hill Cmty. Ass'n, 191 Cal. Rptr. 209, 214 (Cal. App. 4 Dist. 1983) ("The Kite Hill Community Association's approval of a fence not in conformity with the Declaration is analogous to the administrative award of a zoning variance."); Colo. Homes, Ltd. v. Loerch-Wilson, 43 P.3d 718, 722 (Colo. App. 2001).

[120] For a discussion of "public-private hybrid communities," see Hanna Wiseman, *Public Communities, Private Rules*, 98 GEO. L.J. 697, 721 (2010).

[121] *See* OR. REV. STAT. §§ 92.010–92.990.

[122] For example, the City of Bend's city code establishes that homeowners association or condominium association documents may be required as supplemental information accompanying a subdivision Final Plat. BEND, OR., DEVELOPMENT CODE § 4.3.400(E)(4), (8).

[123] Boyack, *supra* note 60, at 836–37; Levine, *supra* note 36, at 587.

[124] Susan F. French, *The Constitution of a Private Residential Government Should Include a Bill of Rights*, 27 WAKE FOREST L. REV. 345, 350 (1992).

be enacted by statute.[125] Oregon, seemingly ahead of the curve on this point,[126] has done just that. Under the PCA and the OCA, associations must provide owners written notice and an opportunity to be heard—the hallmarks of constitutional due process—prior to the issuance of any fine for violation of governing documents or rules.[127] Furthermore, the PCA and OCA require that all board meetings be open to members.[128] Open board meetings are not required in other corporations. Associations, in this regard, resemble city council meetings.[129]

The similarities between associations and local government is more relevant to the best practices that should be employed in adopting and enforcing rules than to the inquiry into the precise scope of rulemaking authority. The due-process-like requirements that are built into the statutes will be discussed more fully in the practical advice section to be included in Part IV. There is, however, one substantive issue to which this discussion has relevance. Section III argues that the rulemaking authority given to associations by the PCA and OCA should be read to include the authority to make rules prohibiting any illegal use of property. Such a reading essentially allows associations to step into the shoes of local governments and adopt and enforce rules that mirror local zoning and nuisance ordinances. This section on the quasi-governmental view of CIDs is included merely to point out that linkages between local governments and CIDs do exist, and that the Oregon statutory framework governing CIDs already addresses many of the due process concerns that may result from those linkages.

### *E. State and Federal Statutes*

CIDs in Oregon are governed primarily by the PCA and the OCA. Most, but not all, HOAs are governed by the PCA.[130] The applicability of the PCA depends on the year that a declaration was recorded, the number of lots in the subdivision, and the size of the association's annual budget.[131] The PCA distinguishes between class I, class II, and class III planned communities based on those factors[132] and

[125] Boyack, *supra* note 60, at 838.

[126] Oregon was an early adopter of statutory schemes regulating CIDs. The PCA and OCA were both based on uniform laws published by the Uniform Law Commission. The first version of the OCA was enacted in 1977 and was based on the Uniform Condominium Act published the same year. The PCA was enacted in 1981 and was based on the Uniform Planned Community Act, which was published one year earlier.

[127] *See* OR. REV. STAT. § 94.630(1)(n); *id.* § 100.405(4)(k).

[128] *Id.* § 94.640(8)(a); *id.* § 100.420(1)(a).

[129] *See, e.g.*, *How Council Works*, CITY OF PORTLAND, https://www.portlandoregon.gov/auditor/article/9113 (last visited Jan. 29, 2019).

[130] *See* OR. REV. STAT. § 94.570.

[131] *Id.*

[132] *Id.* § 94.550(3)–(5).

different selections of the PCA's provisions apply to each class.[133] However, at least some provisions of the PCA will apply to almost all cases where a declaration has been recorded (excluding those declarations which submit property to the condominium form of ownership).[134] In contrast, a condominium can only be created in Oregon in compliance with the provisions of the OCA, and all of its provisions govern all condominiums.[135] Cooperatives are a third form of CID which are popular in places like New York,[136] but which developers in Oregon rarely employ.[137]

The structures of the PCA and OCA are very similar. Each statute grants certain specified powers to associations. Those powers include the authority of an elected board of directors to act on behalf of an association.[138] The statutes also set forth specific substantive provisions that must be included in the governing documents.[139] These provisions act as limitations on the authority of an elected board of directors. Both laws subject a board of directors to certain provisions within the Oregon Non-Profit Corporation Act as well.[140]

In addition to the provisions of the PCA and the OCA, associations must comply with federal laws.[141] The Community Association Institute (CAI) discusses the following federal laws and regulations in its M-100 training manual: Fair Debt Col-

---

[133] *Id.* § 94.570.

[134] The applicability provisions of the PCA are complex. Community Association Law Group provides a free web-app that will list the specific provisions that apply to an association based on input of the year of creation, number of lots and the estimated annual budget. *Oregon Planned Community Applicability Calculator*, CMTY. ASS'N LAW GRP. (Feb. 12, 2018), https://calaw.attorney/articles/applying-oregon-planned-community-act.

[135] OR. REV. STAT. § 100.100.

[136] Susan Stellin, *Co-op vs. Condo: The Differences Are Narrowing*, N.Y. TIMES (Oct. 5, 2012), https://www.nytimes.com/2012/10/07/realestate/getting-started-choosing-between-a-co-op-and-a-condo.html.

[137] *See* Scott Learn, *Northeast Portland Cohousing Group Blends Sustainability and Sociability*, THE OREGONIAN (Nov. 20, 2009), https://www.oregonlive.com/environment/index.ssf/2009/11/northeast_portland_cohousing_g.html.

[138] OR. REV. STAT. § 94.640 (2017) (PCA); *id.* § 100.417 (2017) (OCA).

[139] *Id.* § 94.635 (2017) (PCA); *id.* § 100.415 (2017) (OCA).

[140] *See id.* § 94.640 (2017) ("[O]fficers and members of the board of directors are governed by this section and the applicable provisions of ORS 65.357 (General standards for directors), 65.361 (Director conflict of interest), 65.367 (Liability for unlawful distributions), 65.369 (Liability of qualified directors) and 65.377 (Standards of conduct for officers), whether or not the association is incorporated under ORS chapter 65."); OR. REV. STAT. § 100.417 (2017) ("officers and members of the board of directors are governed by this section and the applicable provisions of ORS 65.357 (General standards for directors), 65.361 (Director conflict of interest), 65.367 (Liability for unlawful distributions), 65.369 (Liability of qualified directors) and 65.377 (Standards of conduct for officers), whether or not the association is incorporated under ORS chapter 65.").

[141] CMTY. ASS'N INST., *supra* note 18, at 23.

lection Practices Act (FDCPA), Fair Labor Standards Act (FLSA), Family and Medical Leave Act (FMLA), Federal Insurance Contributions Act (FICA), Occupational Safety and Health Act (OHSA), U.S. Bankruptcy Code, rules of the Federal Communications Commission (FCC) (particularly OTARD), Fair Housing Act (FHA), and regulations of the Equal Employment Opportunity Commission (EEOC).[142] It is beyond the scope of this Note to discuss the impact of each of these laws on proper association governance. The astute board member will have at least some familiarity with each of them, particularly the FHA, which sets forth important limits on the scope of rulemaking authority.

The rulemaking provisions of the FHA are important for board members to understand as the FHA also prohibits discrimination in housing and applies to associations.[143] As such, boards must ensure that any rules adopted do not single-out or exclude owners based on a protected class, such as race, age, sex, disability, or familial status.[144] Furthermore, associations may be required by the FHA to make reasonable accommodations for disabled owners, such as allowing for service animals, even in associations where pets are prohibited, or allowing for vehicle parking that might otherwise be prohibited.[145] Numerous resources are available for board members to help ensure compliance with the FHA and other federal laws.[146]

Various areas of law regulate and influence CID governance. Numerous background principles of law have relevance to understanding the authority that associations possess in administering and enforcing covenants. In general, the foundation of CID governance developed from three areas of the law: property, contracts, and local governance. Historically, courts determined the enforceability of covenants and established the rules of CID governance. Today, state statutes have supplanted much of the traditional common law rules. Federal statutes overlay additional limits on associations. In Oregon, the PCA and OCA confer specific powers to associations and set forth specific limits on those powers. As is discussed in Section III, the background principles of contracts, property and local governance that have influenced the development of CID law guide the interpretation of authority-conferring provisions of the PCA and OCA. Those principles also guide a proper understanding of authority-conferring provisions contained within covenants themselves, which will be the topic of Parts II and III of this series.

---

[142] *Id.* at 23–29.

[143] *Id.* at 28.

[144] *Id.*

[145] *Id.* at 28–29.

[146] *See Discrimination: An Overview of the Federal Fair Housing Act and a Study of Discrimination Claims Filed Against Associations*, ALTITUDE CMTY. LAW (Oct. 23, 2013), https://altitude.law/resources/pdf/discrimination-overview-federal-fair-housing-act-and-study-discrimination-claims/; *HOA Legal Compliance: A Primer on the Fair Housing Act for Homeowners Associations*, HOALEADER.COM (Nov. 2009), https://www.hoaleader.com/public/354.cfm.

## III. STATUTORY AUTHORITY TO ADOPT AND ENFORCE RULES

Any association power must derive from some source of authority. In a CID there are only two possible sources of authority—statutes or the governing documents.[147] Either source of authority could expressly or impliedly confer authority to bind members of the association. Understanding an association's authority to adopt legally binding rules requires a three-step analysis. First, it is important to understand the scope of powers granted by statute. This comes first because statutory provisions override any contrary language in the governing documents.[148] Second, is to understand the scope of powers that governing documents confer to an association. Third, is to determine if the governing documents are compliant with statutory limitations.[149] All three steps ultimately involve asking how courts interpret authority-conferring language, because courts are the ultimate vehicles for enforcement against disobedient members. This section takes the first step. Parts II and III of this series will take steps two and three.

The PCA and the OCA each establish certain powers of association as well as certain limits on those powers. Statutory powers are independent of any powers granted by the governing documents. In general, the statutes prevent associations from placing restrictions on the use of property that the governing documents do not contain. This is in keeping with the traditional requirement of notice of restrictive covenants. By reserving use restrictions to the recorded governing documents, the statutes ensure at least constructive notice to purchasers. However, this does not mean that associations have no power to regulate the use of individually owned lots or units. This Note argues that associations' authority to regulate members' property—conferred solely by provisions of the PCA or OCA—is coextensive with local land use regulations.

### *A. Clarifying the Scope of Statutory Rulemaking Authority*

The PCA and the OCA each contain provisions authorizing boards of directors to adopt rules, subject to any contrary language within the governing documents.[150]

---

[147] The Restatement asserts that some powers are "implied." But, ultimately, a CID's existence is predicated on the existence of governing documents. This Note takes the view that, to the extent that associations have implied powers, the governing documents or relevant statutes imply those powers. *See* RESTATEMENT (THIRD) OF PROPERTY: SERVITUDES § 6.7 (AM. LAW INST. 2000).

[148] CMTY. ASS'N INST., *supra* note 18 at 35.

[149] For example, a declaration could state, "The Association shall have the authority to levy fines against Members without notice or an opportunity to be heard." Such a provision would violate the provisions of the PCA and OCA that require notice and an opportunity to be heard prior to levying fines. The third step of the analysis essentially asks, how do courts determine if the governing documents go too far, and what is the result when they do?

[150] OR. REV. STAT. § 94.630(1)(a) ("[A] homeowners association may: (a) Adopt and amend

Technically, each statute authorizes an association to adopt rules. However, each statute contains a separate provision authorizing a board of directors to act on behalf of the association.[151] Therefore, the board of directors of an association may adopt rules on behalf of the association. Furthermore, each statute authorizes the board of directors, on behalf of the association, to enforce the rules that it adopts by levying fines, subject to certain procedural requirements.[152] However, this general rulemaking authority is, at times, in tension with the notice requirements built into the PCA and OCA.[153] A purchaser of property within a CID only receives notice of the rules contained in the recorded governing documents. Board-level rules governing the common property or governing the association's operating procedures are uncontroversial.[154] Those substantive areas are arguably the board's *raison d'être*. But, board-level rules impacting an owner's rights to use his or her property appear to conflict with statutory provisions that require such rules to be included in the governing documents.

For example, ORS 94.580 dictates that a declaration must include a "statement of any restriction on the use, maintenance or occupancy of lots or units," but on the other hand, as noted, ORS 94.630 states plainly that "a homeowners association [represented by a board of directors] may: (a) Adopt and amend bylaws, rules and regulations for the planned community . . . ."[155] Because the statute gives no substantive limitation on the power to adopt and amend rules in ORS 94.630, this provision seemingly authorizes boards to adopt rules that other provisions require to be in the governing documents. Similarly, ORS 100.415 states a condominium's

bylaws, rules and regulations for the planned community;"); *id.* § 100.405(4)(a) ("[The association may:] (a) Adopt and amend bylaws and rules and regulations;").

[151] *Id.* § 94.640(1) ("The board of directors of an association may act on behalf of the association except as limited by the declaration and the bylaws."); *id.* § 100.417(1) ("The board of directors of an association of unit owners may act on behalf of the association except as limited by the declaration or bylaws.").

[152] Note that the statutes do not differentiate between levying fines for violations of the covenants and fines for violations of the rules. A rule, therefore, has the same legal effect on members as a provision in the declaration. However, there are some additional procedural requirements for enforcing rules that will be discussed below. *Id.* § 94.630(1)(n) ("[A] homeowners association may: (n) . . . levy reasonable fines for violations of the declaration, bylaws, rules and regulations of the association . . ."); *id.* § 100.405(4)(k) ("[The association may:] (k) . . . levy reasonable fines for violations of the declaration, bylaws and rules and regulations of the association . . . .").

[153] As discussed above, the traditional notice requirement for covenants has been codified in provisions of the PCA and OCA that requirement use restrictions to be included in the governing documents. *See supra* notes 102–106 and accompanying text.

[154] *See* HYATT, *supra* note 18, at 49–50.

[155] *Compare* OR. REV. STAT. § 94.580(2)(o) *with id.* § 94.630.

bylaws[156] must include "[a]ny restrictions on use or occupancy of units,"[157] while ORS 100.405(4) simply authorizes boards to "Adopt and amend bylaws, rules and regulations." The same tension that exists in the PCA exists in the OCA. Perhaps this tension can be resolved by merely taking note that "bylaws, rules and regulations" are within the purview of the board, while "restrictions on use" are reserved to the governing documents. However, some readers may ask: what is the difference between a rule and a restriction on use?

Available literature contains conflicting interpretations of the distinction between rules and use restrictions. On the one hand, a popular CAI publication, *Be Reasonable*, states that the board of directors adopts rules, while restrictions are found in the declaration.[158] Under this interpretation, the distinction is procedural. Rules and restrictions can contain the same substantive matter. However, a developer records restrictions upon creation of the CID – or the association records them by amendment – whereas the board of directors adopts rules by resolution. On the other hand, Wayne Hyatt, in a treatise on the law governing CIDs, states that "[a]lthough the rules and regulations are sometimes referred to as part of the governing documents of the [CID], they differ significantly from provisions in the declaration. *Rules* typically govern use of the common areas. . . . *Use restrictions* typically regulate the homeowner's unit . . . ."[159] This interpretation suggests the distinction is both substantive and procedural. According to Hyatt, board-level rules are limited to certain core substantive topics—common property and procedural rules being the two most prominent. The distinction between rules and restrictions is critical to understanding the scope of rulemaking authority granted by Oregon's statutes. Unfortunately, neither interpretation is a precise fit.[160]

---

[156] *Id.* §100.405. The fact that the OCA requires use restrictions to be in the bylaws, rather than the declaration, is both curious and anomalous. The Uniform Condominium Act, upon which the Oregon legislature based the OCA, as well as the more recent Uniform Common Interest Community Act, each propose to require use restrictions to be in a declaration. There is no explanation in the legislative history as to why the Oregon legislature decided to use bylaws as the document for use restrictions. The OCA requires recording of both declarations and bylaws, so an owner receives notice regardless of which document contains use restrictions. The upshot of placing use restrictions in the bylaws is that they may be amended more easily than if they were placed in a declaration. A simple majority vote of owners may amend bylaws—with the exception of a very narrow subset of restrictions—while only a 75% super-majority may amend declarations. *Compare id.* 135(3) *and id.* § 100.410(3)–(4). *See also* UNIF. CONDOMINIUM ACT § 2-105 (UNIF. LAW COMM'N 1980) (amended 2017).

[157] OR. REV. STAT. § 100.415(1)(r).

[158] BUDD, *supra* note 18, at 2.

[159] HYATT, *supra* note 18, at 49.

[160] The Uniform Laws Commission recognized this tension in drafting the 2008 amendments to the Uniform Common Interest Ownership Act. In comment 3 of the prefatory note, the Commission states: "[The Act] as originally crafted, required that a declaration must contain 'any restrictions (i) on use, occupancy, and alienation of units… .' Taken literally, if a

The purely procedural distinction—governing document versus resolution of the board—is perhaps the more intuitive interpretation. After all, a declaration is commonly known as a declaration of covenants, conditions, and restrictions, or CC&Rs.[161] Restrictions are part of the common name, while rules are not. The fact that both the PCA and OCA require certain restrictions, but not rules, to be in the governing documents lends credence to this interpretation. The problem is that if there is no substantive distinction, then there seems to be no point in requiring one to be in the declaration while authorizing the board to adopt the other. What would prevent a board of directors from adopting a rule that prohibits an owner from having outdoor parties in his yard when no such restriction on use is included in the declaration? If the only difference between a rule and a use restriction is the procedure for adopting it, then the PCA and OCA would arguably authorize a board to do just that because the statutes plainly say that a board of directors may adopt rules. The text of the statutes does not set any substantive limit. Of course, such a liberal interpretation is inapposite to the notice requirements that are fundamental to all covenants.[162]

If the difference between rules and use restrictions is not merely procedural, then it seems logical to presume that it is substantive. Hyatt's interpretation that rules govern common areas while restrictions govern a member's unit *feels* in line with how we understand the general locus of board authority. After all, the association exists in large part to manage and regulate the common areas. The problem is that there is nothing in the text of either statute that leads to a conclusion that rules and restrictions are substantively distinct. Oregon courts frequently cite dictionaries when interpreting statutory language.[163] "Rule" is defined as "a prescribed, suggested, or self-imposed guide for conduct or action."[164] "Restriction" is defined

declaration does not contain any restrictions, none could be imposed by rule or regulation of the association. *But compare* Section 3-102(a)(1) (an association may adopt 'rules and regulations') and Section 3-102(a)(6) (an association may 'regulate the use, maintenance, repair, replacement, and modification of common elements')." UNIF. COMMON INTEREST OWNERSHIP ACT, prefatory note 3 (UNIF. LAW COMM'N 2014). The commission's solution is to amend the act to "(a) permit (rather than mandate) the declaration to contain restrictions on use and occupancy of units and (b) permit the association to adopt rules and regulations of units to prevent uses which violate the declaration, and to adopt reasonable rules and regulations regarding occupancy of or behavior in units insofar as the occupancy or behavior might affect other unit owners." *Id.* One can argue the merits and drawbacks of the Commission's solution, but for present purposes it is sufficient to note that Oregon has not enacted any amendment that would resolve the tension between requirements for a declaration and rulemaking authority.

[161] BUDD, *supra* note 18, at 2; HYATT, *supra* note 18, at 24.

[162] *See supra* notes 102–06 and accompanying text.

[163] *See* State v. Gaines, 206 P.3d 1042, 1052 (Or. 2009) (explaining Oregon's approach to statutory construction, including the court's reliance upon WEBSTER'S THIRD NEW INT'L DICTIONARY (unabridged ed. 2002)).

[164] *Rule*, WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (unabridged ed. 2002).

somewhat circularly as "something that restricts,"[165] with restrict being defined as "to set bounds or limits to."[166] These definitions offer little assistance, but they certainly do not indicate that rules and restrictions are substantively distinct. Furthermore, the idea that rules are limited to common areas does not mesh with common practice within Oregon CIDs. It is widely understood that boards of directors often can and do adopt rules that restrict such things as paint colors, parking, and other uses of member property.[167]

A better interpretation is that the specific restrictions and requirements identified by the governing document-related provisions of the PCA and OCA are a subset of all possible rules. This interpretation comports with the common understanding of the words rule and restriction. A rule can restrict someone from doing something—such as a rule prohibiting doping in the Olympics. But a rule could also establish procedure or a way of doing something—such as local court rules. Rules can also compel someone to do something—such as a rule that students must stand and recite the pledge of allegiance. In this sense, *rule* is broader than *restriction*. A restriction is a kind of rule. So is a requirement. From this perspective each statute with one hand grants broad, discretionary, and rulemaking authority to boards of directors, but with the other hand carves out and removes from that authority the ability to adopt certain specified kinds of rules.

The context within the statutes supports this interpretation. Restrictions on use are not the only kind of rule that is carved out of the board's broad rulemaking authority. The PCA removes "any restriction on the *use*, *maintenance* or *occupancy* of lots or units"[168] from the board's authority and reserves them to the declaration. This single provision lists three areas of rulemaking authority that are beyond the board's powers. Furthermore, separate provisions reserve other substantive subjects of rulemaking to the declaration. These include any restrictions on an owner's rights with respect to her lot or unit, such as the right to subdivide or the right to repair in case of damage or destruction.[169] In addition, the statutes reserve any requirement that an owner's lot or unit is subject to architectural controls or review to the declaration.[170] Lastly, the statutes reserve any restriction on the alienation of lots to the declaration.[171] Each of these provisions within ORS 94.580 operates as a carve-out

[165] *Restriction*, WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (unabridged ed. 2002).

[166] *Restrict*, WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (unabridged ed. 2002).

[167] *See* Marlyn Hawkins, *What Do Your Rules Say About Your Community?*, BARKER MARTIN (Feb. 15, 2018), http://www.barkermartin.com/blog/condo-hoa-blog/post/what-do-your-rules-say-about-your-community; Ashley Yorra, *Rule Making (Oregon Law)*, VF LAW (Jan. 6, 2014), https://www.vf-law.com/articles/rule-making-oregon-law/.

[168] OR. REV. STAT. § 94.580(2)(o) (emphasis added).

[169] *Id.* § 94.580(2)(t)(A)–(B).

[170] *Id.* § 94.580(2)(t)(C)–(D).

[171] *Id.* § 94.580(2)(L).

from the broad powers given to the board by ORS 94.630. The consequences of reserving these specific areas of rulemaking authority to the declaration is that these rules may only be adopted by the original developer or by the 75% vote of the ownership required to amend the declaration.[172] In addition, constructive notice of these kinds of rules is ensured because the governing documents must be recorded with the local county.[173]

The structure and function of the statutory language in the OCA governing condominiums are similar, but there are a few differences worth noting. First of all, the carve-outs from board authority in a condominium are mostly reserved to the bylaws instead of the declaration.[174] The one exception is that any restrictions on the alienation of units are reserved to the declaration.[175] The provision that carves out use restrictions is limited to "[a]ny restrictions on use or occupancy of units."[176] "Maintenance" is omitted and dealt with in a separate provision, which reads, "[r]estrictions on and requirements respecting the enjoyment and maintenance of the units and the common elements as are designed to prevent unreasonable interference with the use of their respective units and of the common elements by the several unit owners."[177] This is a poorly drafted provision. It seems to indicate that only those rules that are designed to prevent unreasonable interference are reserved to the bylaws. Does that mean that rules that restrict or require the maintenance or enjoyment of a unit, but that are not designed to prevent unreasonable interference, do not have to be included in the bylaws? Or does it mean that in general rules may not restrict the maintenance or enjoyment of a unit unless they are designed to prevent unreasonable interference? It is difficult to say, but the former seems the more literal reading. The latter seems more in keeping with the conceptual distinction between governing documents and rules passed by resolution.[178]

A detailed reading of the two relevant statutes uncovered eight kinds of rules that are reserved to one of the governing documents. The following chart places the provisions in the PCA side by side with those of the OCA.

[172] *Id.* § 94.585; § 94.590(1)(a).

[173] *Id.* § 94.580(1); § 94.577.

[174] As discussed above, it is unclear exactly why the legislature reserved use restrictions to the bylaws instead of the declaration in the OCA. *See supra* note 146.

[175] OR. REV. STAT. § 100.105(1)(p).

[176] *Id.*. § 100.415(1)(r).

[177] *Id.* § 100.415(1)(q).

[178] The author could not find case law or commentary to resolve this point.

**Side by Side Comparison of 'Carve Out' Provisions in PCA and OCA**

| | Planned Communities | | Condominiums | |
|---|---|---|---|---|
| **Type of rule reserved** | Governing Document | PCA provision | Governing Document | OCA provision |
| Restrictions on use of unit | Declaration | 94.580 (2)(o) | Bylaws | 100.415(1)(r) |
| Restrictions on occupancy of unit | Declaration | 94.580 (2)(o) | Bylaws | 100.415(1)(r) |
| Restrictions on enjoyment[179] of unit | N/A | | Bylaws | 100.415(1)(q) |
| Restrictions on maintenance of unit | Declaration | 94.580 (2)(o) | Bylaws | 100.415(1)(q) |
| Restrictions on alienation of unit | Declaration | 94.580 (2)(l) | Declaration | 100.105(1)(p) |
| Restrictions on rights with respect to unit | Declaration | 94.580 (2)(t) | N/A | |
| Requirements for maintenance of unit | N/A | | Bylaws | 100.415(1)(q) |
| Requirements for architectural controls[180] | Declaration | 94.580 (2)(t) | N/A | |

One conspicuous observation from this chart is that requirements for maintenance of a unit are not reserved to a governing document in planned communities,

[179] Practically speaking, it is unclear how a restriction on the enjoyment of property differs from a restriction on the use of property. Because the OCA distinguishes between the two, I have separated them out. The PCA does not mention restrictions on enjoyment as a carve-out reserved to any governing document. But, for all practical purposes, any rule restricting an owner's enjoyment can be considered a rule restricting an owner's use.

[180] The PCA lists both requirements for "architectural controls" and requirements for "architectural review." In practice these seem difficult to distinguish, so "architectural controls" as used here includes both.

but they are in condominiums. Perhaps this means that in an HOA the board of directors has the authority to adopt a rule requiring each owner to maintain their own property in good repair simply by operation of the statute, regardless of whether such authority is granted by the declaration itself. That is because a requirement is distinct from a restriction. A restriction limits the actions an owner may take, whereas a requirement typically compels some action. In an HOA, a rule that limits an owner's right to maintain their own property—say, for example a rule giving the association the exclusive right and responsibility to maintain the exterior of houses—would need to be in the declaration. But a requirement for maintenance seemingly does not.

It is unclear why the OCA would carve out requirements for maintenance and reserve them to the bylaws, but the PCA would not. This may simply have been a drafting oversight by those who drafted the PCA. Or perhaps the drafters of the OCA felt that maintenance requirements are often fundamental requirements in a vertical living environment—which describes many condominiums—and so those requirements should be included in the bylaws to ensure notice for subsequent purchasers.[181] Whatever the reason, the distinction exists. However, whether a court would conclude that a requirement to maintain one's property is the kind of rule that does not have to be included in a declaration in a planned community is not certain. It is possible a court might conclude that the intent of the legislature was to reserve those kinds of requirements to the declaration, even if the text of the statute does not explicitly do so.

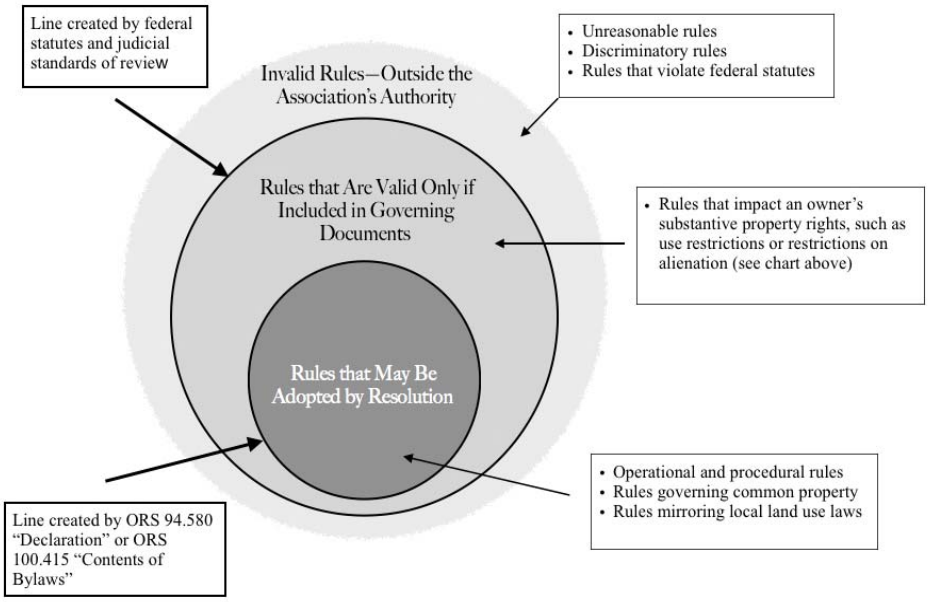
In the end, the message that board members should take from this section is that the Oregon statutes that regulate CIDs confer to boards of directors the authority to adopt rules concerning any aspect of the association except for the specific rule-types that are reserved to the governing documents. As a practical matter, however, the scope of rulemaking authority that remains at the board's discretion simply by operation of the statute is primarily limited to operational matters, like collections and application processes, as well as regulation and management of the common areas. This makes sense, given that one function of the carve-out provisions is to ensure constructive notice to purchasers of certain kinds of rules—particularly those rules that affect an owner's right to use and enjoy her property. However, in the next section, this Note argues that the statutory grant of rulemaking authority does extend into an individual member's lots or units in one rather unintuitive way. Furthermore, as will be discussed in Parts II and III, the governing documents themselves can expand that rulemaking authority even further.

[181] In a condominium, as opposed to a planned community, the bylaws tend to be the more important governing document. Typically, condo bylaws include important provisions relating to insurance, as well as the operational rules for the association. One might conclude a purchaser of a condominium is more likely to read the bylaws than to read the declaration, though, admittedly, this would seem to be weak assumption.

*B. Clarifying the Scope of Statutory Limits on Rulemaking Authority*

The scope of rulemaking authority granted by operation of the statutes can be visualized in a Venn Diagram such as this one:

**Graphical Depiction of Association Rulemaking Authority**




The unbounded, light-grey, outer area represents rules beyond the association's authority. Rules that violate the federal statutes discussed in Section II above are included here. These rules would be invalid regardless of whether they are adopted by resolution of the board or by amendment to the governing documents.[182] The medium-grey area inside the first circle represents the scope of authority that the carve-

[182] The diagram provides "unreasonable rules" as one example of rules that fall into this category. That assertion warrants some exposition. As noted in the Introduction, states have adopted varying standards for reviewing rules. Florida and several other states have adopted a reasonableness test. New York has adopted a more deferential test derived from the business judgment rule. *See supra* notes 22–24 and accompanying text. For a discussion of the varying standards of review that state courts employ see Franzese, *supra* note 33, at 665. This author could find no Oregon case law establishing a standard of review for rules adopted by Oregon CIDs. However, in other contexts, Oregon courts have recognized judicially imposed limitations on the arbitrary exercise of discretionary authority. *See, e.g.*, McKenzie v. Pac. Health & Life Ins., 847 P.2d 879, 881 (Or. Ct. App. 1993) (finding a duty "to refrain from arbitrarily refusing to pre-

out provisions define. Rules within this circle are within the association's authority, but beyond the board's authority. The dark-grey area inside the innermost circle represents the discretionary rulemaking authority that statutes confer to a board of directors. It is important to understand as precisely as possible the meaning of the carve-out provisions. Any rule that is not within the meaning of those provisions, and which is not beyond the authority of the association altogether, is within the discretionary authority of the board of directors.

At first glance, many of the carve-outs appear rather straightforward. Language such as "any restriction on the use, maintenance or occupancy of the lots or units"[183] does not immediately strike the reader as ambiguous. However, as with most areas of the law, upon closer inspection there is some gray area around the edges. Consider a rule prohibiting members of an HOA from sunbathing nude on their property in view of other lots. Sunbathing is clearly a use of one's property. Limiting that use would appear to be a restriction on use of property. Seemingly, a rule like this is reserved by statute to the declaration, and not one that a board of directors can adopt. On the other hand, is this rule actually restricting the members' use of their properties? To restrict means to place some limitations or constraints upon an activity. Here, the prohibited activity is one that the members could not legally do anyway.[184] Public nudity is a common-law nuisance.[185] That is because public nudity unreasonably interferes with the rights of others to enjoy their own property.[186] As such, prohibiting nude sunbathing does not actually restrict a use of property that the member was entitled to. From this perspective, the rule is not a restriction on use, and therefore falls outside the meaning of the carve-out provision in ORS 94.580. By default, then, the rule is within the scope of rulemaking authority granted to boards of directors by ORS 94.630.

To understand this concept, it may be helpful to resort to the often-invoked metaphor for property rights—the bundle of sticks.[187] Real property can be understood as a collection of rights in relation to a parcel of land.[188] Imagine the property-owner holding a bundle of sticks, with each stick representing a specific right in relation to the parcel of land. One of the most fundamental rights within

authorize medical treatment"). This Note assumes that Oregon courts would be willing to invalidate at least some rules based on reasonableness or a similar standard. Exactly where Oregon courts would draw the line is unknown. For present purposes, this Note uses the term "unreasonable rules."

183 OR. REV. STAT. § 94.580(2)(O).

184 *See* Mark v. State *ex rel.* Dep't of Fish and Wildlife, 84 P.3d 155, 162 (Or. Ct. App. 2004) (allowing "findings that the nudity constituted a nuisance").

185 *Id.*

186 *Id.*

187 ANDERSON & BOGART, *supra* note 68, at 31.

188 *Id.*

the bundle is the right to use.[189] However, that right to use is limited by the law of nuisance as well as state laws and local land-use ordinances.[190] As Justice Scalia wrote in a paradigmatic Supreme Court opinion regarding Takings Clause jurisprudence, prohibited uses are "not part of [an owner's] title to begin with."[191] Because a rule that prohibits members from sunbathing nude does not limit any use that was part of those members' title to begin with, it is not a restriction on use.

The Restatement (Third) of Property (Servitudes) echoes this approach, albeit with some minor distinctions, and based on a different rationale.[192] The Restatement sets up a three-tiered structure to rulemaking authority in CIDs.[193] The first tier includes implied powers to adopt rules governing and protecting common areas.[194] The second tier includes "broad" rulemaking authority conferred either by statute or by the governing documents.[195] According to the drafters, this second tier includes authority to "protect community members from unreasonable interference in the enjoyment of their individual lots or units and the common property caused by use of other individually owned lots or units…."[196] The language used resembles the standard for nuisance, and the official comments make it clear that the drafters had "nuisance-like activities" in mind.[197] The third tier includes the authority conferred by "specific authorization" in the governing documents.[198] Absent language in the governing documents conferring specific authority, boards are limited to the first two tiers of rulemaking authority.[199]

There are a few inaccuracies in the Restatement approach, but on the whole the three-tiered approach to rulemaking authority is apt. The first inaccuracy is that

[189] *Id.* at 48.

[190] Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1027 (1992).

[191] *Id.*

[192] RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 6.7 (AM. LAW INST. 2000). For readers who have not studied the law, Restatements are publications by the American Law Institute that are "primarily addressed to courts" and "aim at clear formulations of common law and its statutory elements or variations." *Frequently Asked Questions*, ALI (2019), https://www.ali.org/publications/frequently-asked-questions/. Restatements are not specific to individual states and are not binding authority in and of themselves.

[193] RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 6.7 (AM. LAW INST. 2000).

[194] *Id.*

[195] *Id.* cmt. b (although the language of § 6.7(2) only refers to general powers included in the declaration, the comment clarifies that the same interpretation should be given to broad powers conferred by statute.).

[196] *Id.* § 6.7(2)(a).

[197] *Id.* cmt. b.

[198] *Id.* § 6.7(3).

[199] Part II of this Note will discuss specific authority in more detail.

the official comments describe statutory rulemaking authority as extending to "nuisance-like activities."[200] A finding of nuisance generally requires a finding of both substantial and unreasonable interference.[201] Although courts attempt to be objective, both of these standards are inherently subjective, or at a minimum imprecise. By using the phrase "nuisance-like activities," the Restatement unnecessarily adds even more uncertainty. More importantly, although the Restatement is meant to be a summary of the common law as it has developed through court opinions, the cases that the Restatement cites to do not establish that the "nuisance-like activity" scope of rulemaking authority has been adopted by courts in any state.[202] The official comments clarify the drafters' rationale as being based upon the "traditional expectations of property owners."[203] Purchasers of property "are not likely to expect that the association would be able, under a generally worded rulemaking power, to impose additional use restrictions on their property."[204] Although that may be true, it is not particularly relevant to a question of statutory construction. The drafters are applying a standard used in contract interpretation—the intent of the parties—to the question of what rulemaking power is conferred by statutory language.

That being said, an Oregon court would likely come to approximately the same conclusion by following the statutory analysis described above. In fact, the statutory interpretation is more precise because it does not arrive at "nuisance-like activities." By understanding the word "restriction" in the PCA and OCA to include limitations on any legal right, but to exclude limitations on any activities that were not part of an owner's title to begin with, a court should conclude that the statutory grant of authority extends not only to nuisance, but also to any illegal uses of property. Said another way, "restrictions on use, occupancy or maintenance" means rules that limit a legal right to use, occupy or maintain one's property. Many counties and municipalities in Oregon have local nuisance ordinances that proscribe specific uses.[205] Local governments may also have occupancy regulations.[206] These local ordinances, along with state laws and the common law of nuisance, define the scope of a property owner's legal title.[207] The carve-out provisions of the PCA and OCA

[200] *Id.* cmt. b.

[201] Jewett v. Deerhorn Enterprises, Inc., 575 P.2d 164, 166 (Or. 1978) ("A nuisance, claimed to be an interference with the use and enjoyment of land, is not actionable unless that interference is both substantial and unreasonable.").

[202] RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 6.7 Reporter's Note (citing 35 cases from various jurisdictions as the basis for the Restatement's articulation of the law, none of which ruled that broad rulemaking authority conferred by statute or by governing documents extended to nuisance or nuisance-like activities).

[203] *Id.* cmt. b.

[204] *Id.*

[205] *See, e.g.*, BEND, OR., CODE § 13.10. *Cf.* DESCHUTES CO., OR., CODE § 13.36 (2001).

[206] *See* PORTLAND, OR., CODE § 29.30.210.

[207] *See* J.E. Penner, *The "Bundle of Rights" Picture of Property*, 43 UCLA L. REV. 711, 735–

reserve to the governing documents only those rules that would impair an owner's legal title.

### *C. Statutory Rulemaking Authority in Practice*

The upshot of this interpretation of the rulemaking powers conferred by the PCA and the OCA is that, as a practical matter, boards of directors have the authority to step into the shoes of local government. To be clear, the statutes do not confer the authority to enforce local land use ordinances. That power belongs to the county or municipality. However, they do confer the authority to adopt and enforce rules. Only the carve-out provisions that reserve certain kinds of rules to the governing documents limit the substantive content of that rulemaking authority. Those carve-outs include rules that would impair an owner's legal title. As such, a rule that prohibits an activity that is already prohibited by a local ordinance is within the power of the board of directors to adopt. Once adopted, the board must follow the due-process-like requirements within the PCA or OCA in order to take enforcement actions.

Consider this example: the Bend City Code states "[n]o person shall store or permit the storing of a discarded vehicle on private property for more than 72 hours unless it is completely enclosed within a building or in a space entirely enclosed and hidden by a fence or screen."[208] Imagine an HOA within Bend's city limits whose declaration is silent on rulemaking authority conferred to the board of directors.[209] The board could nonetheless adopt a rule stating "no member may store or permit the storing of a discarded vehicle on that member's lot for more than 72 hours unless it is completely enclosed within a building or in a space entirely enclosed and hidden by a fence or screen." The board has this authority because this rule does not impair a right that the member had to begin with. The Bend City Code has effectively removed storage of discarded vehicles from the owner's bundle of sticks.[210] Because the rule does not limit any right within the bundle of sticks, the rule is not a restriction on use. Once duly adopted the board may enforce this rule

36 (1996).

("[R]egulations like zoning ordinances or rent control . . . are redefinitions of the property right itself, altering the bundle . . . and thus [the] power, of property rights.").

[208] BEND, OR., CODE § 13.25.010.

[209] The declaration would not have to be silent on rulemaking for this example to be effective, but the point is to understand what authority is conferred merely by operation of the statute. Part II of this series will explore how language in the governing documents could augment that authority.

[210] *See* Penner, *supra* note 207, at 735–36 ("[R]egulations like zoning ordinances or rent control . . . are redefinitions of the property right itself, altering the bundle . . . and thus power, of property rights.").

with fines, subject to the due-process-like requirements that are included in the statutes.[211]

If the scope of rulemaking authority extends to those uses already removed from an owner's title by law, it follows that the scope of rulemaking authority will depend on the local land use laws of the jurisdiction in which the CID is located. It may seem counter-intuitive to think that the scope of rulemaking authority conferred by statute would differ from place to place within the state. To understand this oddity, consider another example. The City of Bend sits geographically within Deschutes County. Deschutes County has adopted a slightly different discarded-vehicle ordinance than the City of Bend ordinance discussed above. Deschutes County's ordinance includes "inoperative and/or unlicensed or dismantled or partially dismantled vehicles" within the definition of "solid waste."[212] "Disposal" of solid waste is defined as a nuisance.[213] "Disposal" includes accumulation and storage.[214] The effect is largely the same as in Bend except that in surrounding Deschutes County the code does not provide a 72-hour window for storing dilapidated vehicles, nor provide an exception if the vehicle is screened from view. As such, the board of an HOA located within Bend's city limits would have to allow for those exceptions, while the board of an HOA just outside the city would not. A board-level rule that states "Members may not store dilapidated vehicles anywhere on the Property for more than 24 hours" would be within the statutory scope of rulemaking authority conferred to HOA boards in Deschutes County, but not to HOA boards in Bend, because in Bend that rule would impair the members' legal property rights. In essence, an owner of property in Bend holds a slightly different bundle of sticks from the one held by an owner of property in Deschutes County.[215] Restrictions on use of property therefore include slightly different rules in each location.

The observation that the scope of rulemaking authority in CIDs differs from county to county and city to city is likely to precipitate several objections. First, does it make sense that condominiums and planned communities, which are both governed by a statewide statutory scheme, would enjoy varying scopes of authority from place to place? Second, if we understand CIDs to be private, contractual relationships as opposed to quasi-governmental agencies, why would their authority extend to those limits defined by local ordinance? Third, how can private entities that are not restrained by constitutional due process limitations be empowered to enforce public ordinances?

---

[211] Again, it is important to note that the board may not simply enforce a local ordinance. Rather, the board must first adopt a rule. The rule must be adopted at an open-meeting and delivered to owners prior to any enforcement action.

[212] DESCHUTES CO., OR., CODE § 13.12.205 (2001).

[213] *Id.* §13.36.030.

[214] *See id.* § 13.12.085 (2001).

[215] *See* Penner, *supra* note 207, at 735.

Despite these concerns, there are solid policy reasons for linking the scope of rulemaking authority to local government. Although CIDs are governed by statewide schemes, local governments increasingly have come to rely upon them for provision of services.[216] Other land use regulations, such as zoning and subdivision laws, are governed by statewide statute but differ at the local government level.[217] Some scholars have argued for expanding the linkages between CIDs and local governance, calling for a transfer of authority from local zoning boards to CIDs.[218] Furthermore, in enacting the PCA and OCA the legislature seemingly anticipated the linkage between CIDs and local governance by including due process limitations on the adoption and enforcement of rules.[219] It is difficult to think of another circumstance in which the state of Oregon has required by statute an "opportunity to be heard" prior to enforcement of rules by a private organization against one of its members.[220] Nor does the state of Oregon require open board meetings in other private organizations.[221] The fact that these requirements are included in both the PCA and OCA establishes some legislative recognition that CIDs have at least some government-like authority.

## CONCLUSION

The laws regulating CIDs are complex. In particular, the question of how far a board may go when adopting rules by resolution is not easily discernable. The laws vary widely by state and the literature is lacking in state-level analysis. This Note is intended to begin to fill the gap in state-level analysis by exploring the scope of rulemaking authority in Oregon's CIDs. In Part I, this Note reviews the background law governing covenants in general, and then examines the provisions of

[216] Paula A. Franzese & Steven Siegel, *Trust and Community: The Common Interest Community as Metaphor and Paradox*, 72 MO. L. REV. 1111, 1147 (2007) ("Homeowners associations have assumed many of the functions traditionally provided by local government."); Steven Siegel, *The Public Role in Establishing Private Residential Communities*, 38 URB. LAW. 859, 859–60 (2006) ("[L]ocal governments, on a broad scale and independent of market forces, effectively have *required* developers of new subdivisions to create community associations to operate and maintain the subdivision in lieu of the municipality providing traditionally municipal services to the subdivision . . . .").

[217] *See generally* OR. REV. STAT. § 215 (governing county planning, zoning, and housing codes).

[218] *See generally* Nelson, *supra* note 35.

[219] *See* OR. REV. STAT. § 94.630; *id.* § 100.405(4)(k).

[220] It is unclear whether Oregon recognizes a common law duty to provide fair procedure before private associations may expel a member when membership is important to the member's career. *See* Straube v. Emanuel Lutheran Charity Bd., 600 P.2d 381, 384 (Or. 1979) ("This court has never decided whether there is such a duty in Oregon, and it is unnecessary to do so in this case . . . .").

[221] *See supra* notes 127–29 and accompanying text.

Oregon's CID statutes that define the scope of rulemaking authority. Part II will explore the proper interpretation of authority-conferring language contained within governing documents. Part III will analyze the effect that the statutory limitations have upon that authority.

The distinction between rules and restrictions as described in the literature on association governance is inaccurate. Some commentators have described the distinction as procedural and others as substantive. This Note argues instead that "restrictions," as used in the PCA and OCA, refers to a subset of rules—those rules that place a limitation upon the property owner. The same is true of "requirements," which refers to those rules that compel some action by a property owner.

This interpretation is important because it helps explain the interplay between provisions of the PCA and OCA that, on the one hand, confer to association boards the authority to adopt rules, and on the other hand require various restrictions and requirements to be included in the governing documents. The provisions that confer rulemaking authority contain no substantive limitations. Federal statutes place some substantive limitations on rulemaking authority. Oregon courts would also likely impose a reasonableness or arbitrary and capricious standard. Besides those limitations, however, any rule is theoretically within the PCA and OCA's broad grant of authority. However, the provisions that reserve specific kinds of rules to the governing documents—particularly restrictions on use—effectively carve out much of that rulemaking authority. What is left behind after those subject matters are carved out is primarily the authority to adopt rules governing the common areas and procedural subjects like collections. However, the carve outs only reserve to the governing documents those restrictions and requirements that would impair an owner's legal title. The residual rulemaking authority that remains at the discretion of boards of directors, then, extends to any rules that do not impair the owner's legal title. The upshot of this is that boards have the authority under the statute to adopt rules mirroring local land use and nuisance ordinances.

The analysis in Part I is probably most useful to board members in associations where the governing documents are silent on rulemaking authority or contain only vague or overly broad grants of authority. In many cases, board members in those CIDs feel powerless to regulate egregious uses of property that have deleterious effects on the quality of life in their communities. For example, a board member in an association to which the governing documents do not confer rulemaking authority—meaning the governing documents are silent, as opposed to specifically prohibiting board-level rules—might wonder how it can prevent owners from dumping dilapidated vehicles or refuse on their property. Even if those activities are illegal, a call to the local code enforcement division might not solve the problem. Local governments are often struggling with tight budgets, which limits their ability to enforce these sorts of violations. This Note argues that the rulemaking authority conferred by the PCA and OCA embraces rules that would prohibit some of those more egregious uses—those that constitute private nuisance or violate local ordinances.

That being said, many of the governing documents that are silent on rulemaking authority are older, and at least in the case of planned communities, board members should confirm applicability of the PCA to their association.

More modern declarations and bylaws typically include some rulemaking provisions. However, the wording of those provisions varies greatly. In some cases the documents contain only very broad authority to adopt rules. In other cases the documents contain very specific language authorizing the board to adopt rules regulating specific behavior or uses. Parts II and III will examine how Oregon courts are likely to interpret such language. Of particular importance is the question: If "restrictions on use" must be included in the governing documents then how can a board ever adopt by resolution a rule that impairs an owner's legal right to use? The question cannot be answered to a legal certainty. But, Part III will argue that when authority-conferring language in the governing documents is specific enough that language itself constitutes a restriction as the term is used in the PCA and OCA. Finally, Part IV will provide a series of best practices to assist board members in ensuring their rules are within their authority to adopt.