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Andrea J. Boyack
Washburn University

STRUCTURAL PRECARITY AND POTENTIAL IN CONDOMINIUM GOVERNANCE DESIGN

Andrea J. Boyack*

INTRODUCTION

In the early hours of June 24, 2021, half of Champlain Towers South Condominium, a thirteen-story multifamily building located in the Miami suburb of Surfside, collapsed without warning.[1] The *Miami Herald* called the collapse "unprecedented" in that one wing "simply caved in—for no obvious reason."[2] The collapse killed ninety-eight people and was the deadliest multifamily building engineering failure in US history.[3] After an arduous search and rescue and safely dismantling the rest of the structure, inquiries sought to determine why this deadly collapse happened.[4] Who was to blame, and what could have been done differently?

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* Norman R. Pozez Chair of Business and Transactional Law and Professor of Law, Washburn University School of Law. I am grateful to Professor Carl Circo and the staff of the *Arkansas Law Review* for organizing a superb symposium and providing helpful edits.

1. *See, e.g.*, Matthew Shaer, *The Towers and the Ticking Clock*, N.Y. TIMES (Jan. 28, 2022), [https://perma.cc/X2PP-354L].

2. Sarah Blaskey et al., *House of Cards: How Decades of Problems Converged the Night Champlain Towers Fell*, MIAMI HERALD (Dec. 30, 2021), [https://perma.cc/QB5E-65TF] [hereinafter Miami Herald Special Report] ("The tower wasn't particularly old or under major construction. There was no earthquake, gas explosion or terrorist attack to blame. After standing for nearly four decades, one wing of the building simply caved in.").

3. *What to Know About the Building Collapse in Surfside Fla.*, N.Y. TIMES (June 24, 2021), [https://perma.cc/BMS3-BB9H]. *See also* Anjali Singhvi et al., *The Surfside Condo Was Flawed and Failing. Here's a Look Inside,* N.Y. TIMES (Sept. 1, 2021), [https://perma.cc/A8GX-FJ3U]; Arian Campo-Flores & Scott Calvert, *Surfside, Fla., Condo Collapse: From Glimmering Beaches to Ruin*, WALL ST. J. (Dec. 29, 2021), [https://perma.cc/FX95-E946].

4. Both the Miami-Dade Country's State Attorney's Office and the Occupational Safety and Health Administration of Surfside investigated the collapse. KATHERINE FERNANDEZ RUNDLE ET AL., FINAL REPORT OF THE MIAMI-DADE COUNTY GRAND JURY, 11TH JUD. CIR. OF FLA., at 1 (Spring Term A.D. 2021) [hereinafter GRAND JURY FINAL REPORT] (examining the "policies, procedures, protocols, systems and practices" to ensure the safety of buildings and offering specific recommendations). The Miami-Dade police

Within six months of this tragedy, engineering analyses pieced together a picture of a building with hidden, fatal vulnerabilities.[5] Engineering experts concluded that the condominium's building design was flawed from the start.[6] The project was built by inexperienced developers using an architect who had his license suspended for "gross incompetence."[7] Dangers created by design vulnerabilities were compounded by shoddy construction in terms of materials and methods.[8] Drainage and waterproofing were completely inadequate.[9] A

started a homicide investigation related to the collapse, and the Town of Surfside hired a forensic investigator to do a thorough analysis of the disaster. Phil Prazan, *Surfside Hired Him to Investigate Condo Collapse. Here's How He'll Do It*, NBC MIAMI (July 2, 2021), [https://perma.cc/3FG2-XLB4]. Champlain Towers South unit owners have filed multiple class-action lawsuits against the condo association. The National Institute of Standards and Technology (NIST) within the United States Department of Commerce also investigated the cause of the collapse. *NIST Establishes Expert Team to Investigate the Champlain Towers South Collapse*, NAT'L INST. STANDARDS & TECH. (Aug. 25, 2021), [https://perma.cc/NSM6-2Q5U].

5. *See, e.g.*, Gina Harkins, *What You Need to Know About the Florida Condo Collapse as the Search for Survivors Continues and Probe Begins*, WASH. POST (July 10, 2021), [https://perma.cc/G6DU-R9LL]; *Miami building collapse: What could have caused it?*, BBC NEWS (July 1, 2021), [https://perma.cc/9PYU-RH3Y]; James Glanz et al., *Condo Wreckage Hints at First Signs of Possible Construction Flaw*, N.Y. TIMES (July 3, 2021), [https://perma.cc/KQ3T-XKKX].

6. Professor Dawn Lehman analyzed building plans and used computer models to identify structural problems in the building, isolating the causes of the collapse and whether the collapse was caused by inherent design and structural flaws or due to insufficient maintenance. Miami Herald Special Report, *supra* note 2.

7. Engineers reviewing the plans for Champlain Towers South warned of "design flaws" and "strength differences" between various structural components, as well as building code violations. *Id.* "The wing of the tower that survived the collapse was held up by robust 24-by-24-inch columns. Building plans show the rest of the columns in the structure were less than half that size. Columns in the pool deck were the smallest. And even the slightly bigger columns under the part of the tower that collapsed were too small to safely accommodate all of the necessary steel reinforcement, violating building code requirements at the time." *Id.*

8. Sara Blaskey et al., *Contractor for Fallen Surfside Condo Later Lost License Amid Fraud, Negligence Claims*, MIAMI HERALD (Jan. 25, 2022), [https://perma.cc/V54R-MB6R]; Shaer, *supra* note 1. Their project had many personnel problems: two of the project's general contractors resigned mid-build, and the structural engineer overseeing construction had previously built a parking garage that had immediately collapsed. Miami Herald Special Report, *supra* note 2. It also seems that the plans were not adequately carried out in the Champlain Towers South project. For example, some of the support beams that were planned for the garage were omitted or spaced farther apart during construction in order to maximize parking space, and the columns were too narrow. *Id.*

9. The report by Morabito Consulting in 2018 warned that water had damaged the concrete slab and the damage urgently needed to be repaired. *See infra* note 14.

neighboring development may have weakened the condominium's perimeter wall.[10] The engineering post mortem analysis concluded: "This building was so overstressed for so long it's amazing it stood as long as it did."[11]

The final straw that broke the back of Champlain Towers South was the failure to make necessary structural repairs. For decades, the condominium board had opted for superficial measures that masked the underlying vulnerabilities or even exacerbated them.[12] Members of Champlain Towers South Condominium learned the extent of their building's underlying and worsening structural problems in 2018 when the board commissioned an engineering study to comply with Miami's multifamily recertification requirements.[13] The engineering study identified several critically necessary repairs and warned that "[f]ailure to replace the waterproofing in the near future will cause the extent of the concrete deterioration to expand exponentially."[14]

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10. Shaer, *supra* note 1.

11. Miami Herald Special Report, *supra* note 2.

12. *See id.* For example, board-authorized repairs of the cracking pool deck, focused on appearance rather than structural soundness, paving over damage rather than excavating the vulnerable slab, and each new layer added to the stress on the structure, pressing down on inadequate supports and putting lateral strain on the structural perimeter wall. *Id.* The condominium's waterproofing and drainage problems had been exacerbated by leaking planters and invasive plants. The condominium Board ultimately removed eight palm trees from the pool area after realizing that their roots had been penetrating and weakening both concrete and drains for two decades. *Id.*; *see also* Konrad Putzier et al., *Behind the Florida Condo Collapse: Rampant Corner-Cutting*, WALL ST. J. (Aug. 24, 2021, 1:36 PM), [https://perma.cc/86R7-RQRT].

13. Although Florida state law does not require any reinspection of multifamily buildings, Miami-Dade's County Code requires that multifamily buildings be reinspected every forty years and recertified as structurally sound. MIAMI-DADE COUNTY CODE § 8-11(f)(ii)(1) (2001), [https://perma.cc/X2SS-YN3C] (last visited April 17, 2022); *see also Building Safety Program*, BROWARD.ORG, [https://perma.cc/KRT4-JU72] (last visited Apr. 17, 2022) (Broward County building safety program modeled after Miami-Dade County's). Champlain Towers South was turning forty in December 2021, and the governing board of the condominium commissioned an engineering inspection in 2018 and was "in the process of securing compliance" with the recertification requirement. GRAND JURY FINAL REPORT, *supra* note 4, at 2; *see also* MIAMI-DADE CNTY. DEP'T OF REGUL. & ECON. RES., NOTICE OF REQUIRED RECERTIFICATION OF 40 YEAR OLD BUILDING(S), [https://perma.cc/FW6V-G2Z5] (listing the recertification form required by the Miami-Dade County Code).

14. MORABITO CONSULTANTS, CHAMPLAIN TOWERS SOUTH CONDOMINIUM STRUCTURAL FIELD SURVEY REPORT 1, 7 (Oct. 8, 2018), [https://perma.cc/QL4F-SEJG] (hereinafter MORABITO REPORT). Engineers compiling the report examined 68 of the condominium's 136 units and the building's roof, exterior facade, parking garage, pool deck,

After the 2018 report, the board planned for remediation of the issues raised, but many members of the condominium balked when they learned that these repairs would cost over $9 million, an estimate that later ballooned to $15 million.[15] Minutes of board meetings over the three years prior to the building's collapse show that repeated attempts to approve a special assessment to pay for repairs were stymied by disagreements about getting the work done and, particularly, paying for it.[16] A vocal contingent of owners resisted the repair effort, and members of the Board resigned in protest.[17] The necessary work was delayed for months and years until, one night, damaged rebar inside the concrete structure fractured, thereby destabilizing the tower and causing it to collapse in on itself "like a folding card table."[18]

Champlain Towers South suffered from design faults that created structural vulnerabilities as well as insufficient maintenance that exacerbated them, but the building's ownership and governance design may have also contributed to the deadly effects of its structural failings. Champlain Towers South was a condominium, a legal ownership construction that theoretically encourages and enables adequate building construction and maintenance.[19] In addition to asking engineering questions about the building's physical structure, an analysis of the tragedy also requires asking legal questions regarding the condominium's governance design. Structuring the building's ownership as a

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and common areas to determine what "structural issues . . . require[d] repair and/or remediation in the immediate and near future." It found that "waterproofing is beyond it [sic] useful life and therefore must . . . be completely removed and replaced." *Id.*

15. Shaer, *supra* note 1; Campo-Flores & Calvert, *supra* note 3.

16. Russell Lewis, *Months Before Florida Condo Collapsed, Residents and the Board Sparred Over Repairs*, NPR (July 2, 2021, 5:00 AM), [https://perma.cc/56ST-BXSF]. An association PowerPoint presentation to residents from November 2020 "alluded to the contentious debates among owners" related to paying for necessary repairs: "Complaining Or Shouting At Each Other Doesn't Work! . . ." said one side. *Id.*; Casey Tolan et al., *A 2020 Report Found Surfside Condo Lacked Funds for Necessary Repairs. One Expert Called it a 'Wake-up Call'*, CNN, [https://perma.cc/Y6VW-FAJP] (last updated July 8, 2021, 8:52 PM).

17. Campo-Flores & Calvert, *supra* note 3; Beth Reinhard et al., *Majority of Florida Condo Board Quit in 2019 as Squabbling Residents Dragged out Plans for Repairs*, WASH. POST (June 30, 2021, 4:57 PM), [https://perma.cc/CSM6-8K5U].

18. Miami Herald Special Report, *supra* note 2.

19. *See infra* Part I.A-C.

condominium ultimately failed to ensure quality construction and upkeep, and condominium governance may also have inhibited remediation of the building's structural vulnerabilities.

This Article examines a condominium's legal structure in the context of ensuring construction and upkeep quality in a multifamily building and explores possible systemic improvements. Part I considers three latent vulnerabilities inherent in the condominium governance structure: (1) over-protection of developers; (2) unwillingness of members to ensure optimal upkeep; and (3) association financial precarity. Part II critiques some suggested legal responses to the Surfside disaster and discusses the swift and dramatic impacts on condominium governance caused by changed underwriting requirements of Fannie Mae and Freddie Mac. Finally, this Article concludes by calling for more effective stabilization of condominium governance to remediate its inherent structural weaknesses.

I. PRECARITY OF CONDOMINIUM GOVERNANCE DESIGN

A condominium is a creature of statute, a legal ownership structure that enables individuals to hold title to a box of space in fee simple absolute.[20] In a condominium, each owner holds individual title to their unit, and all owners share ownership of the common elements as tenants in common.[21] Common elements include everything that cannot be divided up, including the roof, walls, lobby, halls, elevators, parking, building structures and systems, fixtures, and all community amenities.[22] All unit owners

20. Every state has adopted a condominium-enabling statute. Several such statutes are modeled on the Uniform Common Interest Ownership Act ("UCIOA") which was created by combining the Uniform Condominium Act ("UCA") proposed in 1982 and 1977, respectively, by the National Conference of Commissioners on Uniform State Laws. Some states have their own comprehensive statutory regime governing condominiums and other common interest communities. *See, e.g.*, Davis-Stirling Common Interest Development Act, CAL. CIVIL CODE § 4000 *et seq.* (West 2022).

21. WAYNE S. HYATT, CONDOMINIUM AND HOMEOWNER ASSOCIATION PRACTICE: COMMUNITY ASSOCIATION LAW 105, 121 (3d ed. 2000) (discussing how Boards make and collect assessments).

22. *See* Robert C. Ellickson, *Cities and Homeowner Associations*, 130 U. PA. L. REV. 1519, 1522-23 (1982) (discussing how community assessments allocate common costs among all owners).

are members of the condominium association, which exists to provide the governance that is essential for joint ownership, but the association does not own any property.[23]

The condominium ownership form makes homeownership more accessible and more affordable, particularly in urban areas.[24] Condominium ownership and governance enables people to enjoy group amenities that they could not individually afford.[25] Generally, resources used and enjoyed in common are subject to overuse and under-maintenance because of the tendency of individuals to maximize their internalized gains and externalize their costs (the so-called "Tragedy of the Commons").[26] Condominium governance is designed to solve the problems of free-riding and overuse by empowering the association to make and enforce rules regarding use and maintenance of common areas. The association funds necessary upkeep by assessing all owners whose pro rata payment obligations are backed by liens on their units.[27] Collective action problems disincentivize

23. THOMAS W. MERRILL & HENRY E. SMITH, PROPERTY: PRINCIPLES AND POLICIES 1, 772 (2007) (discussing the need for some governance regime in the context of common resource management).

24. Every state adopted a condominium-enabling statute between 1961 and 1967, leading to a "tremendous condominium boom" in the decades that followed. HYATT, *supra* note 21, at 11-12. According to the National Association of Realtors, condominiums are "one of the most attainable and affordable options for first-time homeowners, minorities, and older residents." NAT'L ASS'S OF REALTORS, *A Bipartisan Effort to Make Homeownership More Affordable*, (June 2018), [https://perma.cc/MLV4-6HUB]. *See also* Michael N. Neal & Laurie Goodman, *The Housing Market Needs More Condos. Why Are So Few Being Built?*, URBAN INST. (Jan. 31, 2022), [https://perma.cc/BHJ8-ZY8G] (presenting data proving that "[c]ondos are more affordable than single-family homes" in every major city except New York City and Philadelphia).

25. CLIFFORD TREESE ET AL., RESEARCH INST. FOR HOUS. AM., CHANGING PERSPECTIVES ON COMMUNITY ASSOCIATION MORTGAGE UNDERWRITING AND CREDIT ANALYSIS 1, 6-7 (Nov. 2001) (discussing how common upkeep allows a community to take advantage of the cost savings from economies of scale).

26. Garrett Hardin, *The Tragedy of the Commons*, 162 SCI. 1243, 1244-45 (1968).

27. HYATT, *supra* note 21, at 105, 108, 121 (identifying the authority to assess and collect payments as a defining feature of common interest communities and discussing tools available to Boards to collect assessments). *See also* Andrea J. Boyack, *Community Collateral Damage: A Question of Priorities*, 43 LOY. U. CHI. L. J. 53, 73 (2011) ("The association provides sufficient governance to solve the tragedy of the commons by controlling overuse and creating a mechanism for maintenance and shared costs, which in turn permits communities to avoid the economic downside of public goods, meaning that a neighborhood can enjoy better amenities at lower prices."). Condominium associations typically are authorized to make regular as well as special assessments, and unit owners'

individuals from acting to remediate problems that cause widespread harms, including by bringing a lawsuit against a builder for faulty construction or by repairing building flaws, but having an association simply facilitates joint action.[28] Condominiums have been called "little democratic [sub-societies]" that give members an economic stake and a measure of control with respect to the multifamily building in which they live.[29]

Condominium governance design makes it possible for residents of a multifamily building to also be its owners.[30] When occupants have an economic stake in the real property they occupy, there is theoretically an incentive alignment that optimizes building quality.[31] In contrast, landlords owning multifamily rental buildings may be tempted to skimp on upkeep to increase their profits because they can externalize the quality-of-life costs of disrepair.[32] Condominium governance should, in theory, produce well-designed, well-constructed, and well-maintained buildings. In reality, that is not always the case.

There are three aspects of condominium ownership design that should help avoid tragic engineering failures like the one in Surfside, but each of these aspects is undermined by hidden

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obligation to pay assessments are both personal obligations and *in rem* covenants that run with the land. HYATT, *supra* note 21, at 105-09; Boyack, *supra* note 27, at 74.

28. Condominium ownership and governance functions as a built-in class action vehicle for consolidating and litigating common claims. *See* Alexandra Lahav, *Fundamental Principles for Class Action Governance*, 37 IND. L. REV. 65, 70-74 (2003) (discussing how joint action overcomes collective action problems inhibiting litigation of joint claims).

29. Hidden Harbour Ests., Inc. v. Norman, 309 So. 2d 180, 182 (Fla. Dist. Ct. App. 1975).

30. Under the common law, real property is owned in a column of space defined with respect to a two-dimensional real property mapping description that indicates a closed figure on the face of the earth. Today, every state has passed statutes that enable a three-dimensionally defined ownership of space through creation of a condominium. Boyack, *supra* note 27, at 74.

31. *See* Larry L. Dildine & Fred A. Massey, *Dynamic Model of Private Incentives to Housing Maintenance,* 40 S. ECON. J. 631, 638 (1974); Marjorie Flavin & Takashi Yamashita, *Owner-Occupied Housing and the Composition of the Household Portfolio*, 92 AM. ECON. REV. 345, 345 (2002); Geoff Rose & Richard Harris, *The Three Tenures: A Case of Property Maintenance*, URBAN STUD., (July 2021), [https://perma.cc/4FTG-TVEN].

32. Adam Travis, *The Organization of Neglect: Limited Liability Companies and Housing Disinvestment*, 84 AM. SOCIO. REV. 142, 145 (2019) (noting studies showing that under certain market conditions, "the under-maintenance of rental properties represents a rational, profit-maximizing approach for landlords").

weaknesses. First, a condominium creates a vehicle for joint legal action, facilitating lawsuits for faulty construction, and this should ensure builder accountability. Second, association governance solves the Tragedy of the Commons, and this should encourage the care and upkeep of a multifamily building. Finally, the ability to collect assessments from all owners expedites cost-spreading, and this should reduce barriers to funding common costs.

A. Developer Accountability and Developer Control

Negligent construction of a multifamily building imposes harm on all owners. A condominium association with authority to bring legal claims based on construction defects solves the associated collective action problem and makes it easier and less expensive for owners to seek legal redress.[33] Associations frequently bring construction lawsuits against developers, architects, and contractors more frequently than other owners.[34] A large number of construction claims could indicate that condominiums are more motivated and empowered to seek redress for defects, or it could indicate that condominiums are

33. A typical provision is the Texas Condominium Act which provides that the association has the power to "institute, defend, intervene in, settle, or compromise litigation or administrative proceedings in its own name on behalf of itself or two or more unit owners on matters affecting the condominium." John W. Raley & Katie McClelland, *Dealing with Multiple Owners—Condominium Construction Defect Litigation*, COOPER & SCULLY P.C. 1, 3 (Jan. 26, 2007), [https://perma.cc/N969-MHYZ]. Although in the early years of condominium development, the question of standing was sometimes contested in court, decisions have established that the association has broad authority to stand in the place of unit owners and bring a claim on their behalf. *Id.* at 3-4. Many state statutory regimes specifically preclude individual action against a developer for negligent construction in a condominium. *See, e.g.*, MASS. GEN. LAWS ch. 183(a) §10(b) (2017). In such states, courts have held that it would frustrate the statutory regime to permit individual lawsuits against the developer for faulty construction. *See, e.g.*, Cigal v. Leader Dev. Corp., 557 N.E.2d 1119, 1122-23 (Mass. 1990).

34. According to the American Insurance Association, owners in condominium developments are four times as likely to engage in construction litigation than owners of single-family homes. Raley & McClelland, *supra* note 33, at 1. For a discussion of the legal issues involved in association claims against developers, see E. Richard Kennedy & Ellen Hirsch de Haan, *Litigation Involving the Developer, Homeowners' Associations, and Lenders*, 39 REAL PROP., PROB. & TR. J. 1, 2-21 (2004).

more likely to engage in opportunistic scapegoating when something goes wrong in their building.[35]

Condominium construction litigation typically involves claims that the developer violated both express and implied warranties of construction quality as well as claims that the developer's board violated fiduciary duties during the period of developer control.[36] Settlements range from developer remediation to a payout of a couple million dollars.[37] Some construction claims result in much larger payouts. For example, the developer of a luxury oceanfront condominium in Florida recently paid $17.5 million to settle a construction lawsuit brought by the association for flaws relating to pool joints, steam rooms, and sliding glass doors.[38] Construction claims pertaining to the Millennium Tower in San Francisco resulted in a $100

35. Under most state statutes, construction claims can be brought by a condominium association any time within ten years of construction, and the risk of a construction claim being brought during that time by a condominium association is substantial and impacts developer costs. A recent study in California considered whether laws facilitating condominium construction claims reduce affordable housing in the state by raising the costs of condominium development. *See* Cynthia Kroll et al., *The Impact of Construction-Defect Litigation on Condominium Development*, 14 CAL. POL'Y. RSCH. CTR. (Oct. 2002), [https://perma.cc/CZ2J-7YQC] (considering the merits of complaints by developers and insurers that "frivolous" construction lawsuits led to higher development costs, slower pace of condominium development, and higher housing costs in California relative to other states).

36. Many construction claims raise statutory violations as well. *See generally, e.g.*, R. Douglas Rees, *Residential Construction Claims After the Advent of the Texas Residential Construction Commission*, COOPER & SCULLY, P.C. (Jan. 2006), [https://perma.cc/MG7F-NB5P] (discussing how construction claims were impacted by three Texas statutes). Construction claims seem to be particularly common types of litigation brought by condominiums against developers. *See, e.g.*, *Condominiums*, LONG & ROBINSON, L.L.C., [https://perma.cc/BAK2-SJ33] (last visited Apr. 16, 2022) (explaining that "[i]n condominiums, defective construction of common elements—including problems such as water intrusion, deficient roofing and defective windows—can lay a tremendous financial burden at the feet of the homeowners' association" and listing their representation in connection with settlement of several multi-million dollar claims brought by condominium associations against development companies).

37. A recently settled case provides a typical example. Complaint ¶¶ 16, 18, Westview Highlands Condo. Ass'n v. Westview of Berlin, L.L.C., HHD-CV18-6110534-S (Conn. Super. Ct. Sept. 7, 2018). Three years after initiating the lawsuit, the condominium and developer settled their dispute for two million dollars, but only after 20 contractors were impleaded in the case as third parties. Marianna Wharry, *Condo Association Reaches $2M Settlement Over Construction Defects*, LAW.COM (Oct. 28, 2021), [https://perma.cc/CY55-QQ7H].

38. *Construction Defects Lawsuit Leads to $17.5 Million Settlement for Condo Association*, BURNS & WILCOX (May 26, 2021), [https://perma.cc/D3F3-TNMC].

million developer remediation funded, in part, by the Transbay Joint Powers Authority.[39]

Statutes, procedural requirements, and governing documents may limit a board's ability to seek redress from developers for faulty construction. For example, in New York, condominiums are typically developed by a single-purpose entity that divests itself of all assets by selling the condominium units. Until November 2020, New York caselaw barred recovery by condominium associations against the development entity's beneficial owners unless the unit owners can prove that a fiduciary relationship existed between themselves and those investors.[40] This requirement effectively denied condominium owners legal redress for faulty construction once all units were sold.[41] Statutes commonly require owners (including condominium associations) to provide developers with the substance of a complaint and a chance to remedy the problem before a lawsuit can be filed.[42] And, of course, statutes of limitation and developer bankruptcy can prevent recovery for negligent construction.

Several condominium statutes permit the developer to modify default dispute resolution parameters by provisions in condominium governing documents and/or purchase agreements in order to limit who can bring what claims in what forum.[43] For

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39. Jay Barmann, *Millennium Tower May Be Sinking Faster Due to Digging That's Part of Effort to Stop It Sinking*, SFIST (Sept. 1, 2021), [https://perma.cc/K7RC-AULC].

40. Sutton Apartments Corp. v Bradhurst 100 Dev. L.L.C., 968 N.Y.S.2d 483, 485-86 (N.Y. App. Div. 2013) (holding that construction claims against investors holding the beneficial ownership of a developer would be dismissed as a matter of law unless there was a fiduciary relationship between the plaintiffs and the investors).

41. A New York court remedied this problem in Bd. of Managers of Be@William Condo. v. 90 William St. Dev. Grp. LLC, 135 N.Y.S.3d 360, 362 (App. Div. 2020). The 2020 ruling also made it possible for associations with previously dismissed lawsuits to recommence their actions against the beneficial owners of defunct developer entities. *See* Bill Morris, *Condo Owners Win Lawsuit Over Construction Defects*, HABITAT: BRICKS & BUCKS (Nov. 11, 2020), [https://perma.cc/A68D-3MTS].

42. *See* Alice M. Noble-Allgire, *Notice and Opportunity to Repair Construction Defects: An Imperfect Response to the Perfect Storm*, 43 REAL PROP., TR & EST. L.J. 729, 748, 779-80 (2009) (discussing the proliferation and impact of NOR statutes and arguing that a more complex, complete, and uniform approach to construction claims would be a preferable approach).

43. See Ron Holmes, *Stop the Lawsuits: Condominium Construction Defect Litigation*, THE HOLMES FIRM PC (Nov. 26, 2019), [https://perma.cc/9SNL-G7PL], for a discussion of early neutral evaluation.

example, purchase agreements can include a buyer's waiver of jury trial, or condominium documents can mandate mediation or arbitration in lieu of construction litigation.[44] One strategy that developers sometimes employ is to require an "early neutral evaluation" by an impartial expert who will analyze the alleged defect and determine a proper remedy.[45]

In addition to limitations on the association's legal ability to seek redress for construction defects, initial developer control of the association creates practical barriers to accountability. In a condominium, the developer initially holds title to all units and accordingly controls the association.[46] Developer control typically persists throughout the period of development, until a supermajority of units is sold.[47] During the Developer Control Period, the developer dominates voting and controls the association's board, including its actions on behalf of owners as well as management decisions regarding budget, maintenance, and repair. The developer is constrained by fiduciary duties because the board of the association acts in a fiduciary capacity for all owners and must operate and manage the condominium in good faith.[48]

In retrospect, the condominium ownership structure of Champlain Tower South does not appear to have adequately restrained the developer's temptation to cut corners. This may be in part because bringing a claim requires awareness of construction defects, and many of the problems in Champlain Tower South were latent for decades. When a condominium association does not resolve building structural problems by obtaining remediation from the developer, then the responsibility of mitigating such problems falls to the owners themselves.

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44. *See* Eva Lauer, *Arbitration and Mediation in Condominium Law*, LAUER LAW, P.A., [https://perma.cc/ALS2-W48G] (last visited Apr. 14, 2022).

45. *See, e.g.*, Holmes, *supra* note 43; *see also* Mosaic Residential N. Condo. Ass' n v. 5925 Almeda N. Tower, L.P., No. 01-16-00414-CV, 2018 WL 5070728, at *8 (Tex. App. Oct. 18, 2018) (adopting this interpretation).

46. *See* WAYNE S. HYATT & SUSAN F. FRENCH, COMMUNITY ASSOCIATION LAW: CASES AND MATERIALS ON COMMON INTEREST COMMUNITIES 607, 622 (2d ed. 2008) (discussing the developer's initial control of a common interest community and when and how control is transferred to unit owners).

47. *Id.*

48. *See* HYATT, *supra* note 21, at 128 (explaining the Business Judgment Rule in judicial oversight of Board actions).

B. Practical Barriers to Condominium Upkeep

Some landlords defer required maintenance in multifamily rental buildings to boost their profits while letting tenants bear the costs of living in unsafe homes.[49] For example, landlord maintenance cost-cutting has led to fatal fires, as recently as 2021 and 2022 in Chicago, Philadelphia, and New York.[50] Historically and today, tenants frequently complain of uninhabitable conditions in multifamily rental buildings, particularly those that charge lower rents.[51] Unless a landlord can make money by increasing rents to offset maintenance costs, landlords have the economic incentive to delay building repairs and updates.

One of the benefits of owning rather than renting a unit in a multifamily building is that the unit owner can theoretically ensure the quality of their home. Owners occupying the unit directly enjoy the benefits of maintenance and upkeep.[52] Maintenance economically benefits all owners (resident or not) by preserving their equity investment.[53] Theoretically, owner

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49. MATTHEW DESMOND, EVICTED: POVERTY AND PROFIT IN THE AMERICAN CITY, 64-79 (2016).

50. *See, e.g.*, Madison Hopkins & Cecilia Reyes, *42 Fires, 61 Deaths: A Story of Failed City Oversight*, BETTER GOV'T ASS'N (Apr. 23, 2021, 6:00 AM), [https://perma.cc/6EPZ-VTJG]; Sophie Kasakove et al., *18 People, a Deadly Fire: For Some, Crowded Housing Is Not a Choice*, N.Y. TIMES (Jan. 8, 2022), [https://perma.cc/P4Q9-U92W]; Ashley Southall et al., *19 Killed in New York City's Deadliest Fire in Decades*, N.Y. TIMES (Jan. 11, 2022), [https://perma.cc/9DHG-MCU5].

51. The famous case of *Javins v. First Nat'l Realty Corp.* involved uninhabitable conditions in a large multifamily project in Washington, DC. 428 F.2d 1071, 1072 (1970). The dangers created by poor landlord maintenance of rental housing contributed to the creation of judicial and statutory implied warranties of habitability in every state. Paula A. Franzese et al., *The Implied Warranty of Habitability Lives: Making Real the Promise of Landlord-Tenant Reform*, 69 RUTGERS U. L. REV. 1, 3, 10, 11 (2016); *see also* David A. Super, *The Rise and Fall of the Implied Warranty of Habitability*, 99 CALIF. L. REV. 389, 389 (2011).

52. *Compare* Rose & Harris, *supra* note 31, at 2 ("It stands to reason that owner-occupiers would maintain their properties better than absentee landlords . . . ."), *with* Laurie S. Goodman & Christopher Mayer, *Homeownership and the American Dream*, 32 J. OF ECON. PERSPS. 31, 50 (2018) ("[R]enters are unlikely to maintain a property as well as its owner would.").

53. When buildings are more highly leveraged, so that less of an owner's capital is invested in the real estate, maintenance levels appear to decline. Lee Seltzer, *The Effects of Leverage on Investments in Maintenance: Evidence from Apartments*, *in* FEDERAL RESERVE BANK OF NEW YORK STAFF REPORTS, NO. 1000 1, 1 (Dec. 2021). Owners, particularly those in high-rise buildings, must fund consistent maintenance in order to preserve the value of their investment. *See* Rachelle Alterman, *The Maintenance of Residential Towers in*

occupants should be more willing to expend money to maintain and repair the building in which they live in and represents perhaps their largest capital asset. On the other hand, lack of knowledge and buy-in from owners and board members can obstruct efforts to undertake expensive repairs. Condominium owners—including those elected to serve on the association's board—are rarely sophisticated real estate businesspeople and may not appreciate the need for and impact of maintenance. Unit owners accustomed to renting may incorrectly presume that significant building repair costs are not theirs to pay.[54] Even though associations typically employ expert managers and repair professionals to perform maintenance, it is up to the board and, in some cases, the association membership at large, to approve such expenditures.[55] Condominium owner inexperience and lack of understanding can inhibit necessary repairs.[56]

Condominium boards are legally required to maintain common property, with costs allocated among the members.[57] In a condominium, decision-making is by committee. Although democratic decision-making gives stakeholders a voice, it is inefficient, complicated, and time-consuming.[58] Board members

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Condominium Tenure: A Comparative Analysis of Two Extremes - Israel and Florida, *in* MULTI-OWNED HOUSING LAW, POWER AND PRACTICE 127, 128, 142 (Sarah Blandy et al. eds., 2010). Landlords have a similar incentive to maintain to preserve their investment. *See* Dean H. Gatzloff et al., *Cross-Tenure Differences in Home Maintenance and Appreciation*, 74 LAND ECONS. 328, 328, 341 (1998) (finding only weak evidence supporting the hypothesis that owner-occupied homes appreciate at a faster rate than rented homes).

54. Ross Levin, *Levin: People Underestimate the Cost of Owning a Home vs. Renting One*, STAR TRIBUNE (Sep. 11, 2021, 8:00 AM), [https://perma.cc/68MX-Q284]; Arian Campo-Flores, *Florida is Set to Pass Stricter Condo Rules After Surfside Collapse*, WALL ST. J. (Mar. 5, 2022, 9:00 AM), [https://perma.cc/B4ML-5TSG].

55. HYATT, *supra* note 21, at 116 ("Often, special assessments require homeowner approval and greater homeowner involvement than annual assessments."); s*ee also, e.g.*, Azar v. Old Willow Falls Condo. Ass'n, 593 N.E.2d 583 (Ill. App. Ct. 1992) (Illinois' Condominium Act requires two-thirds of the unit owners to approve any special assessment).

56. *See, e.g.*, CMTY. ASS'N RESEARCH FOUND., BREAKING POINT: EXAMINING AGING INFRASTRUCTURE IN COMMUNITY ASSOCIATIONS 5 (2020), [https://perma.cc/97TT-Y6DK] ("Survey respondents found that homeowners and residents were more receptive and supportive of major infrastructure repairs when they were given the opportunity to learn—in advance—about the scope and costs of the project from experts, like the engineers and contractors who had specific knowledge of the damage and how to fix it.").

57. HYATT, *supra* note 21, at 43.

58. Jeffrey L. Kerr & Vincent F. Caimano, *The Limits of Organizational Democracy*, ACAD. MGMT. EXEC. 81, 85, 93 (2004); Li Hao & Wing Suen, *Viewpoint: Decision-Making in Committees*, 42 CAN. J. ECON. 359, 384 (2009).

may be unwilling to upset friends and neighbors by mandating disruptive or expensive repairs. In democratic governance, it is difficult to accomplish a necessary, but unpopular, measure. There is a great temptation for board members to kick the proverbial can down the road rather than promptly attending to the unpleasant business of significant remediation work on a building.[59] Even when board members do plan for necessary repairs, they may face resistance from the membership.[60] If governing documents provide for association approval of any large special assessments or capital improvements (as they often do), a vocal contingent of unit owners can prevent the assessment from happening.[61] In Champlain Towers South, such membership resistance proved fatal.[62]

C. Financial Entanglement and Precarity

Condominiums are authorized by statute and the governing declaration to collect assessments from unit owners for required common expenses.[63] Assessments generally are based on budgets proposed by the board and ratified by the members, which means that significant increases in assessments require that a majority of the unit owners agree.[64] Some governing documents and state statutes allow minor assessment increases without a majority

59. Procrastinating costly and unpopular repairs is a common condominium governance program and was a key factor in the Surfside disaster. Mike Baker & Kimiko de Freytas-Tamura, *Infighting and Poor Planning Leave Condo Sites in Disrepair*, N.Y. TIMES (July 3, 2021), [https://perma.cc/L5K3-XAC5].

60. *Id.* (giving several examples).

61. *Id.* HYATT, *supra* note 21, at 115-16.

62. Baker & Freytas-Tamura, *supra* note 59. Some owners refused to pay for structural repairs, delaying the project. *Id.* Their resistance led several members of the Board to resign in protest, further delaying remediation. *Id.*; *see also supra* notes 16-17 and accompanying text (where a similar situation occurred at another Florida condominium when a disagreement in paying for repairs resulted in Board members resigning).

63. *See* UNIF. COMMON INT. OWNERSHIP ACT § 2-107(a) (2008). The precise method of allocating common costs in a given condominium is set forth in its declaration. UNIF. COMMON INT. OWNERSHIP ACT § 2-107(b) (2008). Unit owners may split common expenses evenly among all units or units may have a pro rata contribution share based on square footage, number of bedrooms, or some other classification. UNIF. COMMON INT. OWNERSHIP ACT § 2-107 cmt. 2 (2008).

64. *See* UNIF. COMMON INT. OWNERSHIP ACT § 3-123(a)-(b) (2008). Common upkeep also allows a community to take advantage of cost savings from economies of scale. TREESE ET AL., *supra* note 25, at 6.

ratification, but large increases almost always require the issue be put to a vote.[65]

An owner's assessment obligation is a personal debt that is secured by statutory lien on the owner's unit.[66] Because assessments are secured by a lien, the association can seek repayment of delinquent amounts both from the unit owner through a collection lawsuit or from the unit's value by foreclosing on the lien.[67] It is critically important that an association be able to collect assessments from each unit owner, even those who disagree with approved expenses.[68] If some owners do not pay their pro rata share, the association will lack sufficient funds to maintain common elements and make necessary repairs.[69] In and after 2008, when a significant number of owners in condominiums located in South Florida and other foreclosure hotspots were unable to pay their assessments, compliant owners either had to pay on behalf of their defaulting neighbors or suffer the ill-effects of poor maintenance.[70] In one

65. *See, e.g.*, CAL. CIV. CODE § 5605(b) (West 2014); KAN. STAT. ANN. § 58-4620(b) (West 2010).

66. HYATT, *supra* note 21, at 107, 117, 119. Amounts owed and secured by the lien may also include reasonable attorney's fees, late fees, fines for violations of community rules, and interest, although these additional amounts are sometimes capped by statute. *See, e.g.*, UNIF. COMMON INT. OWNERSHIP ACT § 3-116 (amended 2014) (NAT'L CONF. OF COMM'RS ON UNIF. STATE L. 2008) (18% cap); CAL. CIV. CODE § 5650 (2014) (12% cap); and GA. CODE ANN. § 44-3-109 (2008) (10% cap).

67. Associations frequently adopt a written collection policy stating protocols to follow for collecting delinquent assessments. A few jurisdictions require a written policy. *See, e.g.*, COLO. REV. STAT. § 38-33.3-209.5 (2014). Some associations operate without a formal collection policy, in which case collection occurs as and how the board determines in its discretion. Foreclosure is an option, but a foreclosed lien is often not the first priority lien, meaning that the sale may not generate large proceeds, particularly if the property is underwater with respect to a first mortgage. *See* Boyack, *supra* note 27, at 53, 90, 95. Most states require judicial foreclosure of association liens, but some states that permit non-judicial foreclosure of mortgage liens also permit non-judicial foreclosure of condominium assessment liens. UNIF. COMMON INT. OWNERSHIP ACT § 3-116 cmt. 5 (amended 2014) (NAT'L CONF. OF COMM'RS ON UNIF. STATE L. 2008). An association that enforces its requirements unevenly is vulnerable to litigation claiming violation of fiduciary duties and good faith. *See, e.g.*, Saunders v. Thorn Woode P'ship, L.P., 462 S.E.2d 135, 137 (Ga. 1995); White Egret Condo., Inc. v. Franklin, 379 So. 2d 346, 352 (Fla. 1979); Cowling v. Colligan, 312 S.W.2d 943, 945 (Tex. 1958).

68. Liens are critical to the functioning of condominiums and are the community's "lifeblood." *See* HYATT, *supra* note 21, at 105, 118, 121.

69. *See id.* at 121.

70. The financial entanglement of owners in a condominium created issues in the aftermath of the 2008 Foreclosure Crisis because owners defaulted both on assessments and

case, a Florida condominium with affordable amenities was left to sink into disrepair when several unit owners did not pay their assessments. Soon, "the rats started chewing through the toilet seats in vacant units and sewage started seeping from the ceiling."[71] The decline in maintenance drove falling property values still lower, and the desperate association began foreclosing on people on a fixed income who could not pay the increased assessment amounts.[72]

Unit owners bear the financial responsibility to maintain their condominium, and this means that "the fiscal fortunes of the members of a community are intertwined."[73] Although sharing responsibility spreads the cost of maintenance, the condominium ownership structure also means that an owner's ability to maintain their home is tied to other people who might refuse to pay their fair share.[74] When owners cannot or will not pay their assessments, the association either must assess willing owners even more to make up the shortfall or go without the repairs.[75]

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their mortgages, and mortgage liens in most states enjoy complete (or at least partial) priority over association assessment liens. *See generally* Boyack, *supra* note 27, at 77-79. *See also* Monica Hatcher, *Mediators Foresee Gloom, Doom in Condo Industry*, MIAMI HERALD, Jan. 4, 2009, at 1H; *Concerned Homeowners Association Members Coalition Forms*, PR.COM (Feb. 18, 2011), [https://perma.cc/FF7H-2C2P].

71. *Neighbor vs. Neighbor as Homeowner Fights Get Ugly*, GAINESVILLE SUN (July 10, 2011), [https://perma.cc/KNT5-KFVC] (discussing the problems of the Inlet House condo complex in Fort Pierce, Florida).

72. *Id.* It is predictable that failure of a condominium to maintain will drive down unit values. *See, e.g.*, Bd. of Dirs. v. Wachovia Bank, N.A., 581 S.E.2d 201, 206 (Va. 2003) (Lacy, J., dissenting) ("[P]art of the value of a condominium unit comes from the ability of the condominium to maintain the common areas of the development . . . . The ability to maintain these elements is directly related to the association's ability to secure payment of assessments from the individual unit owners.").

73. Boyack, *supra* note 27, at 76-77; *see also* Trevor G. Pinkerton, *Escaping the Death Spiral of Dues and Debt: Bankruptcy and Condominium Association Debtors*, 26 EMORY BANKR. DEV. J. 125, 129-30 (2009).

74. HYATT, *supra* note 21, at 121; Christine Haughney, *Collateral Foreclosure Damage*, N.Y. TIMES (May 15, 2008), [https://perma.cc/U5RH-NVGW] (quoting Sam Chandan, chief economist at the real estate research firm Reis).

75. The financial strain caused by assessment default during the Foreclosure Crisis was particularly problematic because some of the deferred maintenance occurred in buildings that had been constructed or converted during the housing preceding the Foreclosure Crisis. The high demand for condominium units, particularly in South Florida, incentivized rushed and sloppy condominium construction and conversion, particularly in projects where developers could insulate themselves from liability through the condominium documents. Instead of governance design ensuring high quality construction, governance design may have created a moral hazard encouraging cutting corners. *See* Boyack, *supra* note 27, at 56-

The Surfside collapse shows that unit owners refusing to pay necessary assessments can have dire consequences. The condominium's 2018 engineering report warned of escalating degradation of the structure if remediation was not undertaken, and, in hindsight, this warning is rather damning.[76] But the owners' resistance to a huge special assessment is also understandable.[77] A $15 million repair bill when divided among 136 unit-owners is still a significant sum: Champlain Towers South unit owners were assessed between $80,000 and $336,000 for units priced only two or three times that amount.[78] This astronomical assessment was necessary because the association's reserve accounts had only 6.9% of the amount that was necessary for the project.[79] Simply mandating that unit owners pay such an enormous sum does not make the money appear. When unit owners cannot pay assessments, they will not pay them. This was true in 2008 and is the stark reality that led to dire consequences in Surfside, Florida in 2021.[80]

In response to the functional insolvency of some condominium associations after 2008, approximately twenty states passed laws requiring that condominiums maintain a certain level of reserves or conduct reserve studies to ensure that the association is not left empty handed should a significant capital need arise.[81] In the wake of the Champlain Towers collapse,

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57, 59; Carolyn Gallaher, *Are American's Condos having a Midlife Crisis?*, GREATER GREATER WASH. (Aug. 10, 2021), [https://perma.cc/4PW3-DLW8].

76. *See* MORABITO REPORT, *supra* note 14, at 1, 7.

77. An analogy can be drawn to citizens resisting any tax increase in spite of critical needs to repair and replace national infrastructure.

78. Putzier et al., *supra* note 12; Association Reserves, *Older Condos Part 1 | Lessons from Champlain Towers*, YOUTUBE (Aug. 3, 2021), [https://perma.cc/ZE34-T2VU] (describing Champlain Towers property values); Campo-Flores & Calvert, *supra* note 3.

79. Tolan et al., *supra* note 16.

80. *See, e.g.*, Rachel Lee Coleman, *Desperate Condo, Homeowner Associations Thrown a Lifeline*, MIAMI HERALD, Mar. 7, 2010, at 1A; Haughney, *supra* note 74. The owners in Champlain Towers South similarly lacked the ability to come up with their pro rata contribution to repair costs. Tolan et al., *supra* note 16.

81. Nine states (California, Colorado, Delaware, Hawaii, Nevada, Oregon, Utah, Virginia, and Washington) currently require that associations do reserve studies. *Reserve Requirements and Funding*, CMTY. ASS'NS INST., [https://perma.cc/27D3-WZG3] (last visited Apr. 10, 2022) [hereinafter *Reserve Requirements and Funding*]. Fannie Mae and Freddie Mac also changed their underwriting requirements in the aftermath of the Foreclosure Crisis to require that common interest communities allocate 10% of their annual budgets to fund reserves; although until 2022, a reserve study showing low risk of a high

Florida is considering imposing a hefty reserve requirement to ensure that maintenance can still be funded even if owners cannot pay a large lump sum assessment.[82] The presence of adequate reserves would mitigate the impact of a huge repair bill in a condominium the same way a "rainy day fund" offsets the need for an owner of a single-family home to pay to repair a broken hot water heater or leaky roof. A mandate to fund reserves to a certain level, however, suffers from the same problem as a mandate to fund a special assessment: it presumes that people can and will pay a higher cost for their housing. And unit owners may be unwilling or unable to do so.

II. CONDOMINIUM STRUCTURE'S POTENTIAL

In the aftermath of the Surfside collapse, multiple lawsuits, grand juries, and advisory task forces called for changes to laws governing multifamily buildings and condominiums.[83] Experts examined how building code requirements, inspections, and occupancy certifications can better ensure the safety and stability of high-rise structures.[84] A grand jury in Miami recommended that government officials be granted greater oversight and

assessment could be offered in lieu of the mandatory 10% funding. *See infra* notes 111, 120 and accompanying text.

82. *See infra* notes 87, 109 and accompanying text.

83. *See, e.g.*, GRAND JURY FINAL REPORT, *supra* note 4, at 2, 8, 11, 16; REPORT OF THE FLORIDA BAR REAL PROPERTY, PROBATE & TRUST LAW CONDOMINIUM LAW AND POLICY LIFE SAFETY ADVISORY TASK FORCE, 2 (Oct. 12, 2021), [https://perma.cc/H7XY-JLUS] [hereinafter FLORIDA BAR TASK FORCE REPORT]; SURFSIDE WORKING GROUP, FLORIDA BUILDING PROFESSIONALS RECOMMENDATIONS 2 (Sept. 2021), [https://perma.cc/X5ZJ-MYZ5].

84. There is great urgency in addressing concerns regarding structural integrity of older multifamily condominiums in Florida where approximately 3.5 million people live in 1.5 million condominium units, 60% of which are more than thirty years old. GRAND JURY FINAL REPORT, *supra* note 4, at 2-3 (calling the Champlain Towers South collapse "a wake-up call for state and local governmental officials"). The Grand Jury Final Report suggested ten or fifteen years, the bill introduced in the Florida legislature proposed a statewide thirty-year recertification requirement that is reduced to twenty-five years for coastal structures. *Id.* at 6; H.R. Pandemics & Pub. Emergencies Comm., Proposed Comm. B. 22-03 (Fla. 2022), [https://perma.cc/2HYY-D6L2]. Prior to the collapse, only Miami-Dade and Broward Counties had recertification requirements. GRAND JURY FINAL REPORT, *supra* note 4, at 2; *see also* MIAMI-DADE CNTY. CODE § 8-11(f), *supra* note 13; Broward County Board of Rules & Appeals, *40 Year Building Safety Inspection Program*, at 5.86 (2015), [https://perma.cc/W9PH-WH7Q].

enforcement authority regarding buildings' structural issues.[85] The grand jury also called for more frequent recertification of buildings in Miami so that structures would be examined more often than every forty years.[86] A proposal that mirrored recommendations of various task forces convened in the wake of the Champlain Towers South collapse.[87] Changes to condominium governing law can complement such building code improvements.[88]

A. Florida Condominium Law Proposals

Post-Surfside proposals regarding condominium law fall generally within four categories. First, condominium maintenance standards should be established and linked to mandated reinspection and reserve studies.[89] Second, the quality of improvements in a condominium and the sufficiency of association reserves should be more transparent, specifically disclosed to owners, buyers, and regulators. Third, various other

85. GRAND JURY FINAL REPORT, *supra* note 4, at 1. *See also* Vanessa Romo, *A Surfside Condo Collapse Grand Jury Calls for Immediate Reforms*, NPR (Dec. 15, 2021), [https://perma.cc/26LB-9LAS].

86. GRAND JURY FINAL REPORT, *supra* note 4, at 3,6; *see also* H.R. PCB PPE 22-03, Pandemics and Public Emergencies Comm. (Fla. 2022), [https://perma.cc/6NAX-4BCB] [hereinafter Florida House Bill].

87. Task forces advocated for additional and more frequent recertification requirements for high-rise condominium buildings after transfer of control to unit owners. FLORIDA BAR TASK FORCE REPORT, *supra* note 83, at 15 (calling for reinspection every five years for buildings over 3 stories tall); SURFSIDE WORKING GROUP, *supra* note 83, at 2, 4.

88. Although the Florida Bar Task Force Report, Surfside Working Group, and Grand Jury Final Report focused on necessary changes to state and local laws in Florida, the Surfside disaster has already spurred changes and proposed changes to building and condominium laws in other states. For example, the Los Angeles County Board of Supervisors passed a measure mandating engineering reinspection for 30-year or older buildings in Los Angeles County. L.A. CNTY. BD. OF SUPERVISORS, MOTION FOR ASSESSING THE SAFETY OF HIGH-RISE BLDGS. IN L.A. CNTY. (2021), [https://perma.cc/73LT-L68T]. Similar measures have been proposed in the District of Columbia, Maryland, Missouri, New York, Ohio, and South Carolina.

89. Proposed legislation in Florida would require condominiums and cooperatives to conduct reserve studies every 10 years for buildings that are three stories or more and requires developers to complete reserve studies for every building that is three stories or more, prior to turning over an association to the unit owners. Florida House Bill, *supra* note 86. The bill defines "reserve study" as study of the reserve funds required for future major repairs and replacement of the common elements. *Id.* at 12. If passed, Florida's law "would be one of the strictest in the U.S. regarding condo inspection and reserve-funding requirements." Campo-Flores, *supra* note 54.

proposals focus on educating board members, bolstering their authority to make repairs in spite of unit owner objections, and/or increasing board accountability to owners and government regulators for repairs not made. Finally, several proposals focus on establishing a non-waivable required amount for reserves that a condominium must set aside for structural repairs.

Establishing maintenance and repair standards for high-rise condominiums would provide needed clarity and cover for boards with respect to building maintenance.[90] Frequent, detailed inspections would raise awareness of defects and needed remediation, and it would be particularly helpful if these requirements led to more robust accountability for developers who negligently built inherently flawed buildings.[91] Associations require sufficient time and methods to discover and bring suit for faulty construction, and laws should ensure that condominiums can obtain funding to remediate harms wrongfully caused by builders. For example, terms in condominium governing documents and standard form purchase agreements that purport to narrow the manner or timing of construction dispute resolution and terms that insulate developers from liability should be deemed ineffective.[92]

Transparency requirements would ensure that new and existing unit owners are not caught off guard with respect to forthcoming maintenance needs.[93] If condominium buyers know

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90. The Florida Condominium Act currently has "no express maintenance, repair or replacement standards for boards of directors to follow in the Act or in most governing documents." FLORIDA BAR TASK FORCE REPORT, *supra* note 83, at 9.

91. The Florida Bar Task Force Report suggests the adoption of new inspection protocols using developer turnover inspection report required by R.S. Ch. 718.301(4)(p) as a model. FLORIDA BAR TASK FORCE REPORT, *supra* note 83, at 14-15. That law lists thirteen items that must be inspected, including roof, structure, fireproofing, elevator, plumbing, and electrical systems. *Id.* at 13-14. The Florida Bar Task Force Report proposes that waterproofing be added to the list. *Id.* at 10. The Grand Jury Final Report also recommends more specific requirements for recertification and condominium maintenance standards, particularly mentioning waterproofing. GRAND JURY FINAL REPORT, *supra* note 4, recommendations 4-8, 10, 12, and 25. Lack of waterproofing was a significant source of the structural problems at Champlain Towers South. Putzier et al., *supra* note 12.

92. *See generally* Andrea J. Boyack, *Common Interest Community Covenants and the Freedom of Contract Myth*, 22 J. LAW & POL'Y 767 (2014) (explaining why common interest community governing documents are not contracts that are freely chosen by unit owners).

93. The Florida Bar Task Force proposes that state condominium laws mandate that developers provide a report with protocols for "required maintenance, useful life, and replacement costs" of each item, and propose that large condominiums be required to include

of upcoming maintenance needs, the condominium unit will be more accurately valued in a sale. Disclosure mandates with respect to current owners can help educate residents about the need for structural remediation, and disclosure to governing bodies can help ensure that dangerous structural issues are addressed.[94] However, disclosing existing problems to current owners cannot avoid the effects of those owners' prior mispricing of units. Many current owners did not expect that their housing costs would dramatically increase to fund significant structural remediation in their building.[95] Perhaps government programs can find ways to help protect not only new buyers but also existing owners who did not have the benefit of such disclosures when they purchased their units.[96]

Condominium board members are non-expert volunteer members of the community.[97] As the Florida Bar Task Force explained, "education of directors, officers and unit owners, as to their specific obligations, statutory requirements and issues involved in association and condominium management, operation and maintenance is imperative."[98] In addition to education efforts, some proposals call for enhanced board accountability for maintenance failures,[99] but increased accountability may chill willingness to serve on the condominium board and may lead to wasteful litigation among condominium members.[100] It is perhaps more effective to focus on enhancing the authority of

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and frequently update such information on their website. FLORIDA BAR TASK FORCE REPORT, *supra* note 83, at 13-14.

94. *See, e.g.*, GRAND JURY FINAL REPORT, *supra* note 4, recommendations 21 and 23.

95. Benny L. Kass, *Wondering Why Your Condo Assessment Keeps Going Up? Here's How to Find Out*, CHI. TRIB. (Dec. 26, 2017), [https://perma.cc/6LEW-RBHS].

96. The Grand Jury Final Report recommends that condominium boards be required to report to government entities. GRAND JURY FINAL REPORT, *supra* note 4, recommendation 21. Such reporting requirements could be tied to oversight and enforcement or could be tied to government assistance and guidance.

97. HYATT, *supra* note 21, at 81; Marilyn Lincoln, *Condo Culture: Volunteer Board Members Work Toward Everyone's Good*, NAT'L POST (Dec. 19, 2012), [https://perma.cc/P4XA-DPXW].

98. FLORIDA BAR TASK FORCE REPORT, *supra* note 83.

99. FLORIDA BAR TASK FORCE REPORT, *supra* note 83, at 33; GRAND JURY FINAL REPORT, *supra* note 4, at 6-10.

100. Association and board legal fees are common expenses, and all members of a condominium are therefore financially responsible for legal costs incurred by boards defending against litigation from members. *See, e.g.*, Ocean Trail Unit Owners Ass'n v. Mead, 650 So. 2d 4, 6-7 (Fla. 1994).

board members to make necessary repairs even without unit owner approval.[101] A mandate to make repairs coupled with the authority to do so may also provide cover for board members who face unit owner resistance to assessment increases. Changing the power of condominium boards, however, requires changing the terms of condominium governing documents because condominium bylaws are private contracts enforceable as such. If a condominium's governing documents mandate that unit owners must vote to approve assessment increases, then changing a statute to deny the owners that approval right creates a troubling conflict with the terms of existing private contracts.[102]

Enhanced board accountability for structural problems may increase board members' focus on and willingness to address adequate building maintenance. But lack of awareness and motivation are not the only problems.[103] Ensuring developer responsibility for design and construction errors is also critical because it is unfair to have unit owners pay for a developer's mistakes.[104] In addition, simply mandating that condominiums undertake significant building repairs will be ineffective if the condominium's financial resources are insufficient to do so.

The biggest reason that Champlain Towers South failed to make critical repairs in its building was that it did not have the money to do so.[105] When a condominium has adequate reserves, it need not resort to a huge special assessment to fund the entire cost of necessary repairs. State laws vary with respect to association reserve requirements, and in only a handful of states is a particular level of reserve funding required by law.[106] Furthermore, in some states, including Florida, a majority of unit owners can waive the statutory reserve funding requirement, a loophole that is particularly problematic when employed by a developer-controlled association to defer maintenance funding.[107]

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101. *See* FLORIDA BAR TASK FORCE REPORT, *supra* note 83.

102. HYATT, *supra* note 21, at 109-111.

103. *Supra* Sections I.A-C.

104. *See supra* notes 93-96 and accompanying text.

105. *See* Baker & Freytas-Tamura, *supra* note 59.

106. *Reserve Requirements and Funding*, *supra* note 81 (describing the requirements of various state laws).

107. Florida's current law does not require a reserve study but requires a reserve schedule for repair and replacement of major components, but this statutory requirement is

New proposals in Florida would raise the condominium reserve requirement to 50% of replacing each component in the inspection report "based on the estimated remaining useful life" and make the requirement un-waivable by unit owners.[108]

If reserves are better funded, condominiums will be better financially situated to make major structural improvements, but reserve mandates risk being a type of magical thinking. Simply requiring owners to pay higher assessments in order to fund reserves will not guarantee that owners have the ability do so.[109] Housing costs today are higher than ever before, and inflationary increases outpace income growth, particularly for retirees on fixed income (such as many residents of South Florida condominiums).[110] Growing reserves require assessments to increase faster than inflation, which may make housing costs unaffordable to existing and would-be condominium owners. Alternate sources of capital might be required in some condominiums in order to effectively fund necessary repairs.

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waivable by a majority vote of the association. FLA. STAT. ANN. §§ 720.303(6), 718.112(2)(f), 719.106(1)(j) (West 2022); *see also* Florida House Bill, *supra* note 86, at 13-14 (describing how developers exploit this loophole).

108. FLORIDA BAR TASK FORCE REPORT, *supra* note 83, at 21; Florida House Bill, *supra* note 86, at 14. The proposed Florida House Bill prohibits members of an association from waiving the reserve requirement, prohibits developers from waiving collection of reserve funds, and mandates that reserve funds earmarked for repair be used for those purposes. Florida House Bill, *supra* note 86, at 14. Similarly, the Grand Jury Final Report recommended that "the waiver provision regarding the obligation to fund reserves for condominium repairs be stricken from the statute," but states that if the waiver provision remains, any such waiver should require the vote of at least 70% of the unit owners. GRAND JURY FINAL REPORT, *supra* note 4, § 28-29, at 35. The Grand Jury also recommends that the Florida Condominium Act be amended to prohibit repurposing reserve funds. *Id*. § 30, at 35. The Bar Task Force proposed a less drastic change, requiring a supermajority (75%) vote to waive required reserves. FLORIDA BAR TASK FORCE REPORT, *supra* note 83, at 22.

109. One of the reasons that Champlain Towers South did not perform structural repairs earlier is that the condominium could not obtain financing to commence the project. Tolan et al., *supra* note 16. Condominiums do have the power to collect delinquent assessments from defaulting unit owners, but collection efforts take time and money. Foreclosing an association lien may be ineffective to obtain delinquent assessment funds when a first mortgage lien encumbers the property. Boyack, *supra* note 27, at 75.

110. Nichole Friedman, *U.S. Housing Affordability Worsens,* WALL ST. J. (Feb. 10, 2022), [https://perma.cc/6RUD-G5RT]; Lisa Iannucci, *Making Special Assessments Work,* COOPERATOR NEWS (Mar. 2017), [https://perma.cc/2AUG-KBW6]; Nathan Crook et al., *Florida Building Collapse Hints at Future When Only Rich Can Afford Beach*, BLOOMBERG (July 7, 2021), [https://perma.cc/4WQT-27RN].

B. Impact of GSE Underwriting Requirements

As legislatures around the country debate changes to building codes and condominium laws, in a practical sense, condominium requirements regarding structural stability have already dramatically changed. Fannie Mae and Freddie Mac, the two government sponsored enterprises ("GSEs") that dominate the secondary mortgage market, announced new underwriting requirements starting in 2022 that require condominiums prove structural soundness and maintenance adequacy as a prerequisite to the GSEs acquiring loans secured by units in the building.[111] Because the GSEs are the secondary home mortgage market's biggest players,[112] their underwriting requirements define access to mortgage capital.[113] It is more expensive and more difficult to obtain a loan secured by units in condominiums that do not comply with GSE underwriting requirements.

The GSEs will only acquire mortgage loans secured by condominium units in condominiums that conform to their underwriting mandates.[114] Numerous examples show the

111. Fannie Mae Lender Letter (LL-2021-14) [hereinafter Fannie Lender Letter]; Freddie Mac Bulletin 2021-38 [hereinafter Freddie Bulletin]. The guidelines are framed as "temporary," but contain no expiration date. Fannie Mae released two other documents detailing these changes to its underwriting guidelines: *Appraising and Underwriting Condo and Co-op Projects*, FANNIE MAE, [https://perma.cc/58G6-FLBY] (last visited Apr. 25, 2022); Jodi Horne, *Protecting Condos as a Sustainable Housing Option*, FANNIE MAE: PERSPECTIVES BLOG (Oct. 13, 2021), [https://perma.cc/MQV7-DRNN].

112. The majority of mortgage loans made today are earmarked for resale to the GSEs. Andrew Ackerman, *Fannie Mae, Freddie Mac to Back Home Loans of Nearly $1 Million as Prices Soar*, WALL ST. J. (Nov. 16, 2021), [https://perma.cc/7TFM-525B]; *see also* Ben Eisen & Nicole Friedman, *Surfside Tower Collapse Makes Buying Condos More Complicated*, WALL ST. J. (Feb. 20, 2022), [https://perma.cc/7NNB-QAMK] (noting that the GSEs "wield enormous power in the housing market" through their dominant role in purchasing and securitizing home mortgage loans); John S. Prisco, *In the Wake of the Surfside Tragedy Fannie Mae and Freddie Mac Issue "Temporary" Requirements for Condominiums and Cooperatives*, NAT'L L. REV. (Jan. 21, 2022), [https://perma.cc/3TVT-QUZJ] (opining that the "new additional requirements could make it harder for unit owners to refinance or for new buyers to obtain mortgages").

113. James L. Winokur, *The Mixed Blessings of Promissory Servitudes: Toward Optimizing Economic Utility, Individual Liberty, and Personal Identity*, 1989 WIS. L. REV. 1, 58-59 (1989).

114. The Department of Housing and Urban Development maintains a list of approved condominium projects, and the GSEs only purchase mortgages on units in condominiums on that list unless there is "spot approval" of a unit in a building that otherwise meets all underwriting mandates. *See id.*

material impact that GSE underwriting requirements have had on the content of condominium governing documents and governance decision-making. For example, owner occupancy requirements led communities to adopt leasing restrictions.[115] Prohibition of third-party covenants led developers to stop including private transfer fee provisions in condominium documents.[116] Further, underwriting valuation constructs based on the racial composition of a neighborhood led to a proliferation of community race-based restrictive covenants in the first half of the 20th century.[117]

Per their new guidelines, neither GSE will acquire any loan secured by a condominium that has "significant deferred maintenance" or is subject to a government agency directive "to make repairs due to unsafe conditions."[118] Units in any such condominium are ineligible under the GSE guidelines "until required repairs have been made."[119] The new guidelines also suspended any flexibility pertaining to the GSE requirement that associations make an annual contribution to reserves in the amount of 10% of the condominium's budget.[120]

The impact of the new GSE underwriting requirements is twofold. First, condominiums now have further incentives to ensure their building's structural soundness and upkeep.[121] The

115. Andrea J. Boyack, *American Dream in Flux: The Endangered Right to Lease a Home*, 49 REAL PROP. TR. & EST. J. 204, 255-59 (2014).

116. *Id.* at 258 n.302.

117. RICHARD R.W. BROOKS & CAROL M. ROSE, SAVING THE NEIGHBORHOOD: RACIALLY RESTRICTIVE COVENANTS, LAW, AND SOCIAL NORMS 3-4, 91 (2013); RICHARD ROTHSTEIN, THE COLOR OF LAW: A FORGOTTEN HISTORY OF HOW OUR GOVERNMENT SEGREGATED AMERICA 81-83 (1st ed. 2017).

118. Fannie Lender Letter, *supra* note 111; Freddie Bulletin, *supra* note 111.

119. Horne, *supra* note 111.

120. Fannie Lender Letter, *supra* note 111. Previously, under Fannie Mae's *Selling Guide*, lenders could submit a reserve showing indicating reserve adequacy in lieu of a 10% annual budgetary contribution. *Id.* The inflexibility of the new guidelines may pose problems for condominiums whose governing documents do not permit 10% of each annual budget to be siphoned into reserves whether or not there is a need to plan for future capital requirements.

121. The vast majority of surveyed condominium boards throughout the country worry that these new underwriting guidelines will expose them to liability and impose onerous requirements to attest to facts that they do not and cannot certainly know. Lew Sichelman & Andrews McMeel, *Surfside Tower Collapse Fallout Could Make Condo Financing a Challenge. Here's Why*, MIAMI HERALD (Mar. 22, 2022, 9:16 AM), [https://perma.cc/3ER7-5Y2M] (citing a study done by the Community Associations Institute (CAI)).

new requirements will also make it exponentially more difficult to sell units in condominiums with maintenance deficiencies because of the lack of access to GSE-subsidized mortgage capital. Lower capital availability also makes it harder to refinance a condominium unit to raise capital for a special assessment. Cutting off mortgage capital access to units in structurally perilous buildings maroons the owners in the buildings, which is ironic and dangerous in the context of structurally unsound condominiums. Unit owners in such buildings who do not have the cash to pay a large special assessment may be unable to obtain financing to do so or even sell their units to someone who can pay the costs. While it is prudential for lenders to ensure the structural soundness of their collateral assets, from a public policy perspective, punishing condominium unit owners for not being able to fund needed repairs by taking away the ability of the unit owners to get loans to fund those repairs creates troubling outcomes.[122]

Spokespeople for the GSEs have framed the new underwriting guidelines as a way for Fannie Mae and Freddie Mac to "protect residents from unsafe buildings."[123] But because the guidelines cut off capital flow to unsafe buildings rather than facilitate construction funding for repairs, the true impact of the guidelines is to protect investors, not owners. Of course, the GSEs should have prudent underwriting guidelines, but the GSEs exist not just for investors but also to achieve public purposes.[124] Protecting GSE investors is a good idea, but there is also a huge public need to enable the remediation of structurally unsound buildings.

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122. A similar conundrum was created by GSE limits on condominium assessment delinquency in the aftermath of the 2008 Foreclosure Crisis, because unit owners in buildings with 30% or more unit owners in assessment default could not access GSE-earmarked mortgage loans. This left the unit owners without a source of capital to refinance (in order to continue operating the condominium) and made it virtually impossible for the unit owners to sell their units other than to a cash buyer. *See* Boyack, *supra* note 27, at 104-05. GSE owner occupancy requirements and condominium leasing restrictions likewise constrained unit owner flexibility and access to capital. Boyack, *supra* note 115, at 255.

123. Eisen & Friedman, *supra* note 112.

124. *See* Boyack, *supra* note 115, at 255-58 (describing the public policy mandates of GSEs); *see also History of Fannie Mae & Freddie Mac Conservatorship*, FED. HOUSING FIN. AGENCY, [https://perma.cc/T5HK-93KJ] (last visited Apr. 13, 2022) (detailing the conservatorship the GSEs were put under after the Foreclosure Crisis).

It would be preferable if GSEs made funds available for condominium remediation and repair instead of simply cutting off non-complying condominium owners from an important source of capital. Perhaps the GSEs can innovate a way to protect investors while also helping to shore up crumbling condominium infrastructure. Maybe they could offer special funding to condominium associations or individual unit owners to help them pay for critical repairs, with loan amounts disbursed directly to those performing remediation. The GSEs should examine the impacts of their underwriting changes on unit owners as well as investors and find a way to financially facilitate the structural remediation that these condominiums desperately need—and likely want—but cannot realistically afford.[125]

CONCLUSION

Condominium ownership structure needs to be shored up in a way to help stabilize buildings' structural flaws, but it is as important to facilitate necessary repairs as to mandate them. For condominiums like Champlain Towers South that are facing hugely expensive but critically important remediation projects, the owners' spirit may be willing, but their finances are weak.[126] Strengthening building quality mandates without providing pathways to fund repairs will result in more noncompliant and functionally insolvent condominiums, not more stable buildings.

In cases where buildings were poorly constructed, laws should protect owners' recourse to the developer. If those responsible for inherent construction flaws cannot provide remediation, public funding of remediation may be warranted.[127] For condominiums with massive maintenance needs and

125. The Florida Bar Task Force agrees: Housing finance and affordable housing administrative agencies should create programs to assist low-income owners pay for special assessments needed for structural remediation of their buildings. FLORIDA BAR TASK FORCE REPORT, *supra* note 83, at 10, 28-29.

126. Tolan et al., *supra* note 16.

127. For example, a public fund could cover developer liabilities that are not recoverable due to expiration of a statute of limitations or developer bankruptcy. Some states have established funds to cover construction defects from time to time, although many of these are limited in scope to buildings under governmental control. *See, e.g.*, KAN. STAT. ANN. § 75-3785 (West 2022) (creating a construction defects recovery fund).

inadequate reserves, government or quasi-government entities (for example, the GSEs) could provide the requisite capital. Improvements to laws and policies should help facilitate structural soundness, not just punish disrepair.

Condominium ownership design holds great promise. Condominium ownership facilitates homeownership and self-governance and can help people build wealth while residing in safe homes. But condominium ownership design is precarious as well. Just as democracy is both a good and potentially frustrating form of government, condominium governance can both benefit from including stakeholders but also suffer from the inefficiencies and insufficiencies inherent in decision-making by a committee of non-experts.[128] Unit owners object to assessment increases, and their elected representatives are tempted to give them what they want. As in all democracies, voters and leaders both prefer to procrastinate painful and latent community problems. In condominiums, the owners' financial interconnectedness makes individuals' financial distress contagious, and unaddressed structural vulnerabilities imperil everyone, not just those who do not contribute to repair costs. Design improvements to condominium law should be calibrated to address issues of owner ability to fund repairs, not just their desire to do so. Ensuring building life safety requires fixing the problem, not just assigning blame. Thoughtful changes to condominium laws and public policies can reduce not only the risk of building collapse but also the problems inherent in condominium ownership as a legal construct.

128. In his November 11, 1947, address to the House of Commons, Winston Churchill called democracy "the worst form of Government, except for all those other forms that have been tried from time to time . . . ." CHURCHILL BY HIMSELF: THE DEFINITIVE COLLECTION OF QUOTATIONS 574 (Richard Langworthy, ed., 2008).