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A Disastrous Rejection: The Case for Including Community Associations under theStafford Act's Individuals and Households Program

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I. Introduction

In the waning days of October 2012, the hurricane-turned-post-tropical-cyclone, since referred to as "Super-Storm Sandy" ("Sandy"), carved its way through the Caribbean and up the east coast of the United States before finally making landfall on New Jersey's coast.[1] The devastation wrought by Sandy was significant; at final tally, the storm resulted in 147 deaths, damage and destruction to at least 650,000 homes, and massive power outages affecting millions of residents.[2]

While Sandy's wrath certainly cast a wide net, the damage to New Jersey and New York was particularly severe. New York's infrastructure was severely impacted, including, among other things, significant flooding to streets, major subway lines, and airports.[3] Similarly, on the other side of the Hudson, Sandy caused an estimated $400 million in damage to New Jersey's public transportation system.[4] Across both states, the storm devastated beaches, roads, parks and utilities.[5] The immensity of Sandy's public devastation was matched only by its cost. With approximately $50 billion in damages, Sandy was the second costliest weather event in

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[1] *See, e.g.*, Doyle Rice, *Weather Lessons from Super Storm Sandy*, USA TODAY (Oct. 28, 2013, 10:28 AM), http://www.usatoday.com/story/weather/2013/10/26/weather-hurricane-superstorm-sandy/3178777/.

[2] Kathryn D. Sullivan & Louis W. Uccellini, *Hurricane/Post-Tropical Cyclone Sandy, October 22-29, 2012*, NAT'L OCEANIC AND ATMOSPHERIC ADMIN., U.S. DEP'T OF COMMERCE iv (May 2013), http://www.nws.noaa.gov/os/assessments/pdfs/Sandy13.pdf.

[3] *Id.*

[4] *Id.*

[5] *See, e.g.*, Ginger Adams Otis, *Hurricane Sandy, On Year Later: Tracing the Superstorm's Path from Inception to* Destruction, N.Y. DAILY NEWS, (Oct. 26, 2013, 5:27 PM), http://www.nydailynews.com/new-york/hurricane-sandy/sandy-1-year-storm-winds-article-1.1495677

American history, behind only Hurricane Katrina.[6] Among a number of other public assistance grants stemming from Sandy (totaling about $1.7 billion), the Federal Emergency Management Agency (FEMA) estimates that it provided almost $20 million to the New York Department of Transportation for debris removal, almost $5 million to the Long Beach Medical Center, $2.5 million to the New York City Department of Health and Mental Hygiene, and over $451,000 to the Hudson River Park Trust to repair its facilities.[7]

Perhaps even more concerning than the public destruction and cost accompanying Sandy's arrival was the storm's impact on the private community. According to the National Hurricane Center, "[t]he extent of catastrophic damage along the New Jersey coast was unprecedented in the state's history," adding that "[w]hole communities were inundated by water and sand, houses were washed from their foundations . . . ."[8] In the storm's aftermath, over 5 million homes went without power, with outages often lasting for weeks.[9] Approximately 346,000 housing units sustained at least some damage, and state officials deemed 22,000 of them uninhabitable.[10] In New York, the story was similar. Governor Cuomo estimated that an astonishing 305,000 homes in the state were destroyed in the storm, most by Sandy's powerful surge.[11]

Portending catastrophes such as Sandy, Congress passed the Robert T. Stafford Disaster Relief and Emergency Assistance Act (the "Stafford Act") with the purpose of "[alleviating] the suffering and damage" resulting from disasters by "providing Federal assistance programs for

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[6] Rice, *supra* note 1.
[7] *Public Assistance By the Numbers*, FED. EMERGENCY MGMT. AGENCY (Aug. 23, 2013, 3:22 PM), http://www.fema.gov/news-release/2013/08/23/public-assistance-numbers.
[8] ERIC S. BLAKE, TODD B. KIMBERLAIN, ROBERT J. BERG, JOHN P. CANGIALOSI & JOHN L. BEVEN II, NAT'L HURRICANE CTR., AL182012, TROPICAL CYCLONE REPORT: HURRICANE SANDY 17 (2013), *available at* http://www.nhc.noaa.gov/data/tcr/AL182012_Sandy.pdf
[9] *Id.*
[10] *Id.*
[11] *Id.*

both public and private losses sustained in disasters."[12] Notably, through its Individuals and Households Program ("IHP"), the Stafford Act permits the distribution of federal grants to homeowners for both repairs and replacements of "owner-occupied" private residences damaged by a major disaster.[13] According to its most recent reports, FEMA provided a combined $13 billion in total federal aid to the recovery efforts in New York and New Jersey.[14] Of this total figure, $996 million of New York's total aid[15] and $412 million of New Jersey's total aid is going towards "individuals and households" claims.[16]

While FEMA has distributed a substantial amount of assistance for "individuals and households" thus far, a regional peculiarity has revealed a gap in the IHP. A substantial number of homeowners in the New York area own homes in common interest communities (planned communities, housing cooperatives, and condominiums).[17] To various extents, common interest communities possess a certain level of collectively owned property which is held by and managed through a community association.[18] The gap in disaster coverage is manifest in FEMA's view of community associations.[19] While community associations are almost always non-profit organizations, composed exclusively of the homeowners in a given community,[20]

[12] Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C.A. § 5121(b)(6) (West 2013).
[13] 42 U.S.C.A. § 5174 (c)(2)–(3) (West 2013).
[14] *See New Jersey Recovery From Superstorm Sandy: By the Numbers*, FED. EMERGENCY MGMT. AGENCY (Sept. 9, 2013, 3:09 PM), http://www.fema.gov/news-release/2013/09/03/new-jersey-recovery-superstorm-sandy-numbers (estimating total federal aid to New Jersey at $ 5.6 billion); *New York: By the Numbers-42*, FED. EMERGENCY MGMT. AGENCY (Aug. 29, 2013, 3:07 PM), http://www.fema.gov/news-release/2013/08/29/new-york-numbers-42 (estimating total federal aid to New York at over $ 8 billion).
[15] *New York: By the Numbers-42*, FED. EMERGENCY MGMT. AGENCY (Aug. 29 2013, 3:07 PM), http://www.fema.gov/news-release/2013/08/29/new-york-numbers-42.
[16] *See* FED. EMERGENCY MGMT. AGENCY, *supra* note 14.
[17] Michael H. Schill, Ioan Voicu, & Jonathan Miller, *The Condominium Versus Cooperative Puzzle: An Empirical Analysis of Housing in New York City*, 36 J. LEGAL STUD. 275, 276 (2007).
[18] JESSE DUKEMINIER, PROPERTY 896 (7th ed. 2010).
[19] Mireya Navarro, *U.S. Rules Bar Aid to Co-ops Hit by Sandy*, N.Y. TIMES, May 1, 2013, at A1, *available at* http://www.nytimes.com/2013/05/02/nyregion/fema-policy-keeps-co-ops-from-disaster-aid.html?pagewanted=all.
[20] *See* DUKEMINIER, *supra* note 18.

FEMA views them as businesses.[21] Because they are viewed as such, community associations are not eligible for federal aid under the IHP.[22] This is especially problematic for homeowners in common interest communities with shared property elements such as outside walls, roofs, or other essentials of the home.[23]

The confluence of the New York area's peculiar housing situation, the Stafford Act's failure to explicitly include community associations under IHP coverage, and FEMA's designation of such associations as businesses, is preventing thousands of condominium and housing cooperative owners in New York and New Jersey from receiving the full benefit of federal disaster grants.[24] After this gap in coverage became apparent, lawmakers in the New York area, anxious for relief, worked to create an amendment to the Stafford Act that would allow condominium and housing cooperatives the same coverage under the IHP as other homeowners.[25] This Comment argues that, because community associations are more appropriately viewed as an extension of their members as property owners, the proposed amendment to the Stafford Act should be passed in order to equally protect all homeowners from the burdens attendant to major disaster events.

Part II of this Comment explores the different types of common interest communities and their unique legal status. Part III outlines the nature of the federal aid generally available to homeowners under the Stafford Act's IHP. Part IV seizes upon the example of Hurricane Sandy to demonstrate the disastrous effects of the gap in coverage for common interest communities

[21] *See* Navarro, *supra* note 19.
[22] *Id.*
[23] *See* Navarro, *supra* note 19.
[24] *See* Maura McDermott, *After Sandy: Aid For Co-Ops and Condos*, NEWSDAY, March 7, 2013, at A05, *available at* 2013 WLNR 5588292.
[25] H.R. 2887, 113th Cong. (2013); S. 1480, 113th Cong. (2013). *See* Press Release, Rep. Steve Israel, Rep. Israel Announces Legislation to Make Co-Ops and Condos Eligible for Storm Recovery Grants (July 29, 2013), *available at* http://israel.house.gov/media-center/press-releases/rep-israel-announces-legislation-to-make-co-ops-and-condos-eligible-for.

under the Stafford Act and elaborates on the amendments proposed to correct it. Finally, by demonstrating the impracticality of viewing community associations as businesses and thus preventing them the benefit of IHP grants, Part V lends support to the legislative effort to amend the act to include condominium associations and housing cooperatives. Part VI concludes.

II. The Legal Underpinnings of Common Interest Communities

As of 2012, approximately 25.9 million housing units in the United States were in common interest communities.[26] Nearly 64 million residents live across the nation's 323,600 common interest communities, and over the last half-century that number has continued to grow.[27] In New York and New Jersey alone, there are a combined 19,000 common interest communities, accounting for almost 6 percent of common interest communities nationwide.[28]

Common Interest Communities are "[r]eal-estate development[s] or neighborhood[s] in which individually owned lots or units are burdened by a servitude that imposes an obligation that cannot be avoided by nonuse or withdrawal."[29] All common interest communities are unified by three characteristics. First, membership in a community association is required for all individual owners within that particular community.[30] Second, each owner in a community is bound, by the same governing documents, to honor mutual obligations between owners and the community association.[31] Finally, each owner in a community contributes economically to the community association which represents the collective.[32] Summed up, "[t]he distinctive feature of a common-interest community is the obligation that binds the owners of individual lots or

[26] *Statistical Review 2012: For U.S. Homeowners Associations, Condominium Communities and Housing Cooperatives, National and State Data*, FOUND. FOR CMTY. ASS'N. RESEARCH (2012), http://www.cairf.org/foundationstatsbrochure.pdf.
[27] *Id.*
[28] *Id.*
[29] RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 6.2 (2000).
[30] *An introduction to Community Association Living*, CMTY. ASS'N INST. 4 (2006), http://www.caionline.org/events/boardmembers/Documents/IntroToCALiving.pdf.
[31] *Id.* at 4
[32] *Id.*

units to contribute to the support of common property, or other facilities . . . whether or not the owner uses the common property or facilities, or agrees to join the association."[33] There are three primary types of common interest community found in America today: (1) planned communities; (2) condominiums; and (3) housing cooperatives.[34] Each of these types will be addressed in kind.

In planned communities, homeowners generally have exclusive ownership of the lot they purchased and the detached housing unit atop it; their purchase, however, also requires that they be members in the governing community association.[35] With ownership of the lot and unit in the hands of individual owners, the common areas in a planned community are typically recreational areas, grounds, and, in some cases, roads that are owned by the association.[36] Since homeowners in planned communities individually own their entire lot and housing unit, their homes will be covered under the IHP.[37] Any property the owners do share, such as recreational areas and grounds[38] are not of the type that that the IHP would cover even if individually owned.[39]

Unlike planned communities, condominium ownership involves a greater degree of shared ownership.[40] Put most generally, the interior space of each unit in a condominium community belongs exclusively to the individual homeowner, while the remaining areas are

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[33] RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 6.2 cmt. a (2000).
[34] *See* CMTY. ASS'NS. INST., *supra* note 30, at 6.
[35] *Id.* at 6–7.
[36] *Id.*
[37] 42 U.S.C.A. § 5174 (c)(2)−(3) (West 2013). *See also* FED. EMERGENCY MGMT. AGENCY, *Help After A Disaster: Applicant's Guide to the Individuals & Households Program*, FEMA 545 5–6 (July 2008), http://www.fema.gov/pdf/assistance/process/help_after_disaster_english.pdf.
[38] *See* CMTY. ASS'NS. INST., *supra* note 30, at 7.
[39] *See* FED. EMERGENCY MGMT. AGENCY, *supra* note 37, at 5–6. It is worth pointing out here that, although individual owners in planned communities will typically qualify for IHP coverage, they still face a unique hardship in the aftermath of disasters. Following Sandy, community association in a number of gated communities in New York were left with immense costs to repair damage to their communal infrastructure. Joseph Berger, *Enclaves, Long Gated, Seek to Let In Storm Aid*, N.Y. TIMES, Nov. 26, 2012, http://www.nytimes.com/2012/11/27/nyregion/new-york-city-enclaves-long-gated-want-to-let-in-storm-aid.html?_r=0.
[40] *See* CMTY. ASS'NS. INST., *supra* note 30, at 7.

owned collectively by all unit owners, as tenants in common.[41] Thus, in most circumstances the physical boundaries of a unit and the land upon which it rests on are the domain of the community association.[42] Under the Uniform Common Interest Ownership Act, which some states have modeled their own statutes on,[43] a common interest community is not a condominium "unless the undivided interests in the common elements are vested in the unit owners."[44] Thus, in the case of condominiums, quite literally, the common areas are co-owned by the *individual* unit owners.[45]

Condominiums can take a variety of different forms.[46] They might be apartment buildings, townhouses, or, less frequently, detached single family dwellings.[47] The make-up of a given condominium community might have a practical effect on which property elements will be shared.[48] Where, as in most cases, a condominium takes the form of an apartment building or attached townhouses, the exterior walls will likely be property shared in common by the individual owners.[49] In rarer circumstances, however, individual units which are detached, and thus do not physically share a structural portions of their home, are unlikely to designate exterior walls, or even their roofs, as common property.[50] These distinctions will all be managed by the

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[41] *See* Paula A. Franzese & Steven Siegal, *Trust and Community: The Common Interest Community as Metaphor and Paradox*, 72 MO. L. REV. 1111, 1115 n. 16 (2007); DUKENMINIER, *supra* note 18, at 897; *see also* WAYNE S. HYATT & SUSAN B. FRENCH, COMMUNITY ASSOCIATION LAW: CASES & MATERIALS ON COMMON INTEREST COMMUNITIES 5 (2d ed. 2008).
[42] *See* CMTY. ASS'NS. INST., *supra* note 30, at 7.
[43] *See* DUKENMINIER, *supra* note 18, at 896.
[44] UNIF. COMMON INTEREST OWNERSHIP ACT §1-103 (8) (1982).
[45] *Id.*; *see also* DUKENMINIER, *supra* note 18, at 897.
[46] *See* CMTY. ASS'NS. INST., *supra* note 30, at 7.
[47] *See* Franzese & Siegel, *supra* note 41, at 1115 n.16; *see also* CMTY. ASS'NS. INST., *supra* note 30, at 7.
[48] Franzese and Siegel explain that a common interest community's allocation of collectively held elements will be affected by its status as either a territorial (individual units spread across a large piece of real estate) or non-territorial (usually a single building). Franzese & Siegel, *supra* note 41, at 1115 n.16.
[49] *See* DUKENMINIER, *supra* note 18, at 897.
[50] The Community Associations Institute explains that while condominiums are popularly conceived of as apartment buildings, they can also take other forms such as a mobile home park. In such a circumstance, the owner would individually own the entire mobile home structure, but would have a shared interest in all of the remaining property on which the unit rests. *See* CMTY. ASS'NS. INST., *supra* note 30, at 7.

"declaration of condominium," which is filed before any sales in a complex are made.[51] Importantly, where the declaration designates only the interior of a unit for individual ownership, as is most often the case, the remaining exterior elements like walls, roofs, and hallways will be under the control of the community association, putting them at risk of falling into the IHP coverage gap.[52]

Somewhat distinct from the condominium is the housing cooperative. In a housing cooperative, the owner of the entire property, including the individual unit, is the cooperative corporation.[53] When a person buys into a housing cooperative, they are purchasing shares of stock in the cooperative corporation.[54] The corporation, in which the resident is now a part-owner, then leases the individual unit to the resident.[55] Thus, "the owner of a cooperative apartment is technically both the owner of shares in the cooperative corporation and a tenant of that corporation."[56] While it is possible for housing cooperatives to take different physical forms, this type of common interest community is almost exclusively found in apartment buildings.[57]

The cooperative corporation is notable for a couple of reasons. First, while technically the cooperative owner "leases" a unit, it is anything but a typical lease.[58] The leases are almost always for an extended period of time.[59] In many circumstances, a cooperative lease is a

[51] *See* DUKENMINIER, *supra* note 18, at 897–98.
[52] *See* Navarro, *supra* note 19.
[53] Michael H. Schill, Ioan Voicu, & Jonathan Miller, *The Condominium Versus Cooperative Puzzle: An Empirical Analysis of Housing in New York City*, 36 J. LEGAL STUD. 275, 277 (2007).
[54] *Id.* at 277.
[55] *Id.*
[56] *Id.*
[57] *See* Franzese & Siegel, *supra* note 41, at 1115 n.16.
[58] This type of lease is distinct from a typical land-lord-tenant arrangement because in housing cooperatives the tenants own the subject building as a group and are thus "collectively their own landlord." *See* Henry B. Hansmann, *Condominium and Cooperative Housing: Transactional Efficiency, Tax Subsidies, and Tenure Choice*, 20 J. LEGAL STUD. 25, 26 (1991).
[59] *See* Schill, Voicu, & Miller, *supra* note 53, at 277 (describing the typical lease period as a "significant period of time (typically 99 years)").

"proprietary lease" entitling the lessee to perpetual occupancy of the unit."[60] Whatever the official length of the lease, it is evident that a cooperative owner's "lease" is radically different than a renter's lease from an individual property owner.[61] Second, a cooperative owner's stock in the corporation is freely transferable; thus, the stock and its accompanying right to occupancy can be sold for whatever price the market commands.[62] A housing cooperative member "effectively has a perpetual, exclusive, and freely transferable property right in the physical unit he occupies."[63]

The final distinctive feature of the housing cooperative form is that the cooperative property is typically secured by a single blanket mortgage for which the corporation is responsible.[64] If one member of the cooperative fails to make payment for their individual share of the mortgage interest or taxes, it is up to the other members to make up the deficiency.[65] Therefore, in housing cooperatives, the financial stability of the collective is very much dependent on the contribution of the individual.

Despite members' proprietary rights to occupy or sell their units and the corporation's unique reliance on those members for survival, housing cooperatives are wholly excluded from the IHP coverage since virtually all of their property is collectively owned through the corporation.[66]

III. The Disaster Relief Available to Qualifying Homeowners under the Stafford Act's Individuals and Households Program:

[60] *See* Hansmann, *supra* note 58.
[61] *See* Hansmann, *supra* note 58, at 26–27 (explaining that a cooperative owner's "proprietary lease" is more akin to "owner-[occupied]" property than to "ordinary land-lord-tenant" relationships).
[62] *Id.* at 26–27.
[63] *Id.*
[64] *See* DUKENMINIER, *supra* note 18, at 898.
[65] *Id.* at 898.
[66] *See* Navarro, *supra* note 19.

Section 408 of the Stafford Act empowers FEMA to "provide financial assistance, and, if necessary, direct services, to individuals and households in the State who, as a direct result of a major disaster, have necessary expenses and serious needs in cases in which the individuals and households are unable to meet such expenses or needs through other means."[67] For § 408 purposes, "financial assistance" simply means cash grants that are provided to eligible individuals and households.[68] While FEMA regulations allow for a relatively broad view of what constitutes a household,[69] it is made explicitly clear that the IHP grants are not available for business losses.[70]

There are two relevant types of assistance available to individuals and households under the IHP.[71] First, FEMA may grant financial assistance for "the repair of owner-occupied private residences, utilities, and residential infrastructure damaged by a major disaster to a safe and sanitary living or functioning condition."[72] A safe home is one that is "secure from disaster-related hazards or threats to occupants."[73] A sanitary home is one "free of disaster-related health hazards."[74] For a home to be considered functioning, it only needs to be "capable of being used for its intended purpose."[75] With respect to repairs, a victim receiving assistance is not required to show that their needs could have been met through other means, except with respect to

[67] U.S.C.A. § 5174(a)(1) (West 2013).
[68] Emergency Mgmt. and Assistance, 44 C.F.R. § 206.111 (West 2009).
[69] 44 C.F.R. § 206.111 (West 2009) (defining "household" as "all persons (adults and children) who lived in the pre-disaster residence who request assistance under this subpart, as well as any persons, such as infants, spouse, or part-time residents who were not present at the time of the disaster, but who are expected to return during the assistance period").
[70] 44 C.F.R. § 206.113 (West 2009).
[71] In addition to grants for repairs and replacement there is also two other forms of assistance offered under § 5174: (1) "temporary housing," under § 5174(c)(1); and (2) "permanent housing construction," for "insular areas outside the continental U.S.," under § 5174(c)(4).
[72] 42 U.S.C.A. § 5174 (c)(2)(A)(i)(West 2013).
[73] 44 C.F.R. § 206.111.
[74] *Id.*
[75] *Id.*

insurance proceeds.[76] Where insurance proceeds are capable of covering an individual's repairs, and where there is no reason to think such proceeds will be significantly delayed, the homeowner is not eligible for IHP repair grants.[77] FEMA is also empowered under the IHP to provide "financial assistance for the replacement of owner-occupied private residences damaged by a major disaster,"[78] up to the maximum amount of the program's power.[79]

While neither the Stafford Act nor the accompanying regulations explicitly detail the types of repairs that are eligible for IHP assistance, except to explain that a home must be safe and functional, an applicant guide designed by FEMA provides greater detail about the types of eligible repairs.[80] The guide makes it clear that the standard is "safe and sanitary" and that the IHP will not simply "pay to return your home to its condition before the disaster."[81] Instead, returning a household to a "safe and sanitary condition" may include: fixing structural issues like the foundation, outside walls, or roof; repairing interior issues like windows, doors, floors, walls, ceilings, and cabinetry; and repairing septic and sewage systems, well water and other water systems, heating and air conditioning systems, utilities, or entrances and exits to a home.[82] Thus, while the types of repairs available under IHP are many, they relate strictly to the core functions of a home. Despite the long list of available home repairs covered by the IHP, monetary relief is capped at $25,000 per household per major disaster.[83]

On its face, the IHP is designed to assist homeowners following major disasters by helping them to return their homes to a merely livable, safe condition. FEMA's view of

[76] 42 U.S.C.A. § 5174(c)(2)(B) (West 2013).
[77] 44 C.F.R. § 206.113 (b)(6).
[78] 42 U.S.C.A. § 5174 (c)(3)(A)(West 2013).
[79] 42 U.S.C.A. § 5174 (h)(1)–(2) (West 2013) (The maximum amount is $25,000 per household, but this number is subject to adjustment based on the consumer price index).
[80] *See* FED. EMERGENCY MGMT. AGENCY, *supra* note 37, at 5–6.
[81] *Id.*
[82] *Id.*
[83] 42 U.S.C.A § 5174 (h)(1) (West 2013).

community associations, however, has substantially limited the program's effectiveness for a great number of homeowners.

IV. The Gap in Coverage for Common Interest Communities under Section 408 of the Stafford Act and Hurricane Sandy

In passing the Stafford Act, Congress determined that federal assistance was necessary to combat the disruptions to the normal functioning of communities and the adverse effects upon individuals and families which are created by disasters.[84] With respect to owners in common interest communities, however, this ambition is not being realized.

In the wake of a natural disaster, an obvious place for community associations to start looking for aid was Section 405 of the Stafford Act, which provides grants to private non-profit facilities.[85] But this approach quickly runs into a road-block. FEMA regulations explicitly state that a private non-profit facility must be providing essential, government-type services *to the general public*.[86] While community associations are generally non-profit organizations, they are not open to the general public and they only provide services to their members. Not surprisingly, FEMA takes a similar view that community organizations are private entities serving private property interests.[87] One of FEMA's disaster assistance policies states that a private non-profit facility will not meet the "open to the general public" standard if membership is restricted to a group of individuals holding an economic interest in the organization's property, offering the specific example of a condominium association.[88]

[84] 42 U.S.C.A § 5121(a)(2) (West 2013).
[85] 42 U.S.C. § 5172 (a)(3) (West 2013).
[86] 44 C.F.R. § 206.221(e) (West 2013)
[87] FED. EMERGENCY MGMT. AGENCY, *Private Non-Profit (PNP) Facility Eligibility*, DAP 9521.3 5 (July 18, 2007), http://www.fema.gov/pdf/government/grant/pa/9521_3.pdf.
[88] *Id.* at 5.

Since FEMA, through its regulatory clarification, has foreclosed the availability of public assistance grants to community associations,[89] the next most logical place for associations to look would be the IHP, described in Part III.[90] For purposes of distributing financial assistance under the IHP, however, FEMA has determined that community associations are not individuals or households, but are instead "business associations."[91] Since the IHP will not cover business losses, community associations are not able to request assistance grants under the program to repair or replace qualifying damages to property over which they maintain control.[92]

While some unit owners in planned communities and detached condominium housing may be able to submit individual IHP claims, the issue becomes more complicated for condominiums in apartment buildings, townhouses, or housing cooperatives where more of the physical property is shared.[93] This is because elements of their physical units, such as roofs, exterior walls, heating and cooling systems, and plumbing, are more likely to be shared between members and, thus, the domain of the community association.[94]

An article from the New York Times, published shortly after Sandy, explained the problem concisely: "[C]o-op boards are prohibited from obtaining grants for common areas, and individual co-op owners cannot seek money for damage to their apartments' walls and floors because those are usually the legal responsibility of the building."[95] Highlighting the damage to one particular Brooklyn co-op, the article goes on to describe "the wallpaper in the lobby is peeling by the yard. The walls themselves show cracks and holes, as if assaulted by a

[89] *Id.*
[90] 42 U.S.C.A. § 5174 (West 2013).
[91] *See* Navarro, *supra* note 19.
[92] 44 C.F.R § 206.113 (b)(9) (West 2013). *See also* Navarro, *supra* note 19; McDermott, *supra* note 24
[93] *See supra* text accompanying note 49.
[94] *Id.*
[95] Navarro, *supra* note 19.

sledgehammer. The Boiler is barely sputtering along and may not last the year."[96] One resident, and secretary-treasurer of the co-op, asked, "How can [FEMA] do that? We're not in business. We don't make a profit . . . I think they don't realize what co-ops are."[97] Likewise, the co-president of a 10,000 person cooperative that sustained over $250,000 of damage after Sandy lamented, "[i]t is unconscionable that FEMA refuses to help the working class community of Glen Oaks Village . . . because we are a co-op."[98] He later added that "[t]o deny co-ops the ability to obtain FEMA grant money simply because of the type of housing choices their residents have made is shameful."[99] In a question and answer post on the web-site of The New Jersey Cooperator, user "Battered in Brick" inquired about FEMA coverage for flood damage that disabled her condominium's boilers and elevators.[100] "Battered in Brick" was likely disappointed by the reply from attorney Hubert Cutolo, which explained "a condominium association—i.e., a non-profit corporation—would not qualify for disaster aid assistance under IHP."[101]

That this gap in the Stafford Act's coverage was brought to light in the wake of Sandy is no accident. New York City is home to the vast majority of the housing cooperatives in the United States and, by and large, these cooperatives come in the form of owner occupied apartment buildings.[102] By one count, there are over 400,000 cooperative apartments in New York City.[103] Another source explains that, while a mere 10 percent of the country's common

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[96] *Id.*
[97] *Id.*
[98] Press Release, Rep. Steve Israel, Rep. Israel Announces Legislation to Make Co-Ops and Condos Eligible for Storm Recovery Grants (July 29, 2013), http://israel.house.gov/media-center/press-releases/rep-israel-announces-legislation-to-make-co-ops-and-condos-eligible-for.
[99] *Id.*
[100] Hubert Cutolo, *Q&A: Hurricane-Damaged*, THE N.J. COOPERATOR (February 2013), http://njcooperator.com/articles/981/1/QampA-Hurricane-Damaged/Page1.html.
[101] *Id.*
[102] *See* Franzese & Siegel, *supra* note 41, at 1115 n.16.
[103] *See* DUKENMINIER, *supra*, note 18, at 898.

interest buildings are housing cooperatives, 80 percent of such communities found in New York are cooperative apartments.[104] Thus, given the high concentration of cooperative owners in the area, Sandy's arrival in New York was especially suited to reveal the unique hardship disasters create for such homeowners and demonstrated the need for a change in the IHP.

V. The Legislative Effort to Fill the Coverage Gap for Community Associations, and Why it Should Be Passed

In the months following Hurricane Sandy, the need for a change in the IHP was quickly apparent. To those affected, an obvious first approach was to call upon FEMA to reevaluate their policy towards community organizations applying for IHP aid.[105] Congressman Steve Israel, a Democrat from New York, sent two letters to the Department of Homeland Security and to FEMA, imploring the agencies to reevaluate their policy toward homeowners associations.[106] Representative Israel explained his position that "FEMA's policy is the result of not understanding the role of co-ops and condos in our community."[107] Likewise, members of housing cooperatives across the region expressed a similar view that FEMA should see community associations as an extension of the private homeowners which comprise them.[108] FEMA, however, insists that they are prevented from providing relief under the Stafford Act.[109]

After failing to convince FEMA to reevaluate their policy on community associations, Representative Israel proposed a legislative solution; he introduced a bill that would amend the Stafford Act to explicitly include condominiums and housing cooperatives in the IHP.[110]

A. The Legislative Effort to Fill the IHP Coverage Gap

[104] Schill, Voicu, & Miller, *supra* note 53, at 276.
[105] *See* Israel, *supra* note 98.
[106] *Id.*
[107] *Id.*
[108] Navarro, *supra* note 19.
[109] Mireya Navarro, *Bill Would Alter FEMA Policy to Assist Co-Ops and Condos*, N.Y. Times (July 29, 2013) [hereinafter *Bill Would Alter FEMA Policy*], *available at* http://www.nytimes.com/2013/07/29/nyregion/us-bill-would-extend-fema-aid-to-co-ops-and-condos.html.
[110] H.R. 2887, 113th Cong. (2013).

Representative Israel's bill, along with an identical bill in the Senate sponsored by Senator Charles Schumer of New York,[111] states its purpose unequivocally: "To amend the Robert T. Stafford Disaster Relief and Emergency Assistance Act to provide assistance for condominiums and housing cooperatives damaged by a major disaster . . . ."[112]

The bills start by adding two definitions to the Stafford Act, one for condominiums, and one for housing cooperatives.[113] The newly added definition of condominium explains:

> The term 'condominium' means a multi-unit housing project in which each dwelling unit is separately owned, and the remaining portions of the real estate are designated for common ownership solely by the owners of those units, each owner having an undivided interest in the common elements, and which is represented by a condominium association consisting exclusively of all the unit owners in the project, which is, or will be responsible for the operation, administration, and management of the project.[114]

This definition of condominium is indicative of the standard condominium form[115] and would likely encompass all condominiums. The definition is also careful to define the association so that it includes all individual unit owners, and only those unit owners.[116]

The proposed bill's newly added definition of housing cooperatives reads as follows:

> The term 'housing cooperative' means a multi-unit housing project in which each dwelling unit is subject to separate use and possession by one or more cooperative members whose interest in such unit, and in any undivided assets of the cooperative association that are appurtenant to such unit, is evidenced by a membership or share interest in a cooperative association and a lease or other document of title or possession granted by such cooperative as the owner of all cooperative property.[117]

[111] S. 1480, 113th Cong. (2013).
[112] H.R. 2887, 113th Cong. (2013); S. 1480, 113th Cong. (2013).
[113] H.R. 2887, 113th Cong. (2013); S. 1480, 113th Cong. (2013).
[114] H.R. 2887, 113th Cong. (2013); S. 1480, 113th Cong. (2013).
[115] See *supra* pp. 6–7.
[116] H.R. 2887, 113th Cong. (2013); S. 1480, 113th Cong. (2013).
[117] H.R. 2887, 113th Cong. (2013); S. 1480, 113th Cong. (2013).

As was the case with condominiums, the proposed definition of housing cooperative is consistent with typical understandings of the ownership form[118] and will bring all homeowners in housing cooperatives within its reach.

Most importantly, the bill adds to § 5174(b)(1) (the IHP) an explicit direction to include communities associations within the umbrella of "individuals and households," stating:

> For purposes of providing financial assistance under subsections (c)(2)[Repairs] and (c)(3)[Replacement] with respect to residential elements that are the legal responsibility of an association for a condominium or housing cooperative, the terms 'individual' and 'household' include the association for the condominium or housing cooperative.[119]

This addition makes it possible for the community association itself to seek aid for damaged common elements instead of the individual owners.

Finally, since the adjustable $25,000 cap on grants in §5174(h) is most practical for single households, the bill proposes a "Special Rule for Condominiums and Housing Cooperatives," that ultimately leaves its meaning to be determined by the President through regulation. [120]

Representative Israel, after proposing the legislation, explained, "[a] storm does not discriminate where it hits, and FEMA should not be discriminating what type of homeowners it helps."[121] Other voices in New York have echoed Israel's sentiment in support of the bill. New York State Senator Tony Avella agrees, arguing that "homeowners of every kind deserve the same FEMA assistance when a storm hits."[122] Mark Weprin, a New York City councilman, adds that "Co-op residents deserve equal access to federal funds for repairs like those needed after

[118] See *supra* pp. 8−9.
[119] H.R. 2887, 113th Cong. (2013); S. 1480, 113th Cong. (2013)
[120] H.R. 2887, 113th Cong. (2013); S. 1480, 113th Cong. (2013).
[121] *See* Israel, *supra* note 98.
[122] *Id.*

Hurricane Sandy. I thank Congress Member Israel for introducing this legislation."[123] In support of the bill, the Community Association Institute issued a call to action on their website, asserting that "[condominium and cooperative] homeowners and communities deserve the same disaster relief as any other homeowner and any other neighborhood."[124] These voices of support for the bill share a common realization that, with respect to the purpose of the IHP, homeowners in common interest communities are not meaningfully different from traditional homeowners. Denying coverage for community associations under the IHP is essentially the same thing as denying it to individual homeowners.

A. The Proposed Amendments Reflect a More Reasonable View of Community Associations and Should be Passed

By designating community associations as businesses, FEMA has created an obvious hardship to homeowners in condominiums and housing cooperatives.[125] A more reasonable view of the entity would recognize that community associations are inseparable from their members. The appropriateness of this view becomes even more pronounced when taken in the context of disaster relief. The repair and replacement provisions of the IHP were intended to assist those living in "owner-occupied private residences" following major disasters.[126] Thus, blocking IHP grants to cooperatives and community associations is only sensible if there is something peculiar to their ownership type that elevates them from the realm of mere homeowners or that uniquely equips them, relative to traditional homeowners, to recover from the disasters. There is no reason to believe, however, that this is the case. Ultimately, the best view of community associations is as extensions of the individual, private home owners of which they are comprised.

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[123] *Id.*
[124] *FEMA Advocacy and Talking Points 2013*, COMMUNITY ASSOCIATION INSTITUTE (2013), http://www.caionline.org/govt/Pages/FEMAAdvocacyandTalkingPoints2013.aspx.
[125] *See* Navarro, *supra* note 19.
[126] 42 U.S.C.A. § 5174 (c)(2)-(3) (West 2013).

To be sure, the issue is not clear cut, and FEMA is not the first to struggle in assigning a legal identity to the ownership form.[127] At various times, and in different contexts, community associations have been viewed as businesses, governmental-type entities, or simply private associations.[128] Similarly, individual rights holders in cooperatives have been viewed as renters, investors, and most appropriately, as holders of real property.[129] No doubt, much of the confusion associated with the form of ownership is a result of the fact that community associations often resemble corporate entities in both name and governance.[130] A closer look at both the make-up and the role of community associations, however, reveals that, while perhaps analogous to businesses in some superficial aspects, a much more realistic view of the community association is as an extension of the homeowner.

In advocating for the passage of Representative Israel's proposed amendments to the Stafford Act, the remainder of this part explains first why cooperative stock ownership should be viewed practically, as home ownership. The focus then turns to an explanation of why a view of community associations as businesses is inconsistent with the views espoused by a number of courts. Finally, the remainder of this Comment explains how, in the specific context of disaster relief, a view of community associations which denies them characterization as home owners works a particular hardship to the members of such communities, a hardship that can only be remedied by passage of Representative Israel's amendments.

1. Cooperative Stock as Real-Estate Ownership

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[127] *See, e.g.*, United Hous. Found., Inc. v. Forman, 421 U.S. 837, 853 (1975); Susan F. French, *Making Common Interest Communities Work: The Next Step*, 37 URB. LAW. 359, 362–65 (2005) (examining the legally confusing similarities and difference between community associations and private businesses, private associations, and local governments).

[128] *See, e.g.*, French, *supra* note 127, at 362–65.

[129] *See Forman*, 421 U.S. at 853. *See also* Kadera v. Superior Court, 931 P.2d 1067 (Ariz. Ct. App. 1996); Anton Sattler, Inc. v. Cummings, 425 N.Y.S.2d 476, 478 (Sup. Ct. 1980).

[130] *See* French, *supra* note 127, at 363.

Housing cooperatives present a special issue for individual ownership because the only thing that the individual technically holds is title to stock in the cooperative corporation, which in turn holds the actual title.[131] This peculiar property arrangement raises questions about the nature of the individual's ownership interest.[132]

While recognizing the ambiguous nature of cooperative ownership, a number of courts facing these definitional issues have opted to place substance over form, ignoring semantic and technical distinctions, to find that cooperative shareholders are more akin to real property owners than mere renters or investors. In *United Housing Foundation, Inc. v. Forman*, for example, the Supreme Court was forced to answer the question of whether residents' shares in a housing cooperative, referred to as "stock" when purchased, constituted "securities," bringing them within the purview of the Securities Act of 1933[133] and the Securities Exchange Act of 1934.[134] The Securities Act of 1933 defined "security" broadly and included in its definition the phrase "any stock."[135] Despite this clear language, the court held that "form should be disregarded for substance," insisting that "the emphasis should be economic reality."[136]

With a view targeting "economic reality" the court explained, "[c]ommon sense suggests that people who intend to acquire only a residential apartment in a state-subsidized cooperative, for their personal use, are not likely to believe that in reality they are purchasing investment securities simply because the transaction is evidenced by something called a share of stock."[137] In determining the nature of the individual's property interest, the Court made clear that reducing

[131] *See* Schill, *supra* note 17, at 276.
[132] David S. Wilson, *First-Aid for Housing the Low- and Fixed-Income Elderly: The Case for Resuscitating Cooperative Housing*, 15 ELDER L.J. 293, 304 (2007) (describing "[o]ne main problem that cooperative housing has faced is the difficulty of classifying the type of interest a buyer obtains when purchasing a cooperative ownership interest").
[133] *Forman*, 421 U.S. at 844.
[134] *Id.* at 845.
[135] 15 U.S.C.A. § 77b (a)(1) (West 2013).
[136] *Forman*, 421 U.S. at 848 (quoting Tcherepnin v. Knight, 389 U.S. 332, 336 (1967)).
[137] *Id.* at 851.

the issue to a literal examination of the chosen nomenclature, in this case a "stock," is misplaced.[138]

Other courts have dealt with the definitional problems of co-op ownership similarly, focusing on the practical realities attendant to the ownership form.[139] In a particularly thorough opinion, an Arizona court of appeals refused to "exalt form over substance in real property transactions," and held that a cooperator acquires a real property interest when they purchase shares in a cooperative.[140] The court explained that, with the exception of the fact that there is no title transfer, the stock purchase possesses all of the indicia of a real estate transaction.[141] In the particular facts of the Arizona case, for instance, the purchaser chose a preferred location and neighborhood, provided a sizable initial investment, possessed an exclusive right to occupy the unit, and held an interest that was both devisable and assignable. [142] In other words, the court was, again, willing to delve below the superficial, and view the "stock purchase" for what it was: a real estate purchase.

2. Community Associations are Inseparable Extensions of their Members

While housing cooperative members present a special issue in receiving grants for repairs to their individual apartments, the bigger issue, and the issue with which Congressman Israel's legislation[143] deals, is FEMA's purported inability under the Stafford Act to offer IHP grants to any community associations, including cooperative corporations.[144] Like a literal view of

[138] *See* Wilson, *supra*, note 132, at 311 ("In Forman [sic], the Court recognized that the most important characteristic of a housing cooperative is that it is a home.").
[139] *See, e.g.*, Kadera v. Superior Court, 931 P.2d 1067 (Ariz. Ct. App. 1996); Anton Sattler, Inc. v. Cummings, 425 N.Y.S.2d 476, 478 (Sup. Ct. 1980) (holding that a cooperator possesses a proprietary lease, which is a real property interest for purposes of the statute of frauds, but that cooperator is subject to the rights and duties set forth in the proprietary lease).
[140] *Kadera*, 931 P.2d at 1074.
[141] *Id.*
[142] *Id.* at 1074–75.
[143] H.R. 2887, 113th Cong. (2013); *see also* S. 1480, 113th Cong. (2013).
[144] *See Bill Would Alter FEMA Policy*, *supra* note 109.

housing cooperative members, a formalistic view of community associations as businesses is misguided and fails to adequately consider the association's make-up and functions.

There is no doubt that much of the impetus behind the desire to view community associations as business entities comes from the fact that they are typically organized as corporations under state corporate law; if viewed in isolation, however, that label is misleading.[145] As an initial matter, community associations are almost always chartered as non-profits.[146] Associations function to protect their resident's interests as property owners, not to maximize profits.[147] Further, unlike profit driven corporate entities, community associations are comprised entirely of the residents they represent and are likewise controlled by a board of directors assembled from, and elected by, members of the same association.[148] In fact, these officers and directors are not paid, their service is not typically treated as a career, and in many cases they have no formal training.[149]

Some courts, recognizing the unique character of community associations, have indicated a wariness to view community associations strictly as businesses.[150] Generally, in corporate law, when a shareholder contests a board's decision, courts will apply the business judgment rule.[151] Premised on the belief that a risk of liability will discourage boards from taking the type of risks necessary to maximize their value, the business judgment rule works to insulate boards from

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[145] *See* Wayne S. Hyatt, *Common Interest Communities: Evolution and Reinvention*, 31 J. MARSHALL L. REV. 303, 342 (1998) ("Most community associations created today are incorporated under the not-for-profit corporation law of the state in which they operate."); *see also* HYATT &. FRENCH, *supra*, note 41, at 3.
[146] *See* Hyatt, *supra* note 145, at 342.
[147] Kristin L. Davidson, *Bankruptcy Protection for Community Associations As Debtors*, 20 EMORY BANKR. DEV. J. 583, 599 (2004) ("Unlike the goal of typical shareholders to maximize profits, members of associations have varied concerns relating to their living environment.").
[148] *Id.* at 592.
[149] *See* French, *supra* note 127, at 364.
[150] *See* Davidson, *supra* note 147.
[151] *See* Hyatt, *supra* note 145, at 345–46.

liability.[152] The Delaware Supreme Court explains that the rule represents a "presumption that in making a business decision the directors of a corporation acted on an informed basis, in good faith and in the honest belief that the action taken was in the best interests of the company."[153] The business judgment rule rests on a judicial deference to corporate boards, essentially allowing them to take whatever actions they believe are in the best interest of the company.[154]

Despite the fact that community associations are *technically* incorporated entities, not all courts have afforded them the generous cover of the business judgment rule, a reality demonstrated by their use of a reasonability standard to review association decisions.[155] One court applying a reasonability standard explained that associations "must balance individual interests against the general welfare" of the community at large.[156] Implicit in the decision to test the reasonability of an association's decision is a revelation by courts that unlike a typical corporation, associations have a "tremendous impact on the personal lives and homes of the association's residents."[157] In fact, courts and commentators alike have argued that community associations often function more like governmental bodies than like businesses.[158] This analogy,

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[152] *See* WILLIAM T. ALLEN, REINIER KRAAKMAN, & GUHAN SUBRAMANIAN, COMMENTARIES AND CASES ON THE LAW OF BUSINESS ORGANIZATION 231–32 (4th ed. 2012); *see also* Hyatt, *supra* note 145, at 346.
[153] Aronson v. Lewis, 473 A.2d 805, 812 (Del. 1984).
[154] *See* Allen, *supra* note 152.
[155] *See, e.g.*, Nahrstedt v. Lakeside Village Condo. Ass'n, 878 P.2d 1275, 1278 (Cal. 1994) (holding that courts must enforce covenants, conditions and restrictions unless they are unreasonable); Cohen v. Kite Hill Cmty. Assn., 142 Cal. App. 3d 642, 652 (Ct. App. 1983) (holding that association's decision not to permit homeowner's building of a fence would be overturned only if it were arbitrary); Hidden Harbour Estates, Inc. v. Norman, 309 So. 2d 180, 182 (Fla. Dist. Ct. App. 1975) (holding that only reasonable association decisions will be upheld; arbitrary and capricious rules with no relation to a unit owner's health, happiness, or enjoyment of their property will be overturned).
[156] *Cohen*, 142 Cal. App. 3d at 653.
[157] *See* Davidson, *supra* note 147, at 599.
[158] *See, e.g.*, *Cohen*, 142 Cal. App. 3d at 651; Davidson, *supra* note 147, at 599; HYATT & FRENCH, *supra* note 145, at 3–4 (explaining that local municipalities have often favored creation of common interest communities because they receive the benefit of an increased tax base while the community association assumes many of the responsibilities otherwise reserved for municipal governments). *See also* French, *supra* note 127, at 362. French argues that, while also different from government in some respects, community associations manage communal property such as parks and streets, enforce land use restrictions similar to local zoning boards, levy assessments akin to property taxes, and supply services like utilities, snow removal, and security. *Id.* at 362.

likening community associations to local governments is more helpful in understanding an association's true character than one likening it to a business entity.[159]

Governments, at their best, exist to represent the populace from which they draw their power, to act in the best interest of the collective. Community associations, similarly, exist as extensions of their individual property owners. Reflecting this view, the California Court of Appeals explained in *Cohen*, "[l]ike any community, [the community association] consists of individual members who form in the aggregate an organic whole."[160] Instead of viewing the association and its property owners as wholly distinct entities, the court recognized that the latter are inseparable parts of the former. This is not to say that community associations should be viewed simply as private governments,[161] nor does the *Cohen* court imply that.[162] The analogy to government simply offers a conceptual aid to understanding how community associations function with respect to their members.

3. Denying IHP Grants to Community Associations Violates Basic Fairness

The aptness of an analogy to government, and its use by courts, reveals the need to re-characterize the superficial view of community associations as mere businesses. This need for a definitional shift is even more pronounced when viewed in the context of disaster relief. As described earlier, community associations are made up exclusively of individual owners, their boards are comprised of, and elected by, members of the association, and much of their decision-making is governed by majority rule. [163] Most importantly, the community association functions

[159] While the analogy is helpful, it is not complete. Community associations only serve to benefit their property-owning private residents. On the other hand, municipal governments serve an entire community. *See* Davidson, *supra* note 147, at 600.
[160] *Cohen*, 142 Cal. App. 3d at 653.
[161] *See supra* note 159.
[162] The court simply analogized a community association's approval of a fence to a municipal zoning board's granting of a variance. *Cohen*, 142 Cal. App. 3d at 652.
[163] *See* French, *supra* note 127 at 363–64.

almost entirely with the money it raises in assessments from its own members.[164] Consequently, when an association faces an emergency, it is, in reality, its member-homeowners who face an emergency.[165]

The community association exists for the purpose of representing its members' interests as homeowners, thus a harm to the association is necessarily a harm to its members. The Court of Appeals of New York espoused this view of community associations in *Neponsit Property Owners' Association v. Emigrant Industrial Savings Bank*, a seminal case in the development of common interest communities.[166] Affirmatively answering the question of whether community associations could enforce covenants running with the land (in this case, the payment of dues) on behalf of their members, the court explained that community associations were formed as "a convenient instrument by which the property owners may advance their common interests."[167] To the *Neponsit* court then, community associations were an extension of their members and the association was simply a convenient way to represent their interests as homeowners.[168] If the Stafford Act is directed at protecting homeowners from the tragedies attendant to disasters by helping them repair and replace their homes, refusing to provide aid to community associations runs directly contrary to that goal, because a hardship to the association is a hardship to the individual owner.[169]

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[164] *Id.* at 362.
[165] *See* Davidson, *supra* note 147, at 608 ("If emergency costs to repair the common elements exceed the insurance coverage, the governing documents of a community association typically provide the association with power to levy and collect special assessments.").
[166] Neponsit Prop. Owners' Ass'n v. Emigrant Indus. Sav. Bank, 15 N.E.2d 793, 798 (N.Y. 1938); *see also* Andrew Russell, *The Tenth Anniversary of the Restatement (Third) of Property, Servitudes: A Progress Report*, 42 U. TOL. L. REV. 753, 759 (2011) (describing *Neponsit* as "the seminal case validating homeowners associations as beneficiaries of association fees").
[167] *Neponsit*, 15 N.E.2d at798.
[168] *See* Russell, *supra* note 167, at 759.
[169] 42 U.S.C.A. § 5174 (b)(1) (West 2013).

There is no reason to think that extending IHP coverage to community associations offers any unique benefits to homeowners in common interest communities. Representative Israel's amendment does not lift any restrictions on the type of repairs and replacements eligible for grants under the IHP program.[170] Just like the grants available to traditional homeowners, grants offered to community associations under the amendments will be for the limited purpose of returning homes to a "safe and sanitary" condition.[171] There is no special benefit conferred upon homeowners in common interest communities under the amended version of the Stafford Act.

Despite their reliance on community associations, homeowners in common interest communities are not substantially better equipped to respond to emergencies than traditional homeowners. While many community associations will have insurance policies that protect against certain emergencies, such a policy is not likely to anticipate all emergencies.[172] In the event that repair costs exceed the policy's coverage, the excess will be covered by special assessments, drawn from the pockets of individual owners.[173] Further, responsible homeowners not living in community associations can also insure their homes from disasters. In fact, as the IHP is currently constituted, it anticipates that qualified homeowners might have insurance, but it does not deny them coverage on that ground.[174]

While it is also true that community associations often develop reserve funds for emergent repairs and needs,[175] it is important to recognize that these funds generally anticipate predictable costs, like repairing common roofs or other long-term projects.[176] Further, these

[170] H.R. 2887, 113th Cong. (2013); S. 1480, 113th Cong. (2013).
[171] H.R. 2887, 113th Cong. (2013); S. 1480, 113th Cong. (2013).
[172] *See* Davidson, *supra* note 147, at 608.
[173] *Id.*
[174] 42 U.S.C.A. § 5174 (c)(2)(B)(West 2013).
[175] *See* HYATT & FRENCH, *supra* note 41, at 341.
[176] *See id.* at 342 (explaining that boards should consider the number of replaceable assets, anticipate the *expected life*, and set the contribution amount from members to meet those eventual needs).

funds are supplied with money raised by the association through assessments on residents.[177] While the administration of the reserve fund is necessarily formal when administered by a community association, it is, in essence, nothing more than a budgetary strategy that most responsible homeowners can and should practice, even if in a less formal capacity.

Reserve funds and insurance policies aside, the fact of the matter is that when a major disaster strikes, homeowners in common interest communities are left to bear the costs just like any other homeowner.[178] When there is damage to a common element that is under the legal control of the community association, like a shared roof, wall, furnace, or boiler, the Stafford Act is not armed to offer the same repair grants it could to an individual homeowner.[179] While the cost of repairing commonly held property will ultimately be paid by individual owners, the determination that community associations are businesses prevents them from receiving the same grants as other homeowners.[180]

This characterization of community associations not only runs contrary to the substantive realities of the ownership form, it creates a result that violates basic fairness. This lack of fairness is even more glaring when considered alongside the reality that many residents who live in common interest communities are doing so out of necessity and not because of any meaningful choice on their part.[181] The number of common interest communities in the United States continues to grow each year, and in many areas housing markets are saturated with

[177] *Id.* at 341.
[178] *See* Davidson, *supra* note 147, at 608–09 ("Special assessments are risky for the financial stability of a community association because they have not been anticipated by the association or budgeted into the personal finance costs of members.").
[179] *See* Navarro, *supra* note 19.
[180] *Id.*
[181] *See* Franzese & Siegel, *supra* note 41, at 1124–25; *see also* Hyatt, *supra* note 145, at 312.

common interest communities.[182] As a result, this trend has deprived many home buyers of meaningful choice.[183]

Adding to the unfairness of this reality, it is worth noting that much of the growth of common interest communities in housing markets across the country has been fueled by local governments.[184] Local governments favor common interest communities because it allows them to widen their tax base while at the same time providing fewer services than they would if traditionally owned homes were built.[185] As local governments continue to struggle with budget crises of their own, it is likely that this trend will continue,[186] placing more and more homeowners in the coverage gap created by their non-inclusion in the Stafford act's IHP program.

VI. **Conclusion**:

The Stafford Act, as presently constituted, unfairly excludes community associations from its IHP.[187] This exclusion is the result of an overly formal interpretation of community associations as business entities.[188] While such an interpretation may be superficially comprehensible, it distorts the reality that community associations are inseparable from the individual homeowners they represent. Thus, the exclusion of community associations from IHP coverage results in the practical exclusion of individual homeowners from the very relief the program purports to offer. The hardship this gap in coverage creates is uniquely apparent in the

[182] *See* Franzese & Siegel, *supra* note 41, at 1125.
[183] *See id.* at 1125.
[184] *See id.* at 1119–24; HYATT& FRENCH, *supra* note 41, at 3–4.
[185] *See* HYATT& FRENCH, *supra* note 41, at 3–4.
[186] *Id.*
[187] *See* Navarro, *supra* note 19.
[188] *Id.*

wake of Hurricane Sandy, where thousands of condominium and cooperative owners were told they were not eligible for the same grants as similarly situated traditional home owners.[189]

This clear inequity would be remedied by the amendment to the Stafford Act that has been introduced in both houses of Congress.[190] The amendment allows cooperative corporations and condominium associations to seek coverage under the IHP program.[191] Since a community association is properly viewed as a collective of homeowners, this amendment offers no new benefits to anyone the Stafford Act's IHP program purported to assist in the first place. Cooperative Corporations and Condominium associations will qualify for exactly the same types of repairs and replacements as traditional homeowners, allowing them to bring their homes back to a safe and sanitary condition.[192]

[189] *See* Navarro, *supra* note 19.
[190] H.R. 2887, 113th Cong. (2013); S. 1480, 113th Cong. (2013).
[191] H.R. 2887, 113th Cong. (2013); S. 1480, 113th Cong. (2013).
[192] 42 U.S.C.A. § 5174 (c)(2)–(3) (West 2013).