

NOTES

DON'T FORECLOSE ON ME: ADR'S ROLE IN REGULATING THE FORECLOSURE POWER OF HOMEOWNERS ASSOCIATIONS IN THE AFTERMATH OF COVID-19

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I. INTRODUCTION

One December day, Miesha Ross received a knock on the door of her home in an Aurora, Colorado Homeowners Association. Behind the door was a foreclosure notice, but, to her great surprise, it wasn't from her bank. It was from her Homeowners Association.¹ Homeowners Associations ("HOAs") serve a regulatory and governmental function in condominium and cooperative buildings.² The responsibilities of HOAs range from imposing regulations on unit owners, such as aesthetics regarding the property, to procedures that help to maintain the overall function of the community.³ Of these procedures, the collection of association dues is arguably the most important function, as it enables HOAs to maintain common areas and provide amenities to residents.⁴ When dues are left unpaid,

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¹ Brittany Freeman, *They Faced Foreclosure Not From Their Mortgage Lender, but From Their HOA*, ROCKY MOUNTAIN PBS (June 23, 2022), <https://www.rmpbs.org/blogs/news/colorado-hoa-foreclosure-investigation/> [<https://perma.cc/L4CP-UFSA>].

² Stewart E. Sterk, *Maintaining Condominiums and Homeowner Associations: How Much of a Priority?*, 93 IND. L. J. 807, 811–19 (2018).

³ *Id.*; Michael C. Pollack, *Judicial Deference and Institutional Character: Homeowners Associations and the Puzzle of Private Governance*, 81 U. CIN. L. REV. 839, 840–52 (2013).

⁴ Rachel Furman, *Collecting Unpaid Assessments: The Homeowner Association's Dilemma When Foreclosure Is No Longer a Viable Option*, 19 J. L. & POL'Y 751, 754–60 (2011).

delinquent owners are faced with foreclosure proceedings and left to figure out how to legally remain in their homes.⁵

The COVID-19 pandemic undoubtedly revealed the conflicts that arise between HOAs and homeowners where foreclosure is on the horizon. Homeowners affected by loss of work or income brought on by the pandemic struggled to afford housing costs.⁶ Buildings governed by HOAs likewise struggled to function where common charges and maintenance fees were left unpaid, as non-payments lead to reduced amenities and the possible demise of the community.⁷ Where common charge fees are left unpaid, HOAs must take action in order to preserve the integrity of the community, often leading to the commencement of foreclosure proceedings against the delinquent homeowner.⁸ The legitimate needs of both sides of this scheme were uncovered by the pandemic, revealing the need for an alternative source of dispute resolution. With millions affected by unemployment because of the pandemic, the New York City (“NYC”) housing market suffered due to the financial hardships faced by many.⁹ While NYC homeowners were granted temporary relief by way of foreclosure moratoriums, these attempts served as a band-aid on the larger issues surrounding city housing.¹⁰ The end of the moratorium brought high numbers of foreclosures, particularly within condominiums and cooperatives governed by HOAs.¹¹

The disputes that arise in cases involving HOAs have a heightened degree of tension due to the lack of checks and balances that would otherwise serve to regulate the system.¹² Requirements for HOAs to foreclose are often minimal, requiring only that a homeowner falls behind on payments, so long as a foreclosure suit is filed within six years of the filing date of the notice of the lien with dues still outstanding.¹³ State statutes typically grant HOAs the

⁵ Pollack, *supra* note 3.

⁶ *Brooklyn Co-op and Condo Foreclosures Are on the Rise*, HABITAT MAG. (July 22, 2022), <https://www.habitatmag.com/Publication-Content/COVID-19/2022/2022-July/Brooklyn-Co-op-and-Condo-Foreclosures-Are-on-the-Rise> [<https://perma.cc/RYH3-6KJZ>].

⁷ *Id.*; Furman, *supra* note 4.

⁸ Furman, *supra* note 4.

⁹ Margaret Cascino, *The End of New York’s Foreclosure Moratorium*, JD SUPRA (Jan. 20, 2022), <https://www.jdsupra.com/legalnews/the-end-of-new-york-s-foreclosure-3497658/#:~:text=The%20hardship%20stays%20provided%20under,ended%20on%20January%2015%2C%202022> [<https://perma.cc/B52S-Y2X4>].

¹⁰ HABITAT MAG., *supra* note 6.

¹¹ *Id.*

¹² Justin R. Cooley, *Arizona’s Planned Community Act: A Good Start, But Far From the Finish Line*, 4 PHX. L. REV. 853, 854 (2011).

¹³ *Condominium Association Liens and Foreclosures in New York*, GRIFFIN ALEXANDER (July 7, 2017), <https://www.lawgapc.com/blog/condominium-association-liens-and-foreclosures-in-new-york/> [<https://perma.cc/G42H-FERB>].

right to foreclose for delinquencies on payments.¹⁴ The HOA only needs to file a lien to commence foreclosure proceedings pursuant to New York law, relying greatly on the association's governing documents for this power.¹⁵ Associations have been critiqued in their role as quasi-governmental entities, as they are granted broad lien and foreclosure powers by their governing documents.¹⁶ Despite the fact that HOAs are comprised of elected community members¹⁷, homeowners typically have little to no recourse in the event of judicial foreclosure.¹⁸ Since the rules and obligations of each homeowner to pay assessments are clearly explained in the governing documents, it is of general consensus that owners are put "on notice" of these duties.¹⁹ Foreclosure proceedings may begin before homeowners have time to work out an alternative solution given the circumstances of their default.²⁰ As a result, a power imbalance between the board and homeowners arises, with the former often using their powerful resources to the latter's disadvantage by turning to judicial intervention.²¹

Foreclosure is a costly and undesirable end for both the board and homeowners in most cases. HOAs have a valid need to maintain the integrity of their communities while homeowners have a desire to maintain their livelihoods given the unique circumstances of each owner's life. Where these two valid desires seem to come to a stalemate in such situations, a solution in the form of alternate dispute resolution will aid in serving these goals. It is clear from the current state of NYC housing and the effects of the COVID-19 pandemic that judicial intervention in foreclosure proceedings is not a viable form of conflict resolution. Formal judicial proceedings have proven to be slow and cumbersome, causing both parties to inevitably suffer.²² Communities face negative impacts where

¹⁴ Davis S. Vaughn, *Lien Back: Why Homeowner Association Super-Priority Lien Statutes Should Be Replaced*, 71 CONSUMER FIN. L. Q. REP. 68, 69–70 (2017).

¹⁵ GRIFFIN ALEXANDER, *supra* note 13; Amy Loftsgordon, *New York HOA and COA Foreclosures*, NOLO, <https://www.nolo.com/legal-encyclopedia/new-york-hoa-coa-foreclosures.html> [<https://perma.cc/M7UT-S9TT>] (last visited Feb. 3, 2023).

¹⁶ Paul Boudreaux, *Home, Rights, and Private Communities*, 20 U. FLA. J. L. & PUB. POL'Y 479, 480–91 (2009).

¹⁷ Paula A. Franzese, *Common Interest Communities: Standards of Review and Review of Standards*, 3 WASH. U. J. L. & POL'Y 663, 671–73 (2000).

¹⁸ Gemma Giantomasi, *A Balancing Act: The Foreclosure Power of Homeowners' Associations*, 72 FORDHAM L. REV. 2503, 2506–17 (2004).

¹⁹ *Id.*

²⁰ GRIFFIN ALEXANDER, *supra* note 13 (explaining that HOAs are able to initiate foreclosure proceedings as long as six years have not passed since the filing of a lien on the unit).

²¹ Cooley, *supra* note 12.

²² Bryan E. Meek, *Mortgage Foreclosure Proceedings: Where We Have Been and Where We Need to Go*, 48 AKRON L. REV. 129, 151 (2015).

foreclosure is backlogged, and the process has proven to be economically insufficient.²³ The implementation of mediation in this situation can help protect the interests of both sides and allow homeowners to stay within their units while HOAs can continue to effectively maintain the community.

This Note proposes the statutory implementation of mediation in lieu of traditional judicial foreclosure processes where HOAs are faced with homeowners who are delinquent on their assessments. First, the Background section of this Note will discuss the structure and operations of HOAs. Then, this Note will outline the broad powers granted to HOAs, as well as the great deference afforded to them by the judicial system. Next, this Note will discuss the costs and benefits associated with HOA foreclosure, as well as the judicial processes that HOAs undertake when choosing to foreclose on homes. This Note focuses specifically on NYC homeowners in HOA communities in a post-pandemic world, due to the volume of foreclosures that the area is seeing as legislative protections begin to lift. The Discussion section will outline the deficiencies of traditional litigation, as well as forward mediation as a powerful alternative for dispute resolution. This Note will elaborate on the different methods of mediation and the benefits associated with them. Finally, the Proposal section of this Note will discuss the form of mediation that would be the most efficient method for solving HOA-led foreclosures. This Note will argue that the implementation of mediation in the form of potential legislation is a viable alternative to costly judicial intervention.

II. BACKGROUND

A. *The Structure of HOAs*

The role of HOAs is often regarded as acting as a “residential private government” and it is constructed to maintain the community it is situated in.²⁴ Membership in a community governed by an HOA is an incident of purchasing a property in buildings such as cooperatives and condominiums; one cannot choose to opt out of HOA governance.²⁵ The board consists of elected homeowners who reside in the community.²⁶ Elections are guided by the association’s governing documents and

²³ *Id.*

²⁴ Franzese, *supra* note 17.

²⁵ *Id.* at 672.

²⁶ *A Complete Guide to HOA Elections*, ASSOCIA, <https://hub.associaonline.com/blog/a-complete-guide-to-hoa-elections> [<https://perma.cc/TU5L-6EKJ>] (last visited Oct. 15, 2022).

state and local law.²⁷ Regarded as a “quasi-constitution,” the governing documents include articles of incorporation, bylaws, and covenants, conditions, and restrictions.²⁸ These documents effectively serve as the “law of the land,” and put potential buyers on notice of the powers of the board and costs of membership, as well as the obligation to obey these terms.²⁹ While some states such as Florida have enacted term limits for HOAs and other mechanisms for regulating these entities, New York does not have a specific statute governing HOAs, allowing the documents to control.³⁰

Governing boards are usually elected by and from members of the building by way of a democratic voting process set out by these documents.³¹ As a result, neighbors end up governing over their own neighbors, wielding a great amount of decision-making power.³² The formation of HOAs is often criticized, as residents often regard them as “inflexible” or “self-selecting” entities.³³ All members of the association are typically free to run for board positions, but these positions usually do not reflect the popular will of the community as a whole.³⁴ A typical election can result in the appointment of individuals who wish to act in their own self-interest and use the authoritarian power of the board over their neighbors, posing problems in cases of neighborly disputes.³⁵ It is important to note, however, that HOA boards are not all-powerful. Board members can often be removed in cases where duties are neglected and can be voted out at the expiration of their term.³⁶ Although homeowners are afforded the ability to control who serves on their community’s board to some effect, foreclosure action can be exacerbated by cases where “authoritarian” boards enjoy exercising power over their neighbors.³⁷ In cases where residents are threatened with foreclosure, the very integrity of the HOA is called into question. The great powers afforded to members of the board display the power imbalance that

²⁷ *Id.*

²⁸ Monique C.M. Leahy, *Proof of Homeowner Association Acting as Quasi Governmental Entity Whose Conduct Constitutes State Action Requiring Declaration of Rights Under Homeowner Association Restriction Prohibiting Political Signs*, 76 AM. JURIS. PROOF FACTS 3d 89 (2004).

²⁹ Pollack, *supra* note 3, at 847.

³⁰ *New York HOA Laws and Resources*, HOPB, <https://www.hopb.co/new-york> [<https://perma.cc/MJB8-UZDW>] (last visited Oct. 15, 2022).

³¹ Franzese, *supra* note 17; ASSOCIA, *supra* note 26.

³² Franzese, *supra* note 17.

³³ Brian J. Fleming, *Regulation of Political Signs in Private Homeowner Associations: A New Approach*, 59 VAND. L. REV. 571, 579–80 (2006).

³⁴ *Id.* at 579.

³⁵ *Id.* at 580.

³⁶ ASSOCIA, *supra* note 26.

³⁷ Fleming, *supra* note 33.

exists in this structure.³⁸ This imbalance is further exacerbated in cases of payment delinquencies and foreclosure, where the board is given great deference by the judicial system.

B. *Defining the Powers and Judicial Deference Afforded to HOAs*

The governing documents of HOAs empower the board to collect fees to maintain and manage the building.³⁹ These duties are arguably the most important responsibilities given to the HOA, as the collection of fees ensures that the building runs efficiently.⁴⁰ The bylaws, which are regarded as the “guiding force” of HOAs, contain the rules and regulations that grant the board their decision-making powers.⁴¹ The Court of Appeals of New York established in *Neponsit Property Owners’ Association v. Emigrant Savings Bank* that HOAs have the power to collect fees in order to maintain community spaces within the building, as such matters “touch and concern the land.”⁴² When a unit owner defaults and the board is unable to collect, HOAs have the unilateral power to file liens against unit owners for failing to comply with the requirements set by the board.⁴³

The assessments that the board collects are regarded as the “lifeblood” of the building, which “could crumble without that financial support.”⁴⁴ The fact that the assessments serve as the main revenue stream of any condominium or cooperative building further emphasizes the issue at hand.⁴⁵ There is no disputing the fact that the foreclosure power of HOAs serves to maintain the integrity of the community; however, this reveals the vast power imbalance that exists between HOAs and homeowners.⁴⁶ HOAs may take any measure to collect assessments, as long as they are “enforced ‘uniformly, promptly and firmly’” by the board.⁴⁷ If the employment of preliminary warnings and attempts to collect fail, HOAs look to

³⁸ *Id.*

³⁹ Giantomasi, *supra* note 18, at 2507–09.

⁴⁰ *Id.* at 2512–13, 2521.

⁴¹ *Id.* at 2507.

⁴² See *Neponsit Prop. Owners’ Ass’n. v. Emigrant Indus. Sav. Bank*, 15 N.E.2d 793, 797 (N.Y. 1938).

⁴³ Sterk, *supra* note 2, at 810–11.

⁴⁴ *Condominium and HOA Collections During the COVID-19 Pandemic*, NOWACK HOWARD, <https://nowackhoward.com/condominium-and-hoa-collections-during-the-covid-19-pandemic/> [<https://perma.cc/FN94-7BWF>] (last visited Nov. 20, 2022).

⁴⁵ *Id.*

⁴⁶ Giantomasi, *supra* note 18.

⁴⁷ *Id.* at 2513.

judicial interference to aid in foreclosing on an individual, and often do so.⁴⁸ Sale by judicial foreclosure is typically used as a last resort by associations, but become necessary where unpaid assessments begin accruing on a unit.⁴⁹ Courts apply the business judgment rule when weighing in on such matters, giving great deference to the HOA's decisions unless it acted in bad faith.⁵⁰ The board is essentially free to make unilateral decisions for the good of the community, as long as the decision fits squarely into the business judgment rule. The business judgment rule states that "each director [on the board] must perform his or her duties in good faith as would a reasonable prudent person given the circumstances, and in a manner reasonably in the best interests of the corporation."⁵¹ This rule, borrowed by courts from the law of corporations, solidifies the HOA as a quasi-governmental and business entity.⁵² Courts generally refuse to substitute their own judgment in place of the board's, giving great deference to the HOA's internal practices for collecting assessments and dealing with delinquencies.⁵³

C. *Foreclosure Proceedings in HOAs: Costs and Benefits*

Given the fact that the collection of assessments is important to the overall function of HOAs, it is important to understand what boards do when faced with delinquent homeowners. The threat of foreclosure enables HOAs to either force the payment of dues or replace the homeowner with an individual who can afford the costs.⁵⁴ When homeowners start falling behind on payments, HOAs are able to attach a lien to each individually owned unit.⁵⁵ The governing documents of each HOA building enable the board to do so and serve to put homeowners on notice, resulting in the broad authority to serve as "judge, jury, and executioner" in the face of delinquency.⁵⁶ The power to attach a lien to a unit is the first step of a foreclosure proceeding, opening the door for the HOA to foreclose on the

⁴⁸ *Id.* at 2517.

⁴⁹ Sterk, *supra* note 2, at 816.

⁵⁰ Pollack, *supra* note 3, at 844.

⁵¹ 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, 556 (2012).

⁵² See Pollack, *supra* note 3, at 844, 850.

⁵³ Giantomasi, *supra* note 18, at 2513–14; see Pollack, *supra* note 3, at 851.

⁵⁴ Furman, *supra* note 4, at 756–57.

⁵⁵ *Id.* at 755.

⁵⁶ *Id.*; Paula A. Franzese, *Privatization and its Discontents: Common Interest Communities and the Rise of Government for "the Nice"*, 37 URB. LAW. 335, 342–43 (2005).

home in the event the lien is not timely settled.⁵⁷ Given a situation where an insolvent homeowner is in arrears on common charge and maintenance fees, HOAs can choose to foreclose on the lien in order to collect the unpaid dues and force the homeowner out of the unit, often with the help of judicial intervention.⁵⁸ Homeowners struggling to afford the costs of housing will come to face this as reality, as evidenced by the hardships brought on by the COVID-19 pandemic.

The onslaught of the COVID-19 pandemic brought significant hardship, with tens of millions of people who lost their jobs struggling to pay for basic expenses.⁵⁹ As a result, homeowners fell behind on mortgage and common charge payments with the threat of foreclosure looming.⁶⁰ Co-op shareholders and condo unit-owners struggled to pay monthly dues to HOAs, accentuated by the loss of employment or reductions in hours as a result of the virus.⁶¹ In July of 2022, NYC saw an unemployment rate of 6.1%,⁶² a strong indication that the pandemic left many unable to tend to the costs associated with living, including the payment of HOA fees. These hardships were seen throughout NYC's boroughs with the highest risk of displacement. In some areas of Brooklyn, homeowners reported a median income at \$41,564, falling below the citywide median household income.⁶³ In 2019, the pre-pandemic median income in Brooklyn was \$67,567, showing the trend of economic hardship that the virus brought to the area.⁶⁴ States quickly adapted to alleviate these hardships through government intervention in

⁵⁷ Giantomasi, *supra* note 18 at 2517.

⁵⁸ Furman, *supra* note 4, at 760–61.

⁵⁹ *Tracking the COVID-19 Economy's Effect on Food, Housing, and Employment Hardships*, CTR. BUDGET & POL'Y PRIORITIES (Feb. 10, 2022), <https://www.cbpp.org/research/poverty-and-inequality/tracking-the-covid-19-economys-effects-on-food-housing-and> [<https://perma.cc/QQ8Y-R7VV>].

⁶⁰ *See id.*

⁶¹ *Co-op and Condo Owners Get a Lifeline Against Foreclosure*, HABITAT MAG. (Dec. 7, 2021), <https://www.habitatmag.com/Publication-Content/COVID-19/2021/2021-December/Co-op-and-Condo-Owners-Get-a-Lifeline-Against-Foreclosure> [<https://perma.cc/C8TH-86DB>]; HABITAT MAG., *supra* note 6.

⁶² Nicole Hong & Matthew Haag, *In New York City, Pandemic Job Losses Linger*, N.Y. TIMES (Sept. 14, 2022), <https://www.nytimes.com/2022/09/14/nyregion/nyc-covid-job-losses.html> [<https://perma.cc/2HRL-C23Y>]; *See* Daniel Finnegan, *Looking for a Silver Lining: How the COVID-19 Pandemic Forced New York to Reckon with its Affordable Housing Crisis*, 15 BROOK. J. CORP. FIN. & COM. L. 467, 479 (2021).

⁶³ Anna Bradley-Smith, *As COVID Protections End, Foreclosures and Homelessness in Brooklyn Could be Poised to Increase*, BROOK. PAPER (July 14, 2022), <https://www.brooklynpaper.com/protections-brooklyn-foreclosures-increase/> [<https://perma.cc/ABB6-YMRT>].

⁶⁴ *Brooklyn, New York (NY) Income Map, Earnings Map, and Wages Data*, CITY-DATA, <https://www.city-data.com/income/income-Brooklyn-New-York.html> [<https://perma.cc/8M8G-W683>] (last visited Feb. 3, 2023).

order to prevent defaults on payments.⁶⁵ New York State, in an effort to protect struggling homeowners, implemented the COVID-19 Emergency Eviction and Foreclosure Prevention Act (“EEFPA”) in December of 2020.⁶⁶ The EEFPA served many purposes, one of which included the prevention of residential mortgage and tax lien foreclosures.⁶⁷ The Act’s protection also extended to “any foreclosure or eviction proceeding in which a borrower or homeowner filed a hardship declaration,” allowing those affected by the pandemic to explain how they were unable to afford living costs.⁶⁸ The legislation protected delinquent owners in residential cooperatives from foreclosure, where ownership of real property is conditioned on the ownership of shares of a unit.⁶⁹ However, the Act failed to prevent foreclosure by HOAs where delinquent common charges were at issue.⁷⁰ This flaw is evidenced by the fact that most of the foreclosures that took place during the period the Act was in place were a result of common charge liens.⁷¹

As a result of the New York State legislation, as well as many other states following suit, foreclosures in the U.S. hit record lows.⁷² In 2020, the number of residential lis pendens in NYC amounted to 2,661 notices.⁷³ This shows a significant decrease from pre-pandemic levels in 2019, which saw over 9,000 lis pendens filed against delinquent homeowners.⁷⁴ However, the end of the EEFPA in early 2022 brought forth the filing of more than 1,000 pre-foreclosure notices against NYC homeowners, a huge surge from the low figures seen earlier in the pandemic.⁷⁵ These figures indicate a

⁶⁵ *U.S. Foreclosure Starts Reach Pre-Pandemic Levels Nationwide*, ATTOM DATA (Sept. 8, 2022), <https://www.attomdata.com/news/market-trends/foreclosures/attom-august-2022-u-s-foreclosure-market-report/> [https://perma.cc/3X3S-7ZG6].

⁶⁶ *New York’s COVID-19 Eviction and Foreclosure Prevention and Small Businesses Acts Extended to August 31, 2021 – What You Need to Know*, BLANKROME (May 13, 2021), <https://www.blankrome.com/publications/new-yorks-covid-19-eviction-and-foreclosure-prevention-and-small-businesses-acts> [https://perma.cc/JJW3-RSEJ].

⁶⁷ *Id.*

⁶⁸ Cascino, *supra* note 9.

⁶⁹ S. 9114, 2020 Leg. (N.Y. 2020).

⁷⁰ *Id.*

⁷¹ HABITAT MAG., *supra* note 6.

⁷² Leesa Davis, *Foreclosures are Rising with the End of COVID-era Moratoriums. Here’s Where They’re Happening the Most*, SCNOW (Aug. 29, 2022), https://scnow.com/business/investment/personal-finance/foreclosures-are-rising-with-the-end-of-covid-era-moratoriums-heres-where-theyre-happening-the/collection_4850a0af-9995-5b80-9153-7679a7e81cec.html#1 [https://perma.cc/9P8C-VGMS].

⁷³ Eliza Theiss, *2022 Q1 Foreclosure Report: NYC Records 87 Foreclosures Since End of Moratorium*, PROP. SHARK (Apr. 14, 2022), <https://www.propertyshark.com/Real-Estate-Reports/2022/04/14/nyc-foreclosure-report-q1-2022/> [https://perma.cc/CZN5-JR9M].

⁷⁴ *Id.*

⁷⁵ HABITAT MAG., *supra* note 6.

growing pressure on homeowners to repay arrears in order to avoid foreclosure. However, with the pandemic still ongoing and many struggling to get back on their feet, the financial situations of many remain unchanged.⁷⁶ Where liens accumulate and remain unsettled as a result of non-payment, it becomes clear that foreclosure may be imminent.

A significant portion of these pre-foreclosure notices were generated from common charge liens on condominiums and cooperative buildings, constituting 501 notices within the first three months of 2022 alone.⁷⁷ While this figure is not as high as the 808 foreclosures that affected homeowners in HOA-led buildings in 2019, it is predicted that common charge liens will be foreclosed on at increasing rates now that the moratorium has been lifted.⁷⁸ Common charge liens are attached to the unit of a delinquent homeowner in a condominium or cooperative building by the building's HOA.⁷⁹ Where assessments are left unpaid and homeowners lack statutory protection against foreclosure, HOAs are enabled to attach a lien to the homeowner's unit and begin foreclosure processes. Where HOAs initiate a foreclosure proceeding against a delinquent unit, the property will typically be sold at auction to satisfy the homeowner's debts.⁸⁰ These liens take priority over unpaid mortgage liens that the owner may have and play a significant role in the foreclosure power of the HOA.⁸¹ The collection of assessments are an important part of the duties afforded to HOAs, as these assessments effectively work to maintain the community functions of the building.⁸² Without the collection of these assessments, the building may cease to provide any of the essential services that work to maintain the community.

With nearly 73.9 million Americans living in community associations governed by an HOA, it is clear that the threat of foreclosure in a post-pandemic world jeopardizes the well-being of homeowners across the country.⁸³ NYC currently leads as the metropolitan area with the greatest number of foreclosure starts in

⁷⁶ Hong & Haag, *supra* note 62.

⁷⁷ HABITAT MAG., *supra* note 6.

⁷⁸ Bradley-Smith, *supra* note 63.

⁷⁹ *Condominium Liens: Which Comes First?*, GRAFF L. OFFS., <https://www.grafflawoffices.net/condominium-liens-which-comes-first/> [<https://perma.cc/ST4V-3MQL>] (last visited Nov. 20, 2022).

⁸⁰ Amy Loftsgordon, *HOA Liens and Foreclosures: An Overview*, NOLO, <https://www.nolo.com/legal-encyclopedia/hoa-liens-foreclosures-an-overview.html> [<https://perma.cc/MK89-6Z9S>] (last visited Nov. 20, 2022).

⁸¹ GRAFF L. OFFS., *supra* note 79.

⁸² Sterk, *supra* note 2.

⁸³ *HOA Statistics*, IPROPERTYMANAGEMENT (Apr. 23, 2022), <https://ipropertymanagement.com/research/hoa-statistics#:~:text=73.9%20million%20Americans%20live%20in,HOA%20housing%20units%20are%20occupied> [<https://perma.cc/YTP2-R874>].

the country.⁸⁴ Where a large number of New York residents reside in buildings governed by HOAs,⁸⁵ it is clear that the harmful effects of the COVID-19 pandemic will inevitably end in conflict between the homeowner and the board.⁸⁶ HOAs, acting as a “private government” with an abundance of resources at their disposal, can represent themselves in the face of the judicial foreclosure while struggling homeowners are not likely to secure representation.⁸⁷ Where these processes have proven to impose costs on both parties, it is clear that a different approach to traditional common charge lien foreclosure must be adopted.

When HOAs typically follow through with the proceedings for judicial foreclosure, they are faced with an undesirable result. After a unit is foreclosed on and is emptied of its delinquent owners, HOAs must absorb the tax costs of the property while trying to find a new buyer.⁸⁸ While the HOA has successfully removed the non-paying homeowner, they are left to search for a new owner who will hopefully pay the costs associated with living in a condominium or cooperative building. This result likewise has undesirable effects on other homeowners in the building as well. Incentives to pursue foreclosure litigation are often built into the very guidelines that authorize HOAs to take action and further allow them to tax other building residents in order to finance costly lawsuits.⁸⁹ This proves to be a costly end for both the HOA—who must cover taxes on an empty unit and effectively injure other residents—and for the struggling owner.⁹⁰ Through understanding the undeniable impact that the COVID-19 pandemic continues to have on homeowners across NYC, it is clear that judicial foreclosure is an undesirable result that can leave both parties worse off.⁹¹

⁸⁴ *U.S. Foreclosure Activity Continues to Increase Quarterly Nearing Pre-Pandemic Levels*, ATTOM (Oct. 13, 2022), <https://www.attomdata.com/news/market-trends/foreclosures/attom-september-and-q3-2022-u-s-foreclosure-market-report/#:~:text=13%2C%202022%20%E2%80%94%20ATTOM%2C%20a,up%203%20percent%20from%20the> [<https://perma.cc/TEP2-A9YJ>].

⁸⁵ Tony Mariotti, *HOA Stats: Average HOA Fees & Number of HOAs by State* (2023), RUBYHOME (July 18, 2022), <https://www.rubyhome.com/blog/hoa-stats/#hoa-popularity> [<https://perma.cc/T8NE-TH6F>] (explaining that 18.8% of New York State’s population resides in a HOA).

⁸⁶ *2019–2020 U.S. National and State Statistical Review for Community Association Data*, CMRY ASS’NS INST., https://foundation.caionline.org/wp-content/uploads/2020/08/2020StatsReview_Web.pdf [<https://perma.cc/7HTP-ERPX>] (last visited Nov. 20, 2022).

⁸⁷ Boudreaux, *supra* note 16.

⁸⁸ Furman, *supra* note 4, at 761.

⁸⁹ Franzese, *supra* note 56.

⁹⁰ Furman, *supra* note 4.

⁹¹ HABITAT MAG., *supra* note 6.

III. DISCUSSION

As title holders to the common property in the community, HOAs have a strong interest in maintaining the operations and activities of each building.⁹² This interest is particularly strong because the members of the board reside in the very building they oversee, enhancing the desire to keep building operations running smoothly.⁹³ The purpose of monthly assessments is to enable unit owners to pay their proportionate share of expenses in order to fund the overall function of the community vis-à-vis the HOA.⁹⁴ Without the participation of unit owners in paying these assessments, the board is unable to carry out its delegated functions.⁹⁵ The non-payment of these dues can either result in other unit owners bearing the costs of delinquent owners or the cessation of amenities due to a lack of funding.⁹⁶ Neither of these options are desirable, so the collection of these dues are one of the most important duties of the board.⁹⁷ As a self-governing mechanism, HOAs have a strong interest in funding the maintenance and repairs of amenities and are governed by strict regulations as such.⁹⁸ It is clear that the interests of the HOA are significant, as HOAs cannot afford to absorb a high number of delinquencies.⁹⁹

Homeowners have a strong interest in participating in communities and staying within their homes. The problem that arises is the potential for mistreatment where HOAs are afforded the broad array of powers that they are to keep the community in order.¹⁰⁰ The threat of foreclosure can be detrimental to struggling homeowners when they are taken to court for unpaid assessments, as the legal fees they incur can be greater than the actual amount they owe to the HOA.¹⁰¹ This issue is further exacerbated where homeowners are already facing financial hardship. In addition, homeowners brought to judicial foreclosure must incur the costs of funding their own case while paying a share of the HOA's legal expenses, a duty

⁹² Giantomasi, *supra* note 18.

⁹³ ASSOCIA, *supra* note 26.

⁹⁴ Giantomasi, *supra* note 18.

⁹⁵ Sterk, *supra* note 2.

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ Furman, *supra* note 4.

⁹⁹ Laci Ehlers, *Limiting the Foreclosure Power of Texas HOAs with a Percentage Threshold*, 43 ST. MARY'S L. J. 187, 200 (2011).

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

that is typically stated in the bylaws.¹⁰² The unique situation of NYC homeowners as a result of the COVID-19 pandemic furthers the issues posed by HOA power. As foreclosure moratoriums lift and the COVID-19 pandemic dwindles on, it is clear that there is a conflict of interest where judicial foreclosure is not the solution.

A. *The Deficiencies of Traditional Litigation*

Given that most HOAs move to foreclose on unsettled liens and resort to judicial foreclosure in order to expel a delinquent owner from the community, it is important to note the deficiencies of this traditional process. Litigation and delays associated with it have been referred to as a “ceaseless and unremitting problem of modern civil justice.”¹⁰³ In major urban areas, court dockets are congested and slow-moving as a result of the influx of housing disputes that are filed.¹⁰⁴ As a result, parties are typically left in limbo while waiting for their case to reach the courts. Critics of litigation-based solutions argue that the escalating court costs and legal fees surrounding judicial intervention are excessive.¹⁰⁵ Delays are viewed as problematic where time-sensitive issues are at hand, as delays can often last years before a decision is reached.¹⁰⁶

Other criticisms regarding litigation concern the inherent limitations to the process. When litigation is chosen as a means of dispute resolution, it typically focuses on narrow issues that are handled within the scope of existing legal doctrine.¹⁰⁷ Given the court’s tendency to defer to the business judgment rule, rulings are often given in favor of the HOA, who have acted within their scope of duties by foreclosing on a delinquent homeowner.¹⁰⁸ With an objective of arriving at a decision about “who is right and who is wrong,” litigation fails to capture the various factors that underlie the dispute.¹⁰⁹ The adversarial nature of the process fails to encapsulate the “human” qualities of each dispute, such as the factors that

¹⁰² Evan McKenzie, *Private Covenants, Public Laws, and the Financial Future of Condominiums*, 52 UNIV. ILL. CHI. J. MARSHALL L. REV. 715, 721 (2019).

¹⁰³ George L. Priest, *Private Litigants and the Court Congestion Problem*, 69 B.U.L. REV. 527 (1989).

¹⁰⁴ Scott E. Mollen, *Alternate Dispute Resolution of Condominium and Cooperative Conflicts*, 73 ST. JOHN’S L. REV. 75, 80–93 (1999).

¹⁰⁵ Kathleen A. Devine, *Alternative Dispute Resolution: Policies, Participation, and Proposals*, 11 REV. LITIG. 83, 84 (1991).

¹⁰⁶ Mollen, *supra* note 104.

¹⁰⁷ Devine, *supra* note 105, at 88.

¹⁰⁸ Giantomasi, *supra* note 18; Pollack, *supra* note 3.

¹⁰⁹ Devine, *supra* note 105, at 88–89.

led to the delinquencies or other changing circumstances in the homeowner's life. The process fails to consider the nature of the relationship between parties and instead places the judiciary in the position of evaluating the intricacies of the dispute.¹¹⁰ The process antagonizes parties and gives them little control over the process, contributing to the animosity that surrounds litigation.¹¹¹

Despite the undeniable defects of this system, litigation has increased in most areas of conflict.¹¹² The model assumes the self-interest of the parties and delivers a favorable outcome to those with the resources to advocate for their cause.¹¹³ The tendency to stick to the status quo is driven by the perception that the judicial process will present a clear winner and loser in any situation and will tend to favor those who have prior decisions on their side.¹¹⁴ A shift to an alternative source of dispute resolution is a clear alternative to the pitfalls of litigation and should be explored in this context.

B. *Mediation as a Viable Form of Conflict Resolution*

Mediation serves as an alternative form of dispute resolution compared to typical judicial processes. The informal process of mediation employs the use of a neutral third party in order to help conflicting parties reach a voluntary and negotiated resolution.¹¹⁵ The mediator does not decide what the fair outcome of the situation is but instead provides the means for parties to communicate and provides guidance to a mutually beneficial solution.¹¹⁶ Mediators act through setting a realistic agenda for the conflict at hand and maintaining order where parties are unable to sort through issues themselves.¹¹⁷ Parties are also able to meet one-on-one in a separate caucus with the mediator to ask questions and express their position in a more private setting.¹¹⁸ In cases where homeowners are faced with difficulties as the result of an unprecedented pandemic,

¹¹⁰ Kenneth R. Feinberg, *Mediation—A Preferred Method of Dispute Resolution*, 16 PEPP. L. REV. S5, S6-S7 (1989).

¹¹¹ *Id.* at S7.

¹¹² *Id.*

¹¹³ Jack B. Weinstein, *Some Benefits and Risks of Privatization of Justice Through ADR*, 11 OHIO ST. J. DISP. RESOL. 241, 277-80 (1996).

¹¹⁴ Feinberg, *supra* note 110, at S6.

¹¹⁵ *Mediation Questions and Answers*, N.Y.C. HUM. RTS., <https://www1.nyc.gov/site/cchr/enforcement/mediation.page> [<https://perma.cc/P7KX-D76B>] (last visited Oct. 15, 2022).

¹¹⁶ *Mediation Defined: What is Mediation?*, JAMS, <https://www.jamsadr.com/mediation-defined/> [<https://perma.cc/XZ4N-VLPM>] (last visited Oct. 15, 2022).

¹¹⁷ *Id.*

¹¹⁸ *Id.*

mediation allows for these individuals to explain the unique nature of their situation. Mediation is a form of dispute resolution that emphasizes an outcome based on harmony rather than determining who is right or wrong in the given situation.¹¹⁹ This process stands in stark contrast to the adversarial nature of litigation and is a viable alternative to the judicial foreclosure process.

The mediation process typically begins with a joint session, which serves to educate the mediator, state the differing views of the facts, and uncover what each side regards as a satisfactory resolution.¹²⁰ The mediator is able to understand the basis of the issue at hand and where the parties currently stand in the dispute.¹²¹ It is within this portion of the mediation that the ground rules of the session are stated and the realistic expectations of the parties are established.¹²² Joint sessions are utilized by mediators to assess the emotional state of the parties from the beginning and to evaluate possible strategic choices for continuing the mediation.¹²³ If the situation is one of great sensitivity and the mediator senses that emotions are running high, the mediator may opt to bypass the joint session and move directly to the next stage of mediation in order to avoid any further conflict.¹²⁴ This is an important benefit of the process, as the session can continually be adapted to the needs of the parties.

The next step of the process, the caucus stage, is regarded as being one of the most attractive features of mediation.¹²⁵ The caucus stage allows parties to discuss the matter separately with the mediator and invites private conversation.¹²⁶ These caucuses are confidential and allow each side to discuss their underlying needs and concerns in the dispute, as well as how important each factor is in reaching a resolution.¹²⁷ It is within these caucuses that parties can reveal private facts and requests that they may not otherwise be able to express to the other side.¹²⁸ The transfer of this information enables the mediator to engage in shuttle diplomacy, a process in which the mediator moves back and forth between parties with proposals and

¹¹⁹ Leonard L. Riskin, *Mediation and Lawyers*, 43 OHIO ST. L. J. 29, 33–4 (1982).

¹²⁰ James Kerwin, *How Mediation Works When Both Parties Agree They Need Help Resolving the Dispute*, HARV. L. SCH. (Dec. 22, 2022), <https://www.pon.harvard.edu/daily/mediation/navigating-the-mediation-process/> [<https://perma.cc/HJD5-XEGX>].

¹²¹ *Id.*

¹²² Mollen, *supra* note 104.

¹²³ Kerwin, *supra* note 120.

¹²⁴ *Id.*

¹²⁵ Mollen, *supra* note 104, at 95.

¹²⁶ *Id.*

¹²⁷ Kerwin, *supra* note 120.

¹²⁸ *Id.*

suggestions to resolve the issue at hand.¹²⁹ With the mediator acting as a proxy, emotional situations can be de-escalated. This process may take some time, but more often than not, it ends in a resolution that is mutually acceptable to the parties.¹³⁰

There are three common models of mediation that are typically used by mediators when engaging in these processes. These models include facilitative, transformative and evaluative mediation.¹³¹ Mediation is unique in that these different methods can be adopted based on what kind of conflict is at hand. The facilitative model employs a mediator to help the parties recognize their problems and seek a mutually agreeable resolution.¹³² The mediator in this instance abstains from making recommendations or imposing a decision on the parties, but rather works to encourage the parties to reach their own solution through a thorough analysis of the other's deeper interests.¹³³ The philosophy of this approach is that the parties will come to their best-case solution with as little help from the mediator as possible.¹³⁴ Facilitative mediation places an emphasis on creating an environment free of hostilities, as well as a place where parties can discuss all the relevant information of the issues at hand.¹³⁵ This is particularly useful in emotionally charged situations.¹³⁶

In the transformative mediation model, mediators encourage disputants to recognize each other's needs and interests.¹³⁷ This method is more holistic in nature, as the parties' values and points of view are considered.¹³⁸ Empowerment and mutual recognition are the fundamentals of this method.¹³⁹ Transformative mediation places an emphasis on parties structuring the process and outcome of the mediation session, and the mediator follows the lead of the parties.¹⁴⁰ Parties are enabled to define their issues and seek solutions on

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ Tanya M. Marcum, et al., *Reframing the Mediation Lens: The Call for a Situational Style of Mediation*, 36 S. ILL. UNIV. L. J. 317, 318 (2012).

¹³² *Id.* at 319.

¹³³ Katie Shonk, *Types of Mediation: Choose the Type Best Suited to Your Conflict*, HARV. L. SCH. (Aug. 8, 2022), <https://www.pon.harvard.edu/daily/mediation/types-meditation-choose-type-best-suited-conflict/#:~:text=In%20facilitative%20mediation%20or%20traditional,exploring%20each%20other's%20deeper%20interests.%2036%20SILULJ> [<https://perma.cc/5NMD-8VUR>].

¹³⁴ Dave Wakely, *Spectrum of Mediation: Facilitative Mediation*, WAKELY MEDIATION (Sept. 5, 2017), <https://wakelymediation.com/2017/09/facilitative-meditation/> [<https://perma.cc/4VBF-Y9AD>].

¹³⁵ Marcum et al., *supra* note 131, at 319.

¹³⁶ Wakely, *supra* note 134.

¹³⁷ Marcum et al., *supra* note 131, at 320.

¹³⁸ *Id.*

¹³⁹ Brad Spangler, *Transformative Mediation*, BEYOND INTRACTABILITY (2013), https://www.beyondintractability.org/essay/transformative_mediation [<https://perma.cc/JDD2-VF3C>].

¹⁴⁰ Marcum et al., *supra* note 131.

their own, as well as understand the perspective of the other side.¹⁴¹ Like the facilitative model, the mediator's role is to help guide the conversation rather than impose an outcome on the issue at hand.¹⁴² This method is particularly useful where parties have difficulty interacting with each other and have a hard time understanding where the other side is coming from.¹⁴³ This method is intended to effect a deeper change in people and their interpersonal relationships beyond that of remedying a short-term problem.¹⁴⁴ Mediators often opt to use this model where they feel a deeper conflict is at issue between the parties.¹⁴⁵

The evaluative mediation model—regarded as the “court-mandated” model—allows the mediator to take on a more active role in the dispute resolution process.¹⁴⁶ In this scenario, mediators are more likely to make recommendations and suggestions towards a solution that they believe would be best for the parties.¹⁴⁷ Mediators take into account the legal rights of the parties rather than their needs and interests, and help to determine what is fair under the circumstances.¹⁴⁸ Mediators will typically point out the weaknesses in each party's case and predict what a judge or jury would be likely to do.¹⁴⁹ This method is particularly helpful in assessing the costs and benefits of resorting to litigation rather than a settlement rooted in mediation.¹⁵⁰ Attorneys with legal expertise in the area of dispute usually head evaluative mediation conferences, allowing for impartial yet informed leadership.¹⁵¹

C. *The Benefits Associated with Mediation*

Regardless of the method chosen, the mediation process holds a wide range of benefits to conflicting parties. This flexible form of conflict resolution does not require the use of attorneys or formal

¹⁴¹ Spangler, *supra* note 139.

¹⁴² Jim Hanley, *Transformative Mediation*, SHRM (Apr. 1, 2010), <https://www.shrm.org/hr-today/news/hr-magazine/pages/0410tools.aspx> [<https://perma.cc/BP8V-4U92>].

¹⁴³ *Id.*

¹⁴⁴ Spangler, *supra* note 139.

¹⁴⁵ *See id.*

¹⁴⁶ Marcum et al., *supra* note 131, at 319.

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

¹⁴⁹ Zena Zumeta, *Styles of Mediation: Facilitative, Evaluative, and Transformative Mediation*, MEDIATE (Feb. 27, 2018), <https://mediate.com/styles-of-mediation-facilitative-evaluative-and-transformative-mediation/> [<https://perma.cc/XG6C-LHNL>].

¹⁵⁰ Marcum et al., *supra* note 131.

¹⁵¹ Shonk, *supra* note 133.

rules of evidence in order to provide a solution.¹⁵² Legal fees tend to increase as litigation drags on, yet mediation processes generally take less time to complete and allow for an earlier solution compared to traditional litigation.¹⁵³ Attorneys are not necessary during the mediation process, whereas litigation typically has attorneys controlling the process and charging exponential fees.¹⁵⁴ As a result, mediation processes tend to save time and money compared to traditional litigation.¹⁵⁵ Pro-bono services are also an option for those who require assistance with the fees associated with mediation.¹⁵⁶ Parties are generally working together on their own terms and in accordance with the terms that they drafted themselves.¹⁵⁷ Parties to mediation sessions typically reach settlement quickly due to the high rate of compliance in such a collaborative setting.¹⁵⁸

Another key benefit of mediation is that it aids in preserving relationships.¹⁵⁹ The litigation process is often regarded as creating a hostile environment.¹⁶⁰ The adversarial nature of the process tends to result in parties being further divided rather than solving the actual issues at hand.¹⁶¹ Mediation is better suited for conflicts between parties where there is a need for cooperation in an ongoing relationship.¹⁶² Where future disputes may arise due to the nature of the parties' relationship, mediation looks towards ending the problem and creating a resolution that can mitigate any future issues.¹⁶³ Preservation of relationships is an important goal of mediation, and the process aids in achieving this through the use of customized and ongoing agreements.¹⁶⁴ Parties play a greater role in setting the terms and goals of the session.¹⁶⁵ Procedural and interpersonal

¹⁵² *Advantages of Mediation*, U.S. OFF. SPECIAL COUNS., <https://osc.gov/Services/Pages/ADR-Advantages.aspx> [<https://perma.cc/2FBB-HZTX>] (last visited Oct. 15, 2022).

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ NYC HUM. RTS., *supra* note 115.

¹⁵⁶ *Recommendation § 300*, A.B.A. (Aug. 3–4, 2009), https://www.americanbar.org/content/dam/aba/directories/policy/annual-2009/2009_am_300.pdf [<https://perma.cc/3FJP-7439>] (ABA resolution supporting access to pro bono or low-cost counsel or other advocates for parties who would otherwise be unrepresented in the mediation process).

¹⁵⁷ Fabiola De Armas, *Is Mediation the Future for Settling Disputes*, 23 PUB. INT. L. REP. 106 (2018).

¹⁵⁸ *Id.*

¹⁵⁹ U.S. OFF. SPECIAL COUNS., *supra* note 152.

¹⁶⁰ *How Courts Work*, A.B.A. (Sept. 9, 2019), https://www.americanbar.org/groups/public_education/resources/law_related_education_network/how_courts_work/mediation_advantages/ [<https://perma.cc/F34H-8NXN>].

¹⁶¹ *Id.*

¹⁶² *Id.*

¹⁶³ *Id.*

¹⁶⁴ U.S. OFF. SPECIAL COUNS., *supra* note 152.

¹⁶⁵ *Id.*

issues that are not suited for legal intervention typically fare better in mediation, as settlements are tailored by parties to suit the fine details of the issue.¹⁶⁶

Although litigation is typically turned to because of the benefits of judicial enforcement, mediation can also result in a legally binding outcome.¹⁶⁷ One of the attractive features of mediation includes the parties' ability to tailor the session to their individual needs. Parties can agree to a contract on their own terms that provides that a decided outcome is legally binding on the parties.¹⁶⁸ This contract gets sent to a court and is approved by a judge, thus holding both parties to the mutual agreement.¹⁶⁹ In the event that this contract is not honored by a party, individuals are able to pursue legal recourse.¹⁷⁰ The mediation process is unique in its ability to conform to parties' needs and provide legally binding outcomes without the need for litigation.

III. PROPOSAL

The structure of HOAs must be reconfigured in a way that allows for alternate dispute resolution to rectify the issues exposed by hardships of the pandemic. A system that helps to avoid judicial foreclosure in HOA-governed buildings must be implemented to effectively solve these disputes. The structure of HOA boards breeds opportunities for conflicts of interest between residents and boards in the context of foreclosure.¹⁷¹ Litigation typically falls in favor of HOAs, who use their power and resources to foreclose on a homeowner.¹⁷² The use of judicial foreclosure neglects the unique circumstances posed by the COVID-19 pandemic. Where homeowners facing hardship are struggling to pay and lack the resources to explain their situation or pay their arrears, the HOA will nearly always prevail in litigation.¹⁷³ A solution where the needs of both parties are dealt with exists and can be found through alternate dispute resolution.

¹⁶⁶ *Id.*

¹⁶⁷ *Is Mediation Legally Binding?*, ANDERSON HUNTER (July 31, 2021), <https://andersonhunterlaw.com/blog/is-mediation-legally-binding> [<https://perma.cc/R85N-EKFU>].

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

¹⁷⁰ *Id.*

¹⁷¹ See Mollen, *supra* note 104 at 88–89 (describing the hostilities that occur in the between the HOA and resident facing foreclosure).

¹⁷² Mollen, *supra* note 104 at 86.

¹⁷³ Devine, *supra* note 105; Mollen, *supra* note 104 at 86.

The use of alternate dispute resolution methods helps to save homes from auctions, as well as to provide an outlet for the homeowner and HOA to work through a plan together.¹⁷⁴ Mediation can offer a solution to these problems and allow for a forum for homeowners to vouch for themselves regarding their situation. The introduction of a mediator to help work out the issues related to payment delinquencies in a non-judicial setting may help aid parties in reaching a mutually desirable end. Parties are empowered to work together and with the mediator to figure out a solution, rather than leave the outcome in the hands of a judge.¹⁷⁵ As mentioned above, mediation is time-efficient and inexpensive compared to traditional judicial foreclosure methods.¹⁷⁶ The use of this method allows for parties to work together towards a common-interest goal.¹⁷⁷

A. *Methods of Mediation Suitable for HOA Foreclosure*

Of the facilitative, transformative, and evaluative models of mediation, the issues posed by foreclosure in buildings governed by HOAs require a blend of these methods. Mediators view these models as existing on a continuum, often blending these techniques in order to adapt to the unique circumstances of every dispute.¹⁷⁸ Aspects of each of these models are often applied to areas where communication between HOAs and homeowners is necessary, such as in a time of financial hardship. The facilitative model's emphasis on de-escalating hostile situations may play a significant role in communities where neighborly disputes exist between board members and unit owners.¹⁷⁹ Homeowners and the HOA work together in this model rather than as adversaries. The transformative model allows for each party to express their points of view and interests.¹⁸⁰ In cases where financial hardships hinder individuals from being able to pay their common charges, a transformative setting may give struggling homeowners the space to express their financial situation and how the COVID-19 pandemic has affected their ability to keep up with assessments. Homeowners could use the forum to explain how they expect their financial situation to change over time and how they

¹⁷⁴ Meek, *supra* note 22.

¹⁷⁵ JAMS, *supra* note 116.

¹⁷⁶ Ehlers, *supra* note 99, at 218.

¹⁷⁷ *Id.*

¹⁷⁸ Zumeta, *supra* note 149.

¹⁷⁹ ASSOCIA, *supra* note 27; Marcum et al., *supra* note 131, at 319.

¹⁸⁰ Marcum et al., *supra* note 131, at 320.

can expect to afford the association's dues in the coming months. Likewise, board members will be able to express their concerns about how to maintain the common areas and provide other services in the face of resident delinquency. The evaluative model would be helpful in these disputes in that the mediator would be empowered to suggest a possible resolution.¹⁸¹ This model would also be helpful in communicating the advantages of reaching a mutual agreement rather than resorting to traditional litigation, in that parties can work out a plan with the help of an informed leader.¹⁸²

Where parties reach a stalemate, the mediator may be helpful in working toward a solution that benefits both parties. Examples of possible solutions could be like that of a payment plan for the delinquent resident based on a showing of financial hardship and inability to pay common charges. If individuals are getting back on their feet due to a new job or changed circumstances, they would be able to make a showing of this to the board and work out an agreement that allows them to remain in their homes while they catch up on unpaid dues. HOAs would likewise be able to tailor their own needs to this plan in order to ensure a fair resolution. Regardless of the proposed method and solution, a neutral mediator will be able to recognize the needs of both parties and work towards a mutually beneficial solution.¹⁸³

A situation where foreclosure is on the table is aided by mediation's benefits of low costs and speedy resolution, as homeowners under financial pressure can often not afford the high costs of legal representation. Litigation costs can rack up as HOAs are able to add their legal fees to the homeowner's common charge arrears.¹⁸⁴ If the homeowner wishes to contest the foreclosure and loses, the owner may face legal fees reaching upwards of tens of thousands of dollars.¹⁸⁵ HOAs likewise face pressures related to the maintenance of the building they govern, as litigation is costly and time consuming, and fees remain unpaid.¹⁸⁶ Mediators can seek agreement from litigators to forbear from litigation during the mediation process,¹⁸⁷ preventing any judicial foreclosure proceedings from taking place. Mediation also preserves confidentiality, as the

¹⁸¹ Marcum et al., *supra* note 131, at 319.

¹⁸² Shonk, *supra* note 133.

¹⁸³ Marcum et al., *supra* note 131, at 320.

¹⁸⁴ Wade Goodwyn, *Not So Neighborly Associations Foreclosing on Homes*, NPR (June 29, 2010), <https://www.npr.org/2010/06/29/128078864/not-so-neighborly-associations-foreclosing-on-homes> [<https://perma.cc/G6YS-56U2>].

¹⁸⁵ *Id.*

¹⁸⁶ Furman, *supra* note 4; Riskin, *supra* note 119, at 33 (explaining that mediation is beneficial where the parties have a complex and interdependent relationship).

¹⁸⁷ JAMS, *supra* note 116.

parties and mediator must sign an agreement to treat any information shared as private.¹⁸⁸ In a situation where neighbors who serve on HOAs are given the power to foreclose on their own neighbors, it is significant that the unfortunate details of one's financial hardships cannot be used against them at a future time.

The co-dependent relationship between the HOA and the homeowner makes foreclosure cases ripe for mediation, as they focus on repairing and facilitating an ongoing relationship rather than solving a "one-time situation."¹⁸⁹ The HOA's existence is dependent on the homeowner's ability to pay, and homeowners rely on the board to maintain and provide services to the benefit of the community as a whole.¹⁹⁰ Mediation settlements consider all parties' interests in ways that judicial processes do not consider, as the latter typically result in a "win/lose" outcome.¹⁹¹ Mediation is forward-looking in that parties are more likely to use it as a form of dispute resolution for future issues rather than resorting to an adversarial approach, like litigation.¹⁹² In the context of an ongoing pandemic, where one's financial state and overall well-being continues to be uncertain, this system can aid in resolving future disputes or coming up with a sustainable plan that benefits both parties.

B. *Implementing Mediation into HOA Policy*

There are methods that allow for the implementation and enforcement of mediation processes between homeowners and the HOA in the face of foreclosure. One of these methods includes action taken directly by the state legislature.¹⁹³ Other states have implemented ADR provisions in their statutes that govern HOAs across the country, such as in Florida and Maryland.¹⁹⁴ In Florida, the legislature mandated nonbinding arbitration in disputes where judicial foreclosure was at stake for delinquent homeowners living in HOA-led communities.¹⁹⁵ The Florida legislature justified this statute by finding that unit owners faced disadvantages when litigating against HOAs that were more equipped to bear the costs

¹⁸⁸ NYC HUM. RTS., *supra* note 115.

¹⁸⁹ Andreas Nelle, *Making Mediation Mandatory: A Proposed Framework*, 7 OHIO ST. J. DISP. RESOL. 287, 297 (1992).

¹⁹⁰ Giantomasi, *supra* note 18.

¹⁹¹ U.S. OFF. SPECIAL COUNS., *supra* note 152.

¹⁹² *Id.*

¹⁹³ Giantomasi, *supra* note 18, at 2521–24.

¹⁹⁴ *Id.* at 2518.

¹⁹⁵ *Id.*

of litigation.¹⁹⁶ Although the Florida legislature was reacting to a congested docket and other deficiencies in the judicial foreclosure system, NYC would benefit from a similar statute.¹⁹⁷ The California legislature also took similar steps to limit judicial foreclosure in HOAs through the Davis-Stirling Common Interest Development Act.¹⁹⁸ The Act requires HOAs to offer a homeowner the chance to participate in ADR methods before initiating foreclosure proceedings for delinquent assessments.¹⁹⁹ The effects of COVID-19 only further exacerbate the issues that were recognized in Florida and California, and further expose the pressing need for action on the part of the legislature. The New York state legislature, in recognizing the pressing issue that foreclosure poses in the post-pandemic world, could adopt similar provisions in their laws that currently govern HOAs. The benefit of having a state mandate to turn to an alternate dispute method, such as mediation, would promote efficiency in the process and ensure that all parties could turn to a default rule when faced with conflict.²⁰⁰ Statutory regulations on the foreclosure process could ensure that each board is held to the same standard, and that all homeowners get the same chance to adequately explain their situation.

Rather than the implementation of mediation through legislative action, condominium and cooperative buildings could also implement alternate dispute resolution in their bylaws and governing documents in their own capacity. For example, the major difficulties that the board and its residents incurred at Two Fifth Avenue in NYC resulted in the board acting in a way to mitigate and work with their residents in times of crisis. The cooperative building in that case experienced catastrophic damages to its façade because of poor architectural planning.²⁰¹ The incumbent board was faced with the fact that the building required \$30.7 million worth of repairs to rectify the hazardous state of the façade.²⁰² Where assessments for improvements are borne by the residents of the building, the board recognized that they needed to consider flexible methods for imposing these costs on homeowners.²⁰³

¹⁹⁶ FLA. STAT. ANN. § 718.1255 (West 2021)

¹⁹⁷ *Id.*

¹⁹⁸ Ehlers, *supra* note 99, at 212.

¹⁹⁹ *Id.* at 212–13.

²⁰⁰ *See id.* at 209–10.

²⁰¹ Robin Finn, *The Killer Assessment*, N.Y. TIMES (June 13, 2014), <https://www.nytimes.com/2014/06/15/realestate/village-co-op-gets-hit-with-30-million-assessment.html> [<https://perma.cc/3UZK-2N79>].

²⁰² *Id.*

²⁰³ *Id.*

The board took it upon themselves to implement a three-pronged plan to finance the assessment.²⁰⁴ In recognizing that individual homeowners were all under different financial circumstances, the plan allowed residents to either pay the \$30.7 million assessment up front, pay in multiple de-escalating payments over the term of the project, or pay on a ten-year plan with no penalty.²⁰⁵ The ten-year payment plan option proffered by the board specifically took into account the needs of those who could prove financial hardship and provided an alternative payment method.²⁰⁶ The system worked out seamlessly, and the board noted that no resident defaulted under this scheme.²⁰⁷ Those who opted to pay the entire assessment up front effectively subsidized their neighbors, and did so for moral and ethical reasons connected to wanting their neighbors to continue to live in the building.²⁰⁸ The HOA, faced with uncertainty and the realization that all residents were impacted negatively by the large assessment, took action that displays how boards can work with residents rather than against them.

Although unrelated to the matter of foreclosure, the tale of Two Fifth Avenue reveals the self-recognition capabilities of HOAs. The board, rather than acting in a way to penalize its residents, acted in a way that recognized that each owner's situation placed them in different financial spheres. As both HOAs and homeowners face costs associated with judicial foreclosure, it can be said that there is a desire on both sides to work towards remedying issues caused by delinquency. The recognition that both sides involved in the case of Two Fifth Avenue were inevitably going to suffer because of the repairs that had to be made enabled the board to adopt the plan that it did. This desire to work through issues can even be heightened by moral and ethical considerations due to the effects of the COVID-19 pandemic. Where neighbors are willing to realize the hardships that they endure as a community, solutions that can be reached through internally situated mechanisms—like payment plans—may prove to be viable solutions where foreclosure is on the table.

Although a system where HOAs took it upon themselves to include such provisions for ADR in their governing documents and processes would be a best-case scenario, it is unclear whether it would be the most viable option under the present circumstances.

²⁰⁴ *Id.*

²⁰⁵ *Id.*

²⁰⁶ *Id.*

²⁰⁷ Robin Finn, *The Killer Assessment*, N.Y. TIMES (June 13, 2014), <https://www.nytimes.com/2014/06/15/realestate/village-co-op-gets-hit-with-30-million-assessment.html> [<https://perma.cc/3UZK-2N79>].

²⁰⁸ *Id.*

HOAs can be inflexible forms of governance, and in the face of a nationwide emergency, state-mandated legislation may comprise a necessary solution.²⁰⁹ California's Davis-Stirling Act brought stability to those governed by community associations through the creation of financial safeguards for homeowners.²¹⁰ HOAs are required by law to provide a "fair, reasonable and expeditious" procedure for resolving disputes before resorting to judicial foreclosure.²¹¹ The California Court of Appeals has ruled that HOAs must strictly comply with the requirements of the Act in recording liens and pursuing foreclosure.²¹² Such legislation creates a strict requirement that HOAs explore ADR options before considering foreclosure and keeps boards in check. It is the main goal that the Act will allow for the parties to work out an option on their own before involving the courts.²¹³

In adopting a similar plan, the New York State legislature could create significant change in the realm of foreclosures across the state, especially in the urban areas disproportionately affected by COVID-19. Homeowners and HOA boards would benefit from having such regulations set in place and could further serve to prevent future conflicts. Such legislation could be turned to in the event of other major economic or physical events that may cause similar hardship, creating a framework for how to approach the issue of HOA-led foreclosures.

IV. CONCLUSION

Implementing mediation in the HOA foreclosure process is a low-cost and time-efficient solution. There is an urgent need for this method, specifically in NYC, where homeowners are struggling as a result of the COVID-19 pandemic. Alternate dispute resolution in a time where uncertainty is high can prove to be a viable source of solutions for HOA boards and homeowners alike. Instances of

²⁰⁹ Fleming, *supra* note 33; ASSOCIA, *supra* note 26.

²¹⁰ *History of Davis-Stirling Act*, ADAMS STIRLING, <https://www.davis-stirling.com/HOME/Statutes/History-of-Davis-Stirling-Act#:~:text=Stability%20and%20Disclosures, Californians%20served%20by%20community%20associations> [https://perma.cc/98F2-JF7L] (last visited Feb. 3, 2023).

²¹¹ *Internal Dispute Resolution (IDR)*, ADAMS STIRLING, <https://www.davis-stirling.com/HOME/II/Internal-Dispute-Resolution> [https://perma.cc/WNS3-YQZC] (last visited Feb. 3, 2023) (describing the "meet and confer" procedure of the Act, which enables the parties to confer in good faith in an effort to resolve the dispute without judicial interference).

²¹² Brian Hanley, *HOA Boards Beware: California Courts Require Strict Statutory Compliance to Lien and Foreclose*, PORTER SIMON (Feb. 1, 2015), <https://portersimon.com/hoa-boards-beware-california-courts-require-strict-statutory-compliance-to-lien-and-foreclose/> [https://perma.cc/QMM8-N78M].

²¹³ ADAMS STIRLING, *supra* note 211.

future conflict can be mitigated by the implementation of mediation in any interaction where the board and delinquent residents are in disagreement with one another. The adoption of mediation, whether through legislative action or through the processes that the HOA adopts, can work to alleviate tension caused by uncertainty.