

BARRIERS TO NEIGHBORHOOD WILDLIFE HABITATS: IS LAWN UNIFORMITY WORTH BIODIVERSITY LOSS?

*Sonya Cunningham**

I. INTRODUCTION

The construction of homes, apartments and condominiums are part of the leading cause of biodiversity loss: suburbanization.¹ Homeowners who are aware of this may seek to counter biodiversity loss by planting a wide variety of plants in their lawns.² Those homeowners may also seek to fulfill conservation goals by creating a wildlife habitat in their lawn.³ One conservation goal is to counter biodiversity loss in a neighborhood with the inclusion of wildlife habitats in lawns to provide shelter to animals that have lost their homes as a result of suburbanization.⁴ The inclusion of wildlife habitats in lawns improves

*Sonya Cunningham, Barry University School of Law, J.D. candidate May 2016; University of Texas at Austin, B.A. Human Ecology May 2013. She was inspired to write this comment based on her interests in Land-use planning, Association law, and Environmental Law. This comment is dedicated to her grandparents Rebecca Marie Ornelas and Auralio Jose Ornelas.

¹See Susana B. Lerman et al., *Homeowner's Associations as a Vehicle for Promoting Native Urban Biodiversity*, 17 *ECOL. SOC.* 45, 45 (2012) (concluding suburbanization alters or destroys animal habitats for a "housing development, which leads to biodiversity loss).

² See e.g., Cindy, *Iowa City engages in a "right to garden" dispute over front-yard plantings*, HomegrownIowan (July 6, 2013), <http://homegrowniowan.com/iowa-city-engages-homeowner-in-a-right-to-garden-dispute-over-front-yard-plantings/> (an Iowan homeowner planted a wide array of plants in his lawn to attract various birds and insects to his lawn, which would increase biodiversity in his neighborhood).

³ See e.g., Bob Podurgiel, *Robinson woman turns yard into wildlife habitat*, PITTSBURGH POST-GAZETTE, (Oct. 30, 2014), <http://www.post-gazette.com/local/west/2014/10/30/Robinson-woman-turns-yard-into-wildlife-habitat/stories/201410300018> (a woman in Pittsburg created a wildlife habitat in her lawn, which was certified by the National Wildlife Federation to accomplish conservation goals).

⁴ Cindy, *supra* note 2 (an Iowan homeowner wanted to use his wildlife habitat to provide a home for a variety of birds).

land, groundwater and air quality.⁵ Unfortunately, some of the plants used in these wildlife habitats may be prohibited by an ordinance.⁶ Once a homeowner violates the ordinance, the city will provide the homeowner with a notice that orders the removal of the prohibited plants. If the homeowner fails to remove the prohibited plants, the homeowner would incur heavy fines.⁷ However, this removal would completely destroy the wildlife habitat because the ordinance prohibits the plants required to sustain it.⁸ Further, ordinances usually do not provide exceptions for wildlife habitats.⁹ Thus, homeowners are usually precluded from creating neighborhood wildlife habitats in their lawns¹⁰ by an ordinance.¹¹ However, the covenants, conditions or restrictions, (hereinafter “CCRs”) created by a Homeowner Association, (hereinafter “HOA”) can also preclude wildlife habitats in lawns.¹²

As a result, ordinances and CCRs usually create barriers to wildlife habitats in neighborhoods.¹³ Fortunately, ordinances and CCRs do not

⁵ *Id.* (concluding that a consequence of lawns with diverse plant species is “reduc[ed] groundwater pollution and carbon dioxide.”).

⁶ *Id.* (an Iowan homeowner was informed by Iowa City that all but three of the plants in his yard were prohibited by the city ordinance).

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

¹⁰ *Compare id.* (a city ordinance prevented a homeowner from creating an insect and bird wildlife habitat in his lawn), with Maggie FitzRoy, *New Florida landscaping law supersedes homeowner association rules*, THE FLA. TIMES-UNION, Jan. 30, 2010, http://jacksonville.com/community/shorelines/2010-01-30/story/new_florida_landscaping_law_supersedes_homeowner_association_0

(a Floridian homeowner may replace his lawn’s turf grass with a variety of trees and shrubs despite his HOA’s opposition because his lawn was consistent with the Local Florida-friendly landscaping ordinance).

¹¹ *See e.g.* Cindy, *supra* note 2 (an ordinance prevented an Iowan from creating a wildlife habitat in his lawn).

¹² *See generally* FitzRoy, *supra* note 10 (contending HOAs can generally prevent homeowners from creating wildlife habitats in their lawn but Florida provides statutory protection for neighborhood wildlife habitats that follow the guidelines set out by the Local Florida-friendly landscaping ordinance).

¹³ *See id.* (HOAs in Florida prevent homeowners from creating wildlife habitats in their backyard unless they are consistent with the Local Florida-friendly landscaping ordinance); *see also* Cindy, *supra* note 3 (an ordinance prevented Volm from creating a wildlife habitat in his lawn); *see also* *Good News For Wildlife Habitats*, Florida Wildlife Federation (Oct. 4, 2009), <http://www.fwfonline.org/News-and-Pressroom/Good-News-For-Wildlife-Habitats.aspx#.VHUG-4vF9S2> (before the Local Florida-friendly landscaping ordinance was revised by the Water Rights Bill, it was

make it completely impossible for a homeowner to have a wildlife habitat in their lawn because it is possible under limited circumstances.¹⁴ The first purpose of this comment is to provide a general overview of these limited circumstances. Then, this comment will provide steps to challenge the enforcement of ordinances and CCRs and apply them to the three goals of ordinances and CCRs: (1) “aesthetics”¹⁵; (2) the protection of a homeowner’s enjoyment of their property¹⁶; (3) and the protection of property values.¹⁷

First, Section II of this comment will define biodiversity to further explain the concept of biodiversity loss. This section will also explain property tax exemptions for wildlife habitats as well as the mismatch between the goals of CCRs and ordinance and conservation priorities. Second, Section III will discuss The National Wildlife Federation’s conservation priorities. Next, Section IV will explain how the three purposes of ordinances and CCRs create barriers to conservation. These purposes are the protection of: (1) “aesthetics”¹⁸; (2) a homeowner’s enjoyment of their property¹⁹ and; (3) property values.²⁰ Then, Section V will explain the aesthetic goals of ordinances and CCRs in more detail. Subsequently, Section VI will discuss ordinances and CCRs with the purpose of protecting a homeowner’s enjoyment of their property. Finally, Section VII will explain more about CCRs and ordinances designed to protect the property value of homes.

nearly impossible for Floridian homeowners to have wildlife habitats in their lawns because they generally do not comply with CCRs); *see also* Lerman, *supra* note 1, 45 (contending conservation goals of wildlife habitats are not consistent with a CCR’s goal of uniform landscapes).

¹⁴ *See, e.g.*, FitzRoy, *supra* note 11 (in Florida, HOAs allow homeowners to have wildlife habitats in their lawn if they comply with the Local Florida-friendly landscaping ordinance).

¹⁵ Lerman, *supra* note 1, at 45.

¹⁶ Sarah B. Schindler, *Of Backyard Chickens and Front Yard Gardens: The Conflict Between Local Governments and Locavores*, 87 TULSA L. REV. 231, 252 (2012).

¹⁷ *Id.*; *see also* Lerman, *supra* note 1, at 45.

¹⁸ Lerman, *supra* note 1, at 45.

¹⁹ Schindler, *supra* note 16, 252.

²⁰ *Id.*; *see also* Lerman, *supra* note 1, at 45.

II. BIODIVERSITY

The term biodiversity, refers to variety within a group of living organisms.²¹ There are three types of biodiversity: (1) species biodiversity; (2) genetic biodiversity; and (3) ecological biodiversity.²²

Species biodiversity refers to all living species within an ecosystem who can procreate with one another.²³ On the other hand, genetic biodiversity refers to the existence of a variety of genes among living organisms of the same species.²⁴ Finally, ecological biodiversity refers to variation among ecosystems, natural communities and habitats.²⁵ Therefore, when biodiversity is lost, the result is a loss of species, genes or habitats.²⁶ Further, permanent biodiversity loss leads to the extinction of animals.²⁷

As previously stated, the leading cause of biodiversity loss is suburbanization.²⁸ Suburbanization causes biodiversity loss by completely destroying natural wildlife habitats and replacing them with homes, apartments, condominiums and other development projects.²⁹ Specifically, suburbanization removes the plants needed for a natural wildlife habitat, which renders the land uninhabitable for the animals and insects that formerly lived there.³⁰ Thus, those animals can choose to leave the uninhabitable land in search for a new natural habitat or choose to remain and perish. The simple solution to this problem is to end suburbanization but such a solution would require a complete bar on all future development, which would preclude the construction of new homes and businesses. This solution is not feasible because of our society's dependence on living, working and shopping in buildings.

²¹ See *What is Biodiversity?*, The National Wildlife Federation: Inspiring Americans to protect wildlife for our children's future, <http://www.nwf.org/Wildlife/Wildlife-Conservation/Biodiversity.aspx> (explaining literally "[b]iodiversity is the variety of life.").

²² *Id.*

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.*

²⁸ Lerman, *supra* note 1, at 45.

²⁹ *Id.*

³⁰ *Id.*

Instead, a better solution involves keeping buildings while providing artificial wildlife habitats near the buildings.

In neighborhoods, wildlife habitats would be used to restore natural wildlife habitats.³¹ Neighborhood wildlife habitats are a type of small-scale garden management endorsed by the National Wildlife Federation.³² The National Wildlife Federation assists homeowners in creating wildlife habitats in their lawn.³³ Additionally, the National Wildlife Federation publishes books which provide instructions on which plants will attract particular wildlife to a lawn.³⁴

Neighborhood wildlife habitats re-create the natural wildlife habitats that were lost during the process of suburbanization.³⁵ However, a neighborhood wildlife habitat is not required to include a mass amount of plants. Instead, the addition of a few flowers to a lawn may also be satisfactory.³⁶ However if a homeowner wishes to have their wildlife habitat certified by the National Wildlife Federation or one of their state affiliated partners, a homeowner is required to describe the plants and food sources that will be available in their lawn during different seasons.³⁷ Additionally, the homeowner would be required to continue to plant throughout the year to attract animals, birds or insects.³⁸ Whether the wildlife habitat is certified or not, homeowners could create

³¹ See *id.* at 46 (according to ecological research “small-scale garden management” such as neighborhood wildlife habitats may result in an overall increase in biodiversity in neighborhoods).

³² *What is Biodiversity?*, *supra* note 22.

³³ Steven Kurutz, *Battlefront in the Front Yard*, N.Y. TIMES, Dec. 19, 2012, http://www.nytimes.com/2012/12/20/garden/gardeners-fight-with-neighbors-and-city-hall-over-their-lawns.html?pagewanted=all&_r=0.

³⁴ ANNE HALPIN, THE NATIONAL WILDLIFE FEDERATION: FOR THE BIRDS! A HANDY GUIDE TO ATTRACTING BIRDS TO YOUR BACKYARD (1996).

³⁵ See *What is Biodiversity?*, *supra* note 22 (explaining that wildlife habitats in lawns “provide food, shelter, water and a place to raise young for native wildlife.”).

³⁶ See Kurutz, *supra* note 33 (explaining that neighborhood wildlife habitats “can start with something as minimal as adding flowers that attract migratory butterflies.”); see also Andrea Badgley, *In Search of the luna moth*, Butterfly Mind (Oct. 24, 2013) <http://andreabadgley.com/2013/10/24/in-search-of-the-luna-moth/> (Andrea Badley was aware that a Luna Moth’s natural habitat consist of walnut trees so she planted walnut trees in order to attract them).

³⁷ Rachael Gleason, *Woodlands couple builds a backyard for the birds*, THE HOUS. CHRONICLE, June 26, 2012, <http://www.chron.com/neighborhood/woodlands-news/article/Woodlands-couple-builds-a-backyard-for-the-birds-3664309.php>.

³⁸ *Id.*

one to increase biodiversity in their neighborhood³⁹, or to receive a property tax exemption.⁴⁰

A. BENEFITS OF INCREASES IN BIODIVERSITY

Increases in biodiversity create a multitude of benefits.⁴¹ For example, increases in insect, plant, and soil biodiversity leads to the availability of a wide variety of fruits and vegetables.⁴² Further, increases in species and genetic biodiversity have aided research in cures for diseases and advancements in medical research.⁴³ In the wetlands, increases in the species biodiversity have lead to the absorption of chemicals in water which results in cleaner water.⁴⁴ Additionally, increases in species and genetic biodiversity have lead to the evolution of species who can survive and adapt after natural disasters.⁴⁵ Unfortunately, none of the benefits of biodiversity will be realized without increased biodiversity in neighborhoods from conservation practices such as wildlife habitats in lawns.⁴⁶

B. PROPERTY TAX EXEMPTION FOR WILDLIFE HABITATS

In some states, wildlife habitats in lawns may provide a property tax exemption for homeowners who qualify.⁴⁷ States that provide this type of property tax exemptions include: Arkansas, California, Colorado, Connecticut, Delaware, Florida, Georgia, Iowa, Maryland,

³⁹ Cindy, *supra* note 2.

⁴⁰ See e.g., *Native Prairie, Wetland, and Wildlife Habitat Tax Exemption*, Iowa Department of Natural Resources, <http://www.iowadnr.gov/Environment/LandStewardship/WildlifeLandownerAssistance/PropertyTaxExemption.aspx>. (noting in Iowa, homeowners with wildlife habitats in their lawn receive a property tax exemption.)

⁴¹ See generally *What is Biodiversity?*, *supra* note 22 (providing examples of benefits of biodiversity).

⁴² *Id.*

⁴³ *Id.*; see e.g., William Fenical, *Marine Biodiversity and the Medicine Cabinet Status of New Drugs from Marine Organisms*, 19 OCEANOGR. 23, 24 (studies of a marine animal called the *Luffariella variabilis* has led to research of an isolated enzyme that causes inflammatory diseases and conditions such as lupus).

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ Cindy, *supra* note 2.

Massachusetts, Mississippi, New York, North Carolina, South Carolina and Virginia.⁴⁸ For example, Iowa has a “Native Prairie, Wetland, and Wildlife Habitat Tax Exemption”, which adds a property tax exemption to property which is certified as a “native prairie, wetland, or wildlife habitat.”⁴⁹ Homeowners who apply for certification may receive funding to assist them in creating a wildlife habitat in their lawn.⁵⁰

In Florida, it was possible for homeowners to receive a tax deduction for their wildlife habitat if they obtained a conservation easement on their property.⁵¹ This conservation easement was an easement to prohibit development that destroyed or removed natural resources from their lawn.⁵² Homeowners interested in receiving the tax deduction for this conservation easement had to meet specific requirements set by the Internal Revenue Service (IRS).⁵³ Those requirements were the land had to have “significant conservation value” and the homeowner had to meet “IRS tax code provisions.”⁵⁴ Predictably, tax deduction amounts varied among homeowners.⁵⁵ Thus, homeowners with minute tax deductions did not have much incentive to include a wildlife habitat in their yard. Further, many Floridians wanted a property tax exemption for wildlife habitats and conservation lands, so voters in Florida passed Amendment 4 to add this exemption.⁵⁶

⁴⁸ *State and Local Tax Incentives*, Land Trust Alliance, <http://www.landtrustalliance.org/policy/tax-matters/campaigns/state-tax-incentives>.

⁴⁹ *Native Prairie, Wetland, and Wildlife Habitat Tax Exemption*, *supra* note 40.

⁵⁰ *See Habitat and Access Program*, Iowa Department of Natural Resources, <http://www.iowadnr.gov/Environment/LandStewardship/WildlifeLandownerAssistance/HabitatAccessProgram.aspx>. (explaining the funding to financial support Iowan homeowners with wildlife habitats is provided by “the USDA farm bill, along with habitat stamp funds.”).

⁵¹ *Frequently asked questions about conservation easements*, St. John’s River Water Management District, <http://floridaswater.com/recreationandland/conservationeasements.html>.

⁵² *See id.* (explaining that conservation easements “safeguard the land by prohibiting the construction of buildings or other structures, excavating soil, or removing or destroying trees or native vegetation” and can be used to protect “water resources.”).

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *See id.* (explaining “professional tax counsel” is required for a homeowner to discover the tax deduction amount they will receive from a conservation easement tax deduction.)

⁵⁶ *See State and Local Tax Incentives*, *supra* note 48 (providing information on the passage of Amendment 4 in 2008); *see also* FLA. STAT. § 196.26 (2009) (providing the text of the statute Amendment 4 created).

However, complete property tax exemption only applies to property that is either: (1) at least 40 acres; (2) has a “special environmental features”; or (3) exists near a “protected area.”⁵⁷ Additionally, the property tax exemption does not apply to the first acre around buildings and homes.⁵⁸

1. Special environmental features and Protected areas

The special environmental features are described in Florida’s Exemption for Real Property Dedicated in Perpetuity for Conservation Purposes Statute (hereinafter “Conservation Property Tax Exemption”).⁵⁹ Specifically, environmental features are: (1) a natural sinkhole or natural springs with a “water recharge” or “production function”; (2) “unique geological feature”; (3) wildlife habitat for “endangered or threatened species”; or a (4) wildlife habitat for “marine and estuarine” animals.⁶⁰ However, the ultimate decision of what qualifies as “special environmental features” is decided by the Acquisition and Restoration Council.⁶¹

The Conservation Property Tax Exemption also describes the land, which qualifies as protected areas.⁶² That land is: (1) “vulnerable coastal areas”; (2) habitats around a “natural shoreline”; or (3) a maintained “natural space” in a densely developed area.⁶³

2. Lack of protection for neighborhood wildlife habitats from property tax exemptions.

Unfortunately, property tax exemptions for wildlife habitats do not prevent CCRs and ordinances from ordering the removal of the wildlife habitats in their laws.⁶⁴ Instead, the disparity between HOA and city goals and conservation priorities usually results in CCRs and ordinances inhibiting conservation efforts.⁶⁵ Some of these CCR and ordinance

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ FLA. STAT. § 196.26 (2009).

⁶⁰ *Id.*

⁶¹ *Id.*; see also FLA. STAT. § 259.035 (2012) (explaining the composition of the members of the Acquisition Restoration Council).

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Habitat and Access Program*, supra note 50.

⁶⁵ Lerman, supra note 1, at 45.

goals are the protection of: (1) “aesthetics”⁶⁶; (2) enjoyment of property⁶⁷; (3) and property values.⁶⁸ On the other hand, conservation priorities are the protection and restoration of ecological processes.⁶⁹

III. THE NATIONAL WILDLIFE FEDERATION’S CONSERVATION PRIORITIES

The National Wildlife Federation (hereinafter “NWF”) is a group that actively promotes and creates programs to satisfy conservationist goals of the protection and restoration of ecological processes.⁷⁰ The NWF was founded by Ding Darling but it was originally named the General Wildlife Federation.⁷¹ The NWF’s original purpose was to “unit[e] sportsmen and all outdoor and wildlife enthusiast behind the common goal of conservation.”⁷² Before the NWF was created, the government did not have a program in place to facilitate conservation.⁷³ Ding Darling was troubled by this fact so in 1936 he convinced President Franklin D. Roosevelt to hold a conference to discuss creating such a program.⁷⁴ The NWF was formed at this conference and state federations were created soon after.⁷⁵ These state federations became the NWF’s “affiliate partners.”⁷⁶ Each year, the NWF holds an annual meeting to discuss the steps necessary for conservation goals in

⁶⁶ *Id.*

⁶⁷ Schindler, *supra* note 16, at 252.

⁶⁸ *Id.*

⁶⁹ Lerman, *supra* note 1, at 45.

⁷⁰ *National Wildlife Federation is a voice for wildlife, dedicated to protecting wildlife and habitat and inspiring the future generation of conservationist*, The National Wildlife Federation: Inspiring Americans to protect wildlife for our children’s future, <http://www.nwf.org/Home/Who-We-Are/Our-Mission.aspx>.

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *See id.* (Ding Darling “convinced President Franklin Roosevelt to convene more than 2,000 hunters, anglers and conservationists from across the country to the first North American Wildlife Conference in Washington, DC.”).

⁷⁵ *See id.* (explaining that after the conference, “energized and motivated participants” created their own “federations in each of their states.”).

⁷⁶ *NWF Affiliate Partners*, The National Wildlife Federation: Inspiring Americans to protect wildlife for our children’s future, <http://www.nwf.org/Who-We-Are/State-Affiliates.aspx> (providing a complete list of all the affiliate partners can be found the National Wildlife Federation’s website).

conjunction with its affiliate partners.⁷⁷ Additionally, states offer workshops to teach homeowners how to create wildlife habitats in their lawns.⁷⁸

In Florida, the affiliate partner is the Florida Wildlife Federation (hereinafter the “FWF”).⁷⁹ The FWF was founded in 1936 and its conservation goal is the protection and restoration of Florida’s natural resources.⁸⁰ One way the FWF fulfills this goal is by working in conjunction with the NWF to encourage and certify wildlife habitats in Florida with the FWF’s Wildlife Habitat Program.⁸¹ This program was created in 1993 to create wildlife habitats for animals that have lost their natural wildlife habitats when developers replaced them with apartments, condominiums, homes or other development lots.⁸² In other words, The Wildlife Habitat Program encourages Floridians to combat biodiversity loss with wildlife habitats and provide homes to homeless animals.⁸³ Creating a wildlife habitat, is a simple process that requires the dedication of a minimum of a three by eight feet area of a lawn.⁸⁴ Participating homeowners need to provide food, water, “cover” and shelter for animals who will use the wildlife habitat.⁸⁵ “Cover” refers to a place the animals can hide if they feel threatened.⁸⁶ The FWF even encourages kids to participate, by offering them the chance to enter a Wildlife Habitat contest.⁸⁷ In order to enter the contest, interested children should: (1) create a wildlife habitat; (2) compose a letter to

⁷⁷ *National Wildlife Federation is a voice for wildlife, dedicated to protecting wildlife and habitat and inspiring the future generation of conservationist, supra* note 70.

⁷⁸ Gleason, *supra* note 37.

⁷⁹ *Id.*

⁸⁰ *Mission of the Florida Wildlife Federation*, Florida Wildlife Federation, <http://www.fwfonline.org/About/Our-Mission.aspx#.VLxW15UtHmI>.

⁸¹ *Wildlife Habitat Program*, Florida Wildlife Federation, <http://www.fwfonline.org/Habitat/Wildlife-Habitat-Program.aspx#.VL022ZUtHmI>.

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ *General Entry Information for Kids’ Wildlife Habitat Contest*, Florida Wildlife Federation, <http://www.fwfonline.org/Habitat/Kids-Habitat-Instructions.aspx#.VL06VpUtHmI>.

⁸⁷ *Id.*

explain what they learned from observing the wildlife habitat; and (3) photograph the wildlife habitat.⁸⁸

IV. OVERVIEW OF BARRIERS TO CONSERVATION CREATED BY CCRs AND ORDINANCES

Sometimes ordinances and CCRs act as barriers to conservation in neighborhoods.⁸⁹ For example, ordinances may inform homeowners of which plants they may or may not have in their lawn.⁹⁰ Thus, an ordinance would prohibit a homeowner from creating a neighborhood wildlife habitat which includes those prohibited plants.⁹¹

Similar to an ordinance, a CCR will (1) inform a homeowner of the plants they may or may not have in their lawn; (2) usually prohibit the complete removal of grass from their lawn; and (3) set standards for mowing, removing weeds and keeping minimizing insects in their lawn.⁹²

When a homeowner creates a wildlife habitat in their lawn, it may consist of some of these prohibited plants.⁹³ Alternatively, a homeowner may have created their wildlife habitat by completely replacing ground cover, such as turf grass, with a variety of plants.⁹⁴ In both cases, enforcement of CCRs would create a barrier to conservation by forcing those homeowners to remove their wildlife habitat from their lawn, pay fines, or face foreclosure for non-compliance.⁹⁵ Homeowners may respond by suing their HOA but they would likely lose.⁹⁶ Ultimately, both CCRs and ordinances seek to protect: (1) “aesthetics”⁹⁷; (2) a homeowner’s enjoyment of their property⁹⁸; (3) property values.⁹⁹

⁸⁸ *Id.*

⁸⁹ *See* Cindy, *supra* note 2 (a homeowner’s wildlife habitat was prohibited by a city ordinance because some of the plants were prohibited by an ordinance). *But see* FitzRoy, *supra* note 10 (the Local Florida-friendly landscaping ordinance supersedes other ordinances that may prohibit wildlife habitats in lawns as long as the homeowner complies with the guidelines of the Local Florida-friendly landscaping ordinance).

⁹⁰ Kurutz, *supra* note 33.

⁹¹ *Id.*

⁹² Lerman, *supra* note 1, at 47.

⁹³ FitzRoy, *supra* note 10.

⁹⁴ *Id.*

⁹⁵ Lerman, *supra* note 1, at 47.

⁹⁶ *See id.* (noting “court decisions usually side with the [HOA].”).

⁹⁷ *Id.* at 45.

⁹⁸ Schindler, *supra* note 16, at 252.

⁹⁹ *Id.*; *see also* Lerman, *supra* note 1, at 45.

150 *BARRIERS TO NEIGHBORHOOD WILDLIFE HABITATS*: [Vol. 5
IS LAWN UNIFORMITY WORTH BIODIVERSITY LOSS?

A. AESTHETICS: THE MAINTENANCE OF UNIFORM LANDSCAPES

A CCR or ordinance may exist to promote the maintenance of the uniformity of landscapes.¹⁰⁰ For example, an ordinance may prohibit plants that wouldn't survive in the state's climate or are an invasive species.¹⁰¹ Further, the state may have a statute which defines which plants are considered invasive species.¹⁰² On the other hand, HOA's promote aesthetics¹⁰³ with CCRs that require "neighborhood uniformity" and "neat and tidy" lawns.¹⁰⁴

B. THE PROTECTION OF A HOMEOWNER'S ENJOYMENT OF THEIR PROPERTY AND PROPERTY VALUES

A CCR or ordinance may exist to prevent plants from becoming a nuisance to ensure neighbors can use and enjoy their property.¹⁰⁵ Additionally, a statute may also define which plants are considered a nuisance.¹⁰⁶ Generally for ordinances, a city has the right to order the removal of plants if they become a nuisance.¹⁰⁷ Further, cities may have charters which give a common council authority to create rules to prevent plants from becoming a nuisance.¹⁰⁸ Unfortunately, once a home is used for activities other than as a "single-family home" it is possible for that use to be construed as a nuisance.¹⁰⁹ For example, once a home has a garden, it is no longer being used exclusively as a single-family

¹⁰⁰ *Id.*

¹⁰¹ *See* Kurutz, *supra* note 33 (Jon Ippel, the sustainability director for the city of Orlando said for ordinances "the list of approved and prohibited plantings is intended to create permanent landscaping that survives Florida's climate and keeps out invasive species.").

¹⁰² *See* FLA. STAT. § 369.251 (2008) (describing which invasive plants are prohibited in a homeowner's lawn).

¹⁰³ Schindler, *supra* note 16, at 258.

¹⁰⁴ *Id.* at 252.

¹⁰⁵ *Id.*

¹⁰⁶ *See* FLA. STAT. §581.091 (2014) (defining and listing plants which are invasive and prohibited in a homeowner's lawn).

¹⁰⁷ *See* *Humphrey v. Dunnells*, 131 P. 761, 763 (Cal. Ct. App. 1913) (noting the common council in that case "shall have authority to regulate and control the use of streets, sidewalks, and highways and prevent encroachments upon the same, and to declare what shall constitute a nuisance and provide for the abatement or removal thereof.").

¹⁰⁸ *Id.* at 762.

¹⁰⁹ Schindler, *supra* note 16, at 252.

home so the garden may be considered a potentially nuisance-causing use of property.¹¹⁰ Thus, creating a wildlife habitat may also be construed as a potentially nuisance-causing use of property, since it is a use outside of using a home exclusively as a single-family home. Incidentally, a use of property may not necessarily be considered a “nuisance-causing use”¹¹¹ unless the use prevents another homeowner from enjoying their property.¹¹²

For example, a CCR may treat plants that block the view of the ocean as a nuisance-causing use of property.¹¹³ Under this CCR, a homeowner would need to avoid obstructing ocean views of designated view lots when they put plants in their lawn.¹¹⁴ However, if a homeowner’s plants obstructs a second homeowner’s view of the ocean, the second homeowner may claim the obstruction prevented them from enjoying their property fully.¹¹⁵ The second homeowner may make this argument because there was a CCR in place to protect the homeowner’s enjoyment of their property by preventing obstructions to a neighbor’s view of the ocean, which created a presumption that obstructing ocean views was a nuisance-causing use of property.¹¹⁶ Alternatively, if such a CCR was not in place, the obstruction of the ocean would not have been presumed to be a nuisance-causing use.

Additionally, Ordinances and CCRs may exist to prevent property values from decreasing.¹¹⁷ CCRs in particular have been found to be effective at keeping property values high.¹¹⁸

¹¹⁰ See *id.* (explaining that “gardening and keeping farm animals are prohibited in many localities that hew to traditional Euclidean zoning.”).

¹¹¹ *Id.*

¹¹² *Gulf View Estates Homeowners Ass’n. v. Blichfeldt*, No. CV010073314S, 2001 WL 950275, at *1, *3 (Conn. Super. Ct. July 18, 2001) (explaining the use of a home in a neighborhood is a nuisance causing use if the use violates a CCR to protect the “use and enjoyment of his property.”).

¹¹³ See *Andrews v. Sandpiper Villagers, Inc.*, 170 P.3d 1098, 1100 (Or. Ct. App. 2007) (under the CCR in this case, “trees, hedges, shrubbery, plantings, or fencing” which “obstruct[s] the view of the ocean from designated ocean view lots” were designated a nuisance).

¹¹⁴ See *Gulf View Estates Homeowners Ass’n.*, 2001 WL 950275, at *1 (in this case with a CCR prohibiting obstruction of ocean views, Joseph Blichfeldt planted 14 pear trees along his driveway and behind Dan Patrick’s mansion “in such a fashion as to minimize any visual obstruction to the property.”).

¹¹⁵ *Id.*

¹¹⁶ *Id.* at *3.

¹¹⁷ Schindler, *supra* note 16, at 252.

C. UNENFORCEABILITY OF CCRs AND ORDINANCES

Generally, ordinances are unenforceable when they are unreasonable¹¹⁹ as a result of a lack of a “substantial relationship” to the “public health, safety, morals, or general welfare” of a community.¹²⁰ On the other hand, CCRs are presumed to be valid and it is difficult to overcome that presumption for several reasons.¹²¹

First, CCRs are legally enforceable rules that directly control every aspect of the appearance and maintenance of a lawn’s landscape¹²² and HOAs owe a duty to homeowners to enforce the CCRs.¹²³ Therefore, every homeowner who lives in a neighborhood with a HOA has a copy of the CCRs and is expected to be intimately familiar with them.¹²⁴ Second, most homeowners accept that losing the freedom to choose which plants are in their lawn is worth being part of the safe community HOAs provide.¹²⁵ Finally, CCRs are valid as long as it makes it possible for the homeowner to receive notice of them in the title record.¹²⁶ Fortunately, although CCRs are presumed to be valid, that presumption can be overcome if the CCR is proven to be unreasonable.¹²⁷

Generally, a CCR may be unreasonable without a reasonable relationship to the protection of life, property, or the general welfare of

¹¹⁸ See generally, Lerman, *supra* note 1, at 46 (some studies have shown “homes with a [HOA] commanded significantly higher property values.”).

¹¹⁹ *Vill. of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 395 (U.S. 1926).

¹²⁰ *Id.* (explaining an ordinance is unreasonable when its “provisions are clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare.”).

¹²¹ PETER M. DUNBAR & CHARLES F. DUDLEY, *THE LAW OF FLORIDA HOMEOWNERS ASSOCIATIONS* 77 (8th ed. 2010).

¹²² Lerman, *supra* note 1, at 46.

¹²³ See DUNBAR & DUDLEY, *supra* note 121, at 83 (if a HOA does not enforce CCRs it “may be liable for its failure to enforce covenants governing the community or for its decision to waive covenants or restrictions.”).

¹²⁴ *Id.*

¹²⁵ See Schindler, *supra* note 16, at 252 (noting that “in exchange for the security that one’s neighborhood environment (and thus property values) would be preserved, [they] gave up much of the freedom to use and develop their property.”).

¹²⁶ See *Andrews*, 170 P.3d at 1101 (contending “where title records caused property purchasers and owners to understand” the CCRs were enforceable and “owners relied on them.”).

¹²⁷ DUNBAR & DUDLEY, *supra* note 121, at 77.

the resident of a community.¹²⁸ Additionally, a CCR may be unreasonable without clearly stated terms.¹²⁹

A CCR may be unreasonable if its terms are unclear.¹³⁰ For example, CCRs may prohibit homeowners from blocking ocean views with trees if the homeowner lives on a designated view lot.¹³¹ However, the CCR failed to define what a designated view lot is.¹³² The CCR was designed to protect a homeowner's enjoyment of their property. However, this CCR may be a barrier if a wildlife habitat requires trees and a neighbor makes a complaint that those trees block ocean views. Also, it may be unclear if the neighbor's lot with the wildlife habitat is a designated view lot or not. If it is not designated view lot, the CCR will not be enforceable, but it may unclear what a designated view lot is.¹³³ Further, if the CCR failed to define what a designated view lot is, then a court must "consider extrinsic evidence" to determine the meaning of the ambiguous phrase designated view lot.¹³⁴ The extrinsic evidence can be affidavits of members of the board of a HOA.¹³⁵ On the other hand, a CCR may be reasonable but its enforcement is unreasonable.¹³⁶

The enforcement of CCRs through litigation is unreasonable, arbitrary, or inequitable if: (1) it was "pursued merely to harass or maliciously injure" a homeowner; or (2) it seeks to "accomplish a purpose for which [the covenant] was not designed."¹³⁷ First, enforcement of a CCR is unreasonable if it seeks to "accomplish a purpose for which [the covenant] was not designed"¹³⁸ because that enforcement is "unreasonable, arbitrary, or inequitable."¹³⁹ For example, a CCR may prohibit the construction of fences and enforce the CCR to maintain uniform landscapes without fences.¹⁴⁰ However, courts have held prohibiting the construction of fences does not prohibit planting a row of trees if the HOA did not intend to use the CCR to control or

¹²⁸ *Hidden Harbour Estates, Inc.*, 309 So.2d at 181.

¹²⁹ *DUNBAR & DUDLEY*, *supra* note 121, at 77.

¹³⁰ *Id.*

¹³¹ *Andrews*, 170 P.3d at 1104.

¹³² *Id.*

¹³³ *See generally Id.* (In this case, the CCR referred to designated view lots but did not define what a designated view lot was).

¹³⁴ *Id.*

¹³⁵ *Id.* at 1105.

¹³⁶ *Gulf View Estates Homeowners Ass'n.*, 2001 WL 950275, at *2.

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ *Id.*

prohibit planting trees.”¹⁴¹ Courts have come to the same conclusion if homeowners planted trees without the HOA’s approval after implementing a CCR to prohibit the construction of fences.¹⁴² Second, enforcement of a CCR is unreasonable if it was “pursued merely to harass or maliciously injure” a homeowner.¹⁴³

The first step to challenge the enforcement of ordinances or CCRs is to examine the original purpose of the challenged provisions. For example, an ordinance may be designed to protect public safety. The next step is to examine the reason the ordinance or CCR was enforced against a homeowner. If it was enforced for its original purpose, then it is likely reasonable. In theory, a homeowner may be able to show their violation complied with the original purpose.¹⁴⁴ On the other hand, if it was enforced for a purpose other than its original purpose, then it will likely be found unreasonable. Alternatively, if it was enforced to harass a homeowner, it will be unreasonable.

Aesthetics: a reflection of a community’s morals

As previously discussed, an ordinance may be unenforceable if it does not have “substantial relationship” to the morals of a community.¹⁴⁵ Frequently, the morals of the community usually include maintaining uniform and tidy lawns to protect the aesthetic beauty of the community.¹⁴⁶ Thus, the purpose of this ordinance is to maintain uniform and tidy lawns. For a CCR, it would be reasonable to use a CCR created to protect the property of residents in a community to prevent homeowners from having wildlife habitats in their lawns which completely deviate from uniform landscapes in the neighborhood. Wildlife habitats created by a cluster of various plants usually violate aesthetic ordinance and CCRs because they appear untidy.¹⁴⁷ These ordinances and CCRs may be enforced against a homeowner to prevent

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ *Gulf View Estates Homeowners Ass’n.*, 2001 WL 950275, at *2.

¹⁴⁴ *See FitzRoy*, *supra* note 10 (noting a CCR that exist to promote uniform landscapes will usually find wildlife habitats violate the CCR unless the homeowner demonstrates their wildlife habitat does not deviate from uniform landscapes, which would make it consistent with the CCRs aesthetic purpose).

¹⁴⁵ *Vill. of Euclid*, 272 U.S. at 395.

¹⁴⁶ *Schindler*, *supra* note 16, at 252.

¹⁴⁷ *Cindy*, *supra* note 2.

untidy wildlife habitats in lawns. Thus, it would be reasonable to use these ordinances and CCRs to preclude homeowners from having untidy wildlife habitats in their lawns unless the ordinance was enforced to harass a homeowner.¹⁴⁸

In other words, ordinances and CCRs which protect uniform landscapes prevent wildlife habitats that create an eyesore for neighbors.¹⁴⁹ On the other hand, as a previous director of the Iowa City-based non-profit Backyard Abundance said, “It looks different, but do we really expect environmentally-beneficial landscapes to look similar to conventional turf landscapes?”¹⁵⁰ These conventional turf landscapes include generic lawns in neighborhoods that repeat the same species of plants. Lawns with biodiversity require more variety of species than a traditional lawn. However, if a lawn has a wildlife habitat but is tidy and uniform with other landscapes in the neighborhood, it is unreasonable to enforce those CCRs or ordinances against the homeowner.

To illustrate this point, the Local Florida-Friendly Landscaping Ordinance does not allow homeowners to completely deviate from the uniform landscapes mandated by CCRs and ordinances.¹⁵¹ Under this ordinance, homeowners with wildlife habitats in their lawn must still “stay within the general landscape theme of their community.”¹⁵² Florida’s ordinance creates a way that wildlife habitats can exist while without disrupting uniform landscapes in neighborhoods.¹⁵³ For example, under the Florida-Friendly Landscaping Ordinance a homeowner’s wildlife habitat may replace species of grass and trees where they would normally exist in other lawns in the neighborhood.¹⁵⁴ Also, homeowners are less likely to encounter opposition from HOAs and cities if they gradually change plants in their lawn over time and use plants which are native to their state.¹⁵⁵ Under this circumstance, a CCR or ordinance created to protect the aesthetic beauty of uniform landscapes would remain but HOAs, municipalities or cities would not be able to prevent homeowners from having wildlife habitats in their lawn which fail to disrupt the aesthetic beauty of tidy lawns.

¹⁴⁸ *Gulf View Estates Homeowners Ass’n.*, 2001 WL 950275, at *2.

¹⁴⁹ Kurutz, *supra* note 33.

¹⁵⁰ Cindy, *supra* note 2.

¹⁵¹ FitzRoy, *supra* note 10.

¹⁵² *Id.*

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

VI. ENJOYMENT OF PROPERTY

A. SAFETY OF THE COMMUNITY

Homeowners in city have a right to enjoy their property.¹⁵⁶ However, it becomes difficult for homeowners to enjoy their property when their lives are in danger. Thus, a city or municipality may enact an ordinance to protect the safety of individuals in their community.¹⁵⁷

Trees and other tall plants in a wildlife habitat can become safety hazards if they partially or completely block public roads.¹⁵⁸ Further, a city has the right to remove those trees and plants if they make roads unsafe by subjecting drivers to the threat of accidents.¹⁵⁹ As an illustration, an Iowa City ordinance restricted plants that create “a sight obstruction for vehicles and passage on the sidewalk.”¹⁶⁰

The language of this ordinance demonstrated Iowa City’s desire to prevent plants from becoming an obstruction to public travel by preventing a driver’s clear view of the street and preventing pedestrians from using the sidewalk.¹⁶¹ This ordinance appears to prevent unsafe conditions created by plants which cause an obstruction to visibility of a road or obstruction to a pedestrian’s passage on the sidewalk.¹⁶²

However, the ordinance also stated “a Bradford pear, Japanese red leaf maple and an elm” were exempt from the ordinance.¹⁶³ Unfortunately, that means a Bradford pear, Japanese red leaf maple or an elm were allowed to obstruct the visibility of a road or obstruct passage on the sidewalk, which causes Iowa City to appear as if it had other motives for creating this ordinance.¹⁶⁴ Specifically, it appears Iowa City had an aesthetic reason for this ordinance, which consisted of maintaining uniform lawns with grass and a homeowner’s choice of including either a Bradford pear, Japanese red leaf maple or an elm tree in their lawn. As previously stated, cities possess a right to enact

¹⁵⁶ Schindler, *supra* note 16, at 252.

¹⁵⁷ *Humphrey*, 131 P. at 762.

¹⁵⁸ *See e.g., Id.* (a homeowner’s trees violated an ordinance when the trees partially blocked the road and made part of the road impassable to vehicles.)

¹⁵⁹ *Id.* at 763.

¹⁶⁰ Cindy, *supra* note 2.

¹⁶¹ *Id.*

¹⁶² *Id.*

¹⁶³ *Id.*

¹⁶⁴ *Id.*

ordinances which prevent homeowners from creating wildlife habitats in their lawn which deviate from the uniform landscapes of their community.¹⁶⁵ However, Iowa City's ordinance was designed to protect the safety of Iowa City residents.¹⁶⁶ Iowa City did not have an aesthetic reason for enacting this ordinance so it was not proper to enforce it against a homeowner with an untidy lawn which deviated from the uniform landscapes of the community. Remarkably, Iowa City did use this ordinance against a homeowner who turned his entire yard into a wildlife habitat that clearly deviated from the uniform landscapes of the community.¹⁶⁷

The homeowner wanted to increase the insect and bird biodiversity in his neighborhood by planting a wide variety of plants in his front lawn.¹⁶⁸ However, the city informed the homeowner his plants violated the Iowa City ordinance because they were an obstruction to pedestrians and a driver's visibility of the road.¹⁶⁹ Iowa City took issue with his shrubs and flowers which were planted on opposite sides of the sidewalk.¹⁷⁰ His shrubs and flowers were planted in such a way as to allow a pedestrian clear passage down the sidewalk.¹⁷¹ His plants also failed to block the street partially or completely.¹⁷² Thus, his plants may not be characterized as a "sight obstruction" prohibited by the ordinance.¹⁷³ However, he would have been able to create a sight obstruction with the plants which were exempted by the ordinance.¹⁷⁴ It appears that Iowa City's motive for this exemption is to prevent homeowners from creating wildlife habitats that disrupt lawn uniformity in neighborhoods, so Iowa City would likely support wildlife habitats that fail to substantially disrupt lawn uniformity in a neighborhood.¹⁷⁵

Alternatively, CCRs may be designed to protect the lives and general safety of homeowners in a community.¹⁷⁶ Similar to an

¹⁶⁵ FitzRoy, *supra* note 10.

¹⁶⁶ Cindy, *supra* note 2.

¹⁶⁷ *Id.*

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

¹⁷⁰ *Id.*

¹⁷¹ *Id.*

¹⁷² *Id.*

¹⁷³ *Id.*

¹⁷⁴ *Id.*

¹⁷⁵ *Id.*

¹⁷⁶ *Hidden Harbour Estates, Inc.*, 309 So.2d at 181.

ordinance, if a CCR was designed to protect homeowner's lives, it may not be enforced against a homeowner for aesthetic reasons.¹⁷⁷

In Florida, the Florida-Friendly Landscaping Ordinance only prevents the enforcement of CCRs and ordinances with aesthetic purposes.¹⁷⁸ However, it allows for the enforcement of CCRs and ordinances designed to protect the safety of homeowners, which is reasonable. It is reasonable to prevent homeowners from creating wildlife habitats which endanger the safety of other homeowners. As previously stated, homeowners want to live in neighborhoods that are safe so they can safely enjoy their property.¹⁷⁹ However, these CCRs and ordinances shall not be enforced to harass homeowners.¹⁸⁰

B. GENERAL WELFARE OF A COMMUNITY

An ordinance to protect the general welfare of a community may be unenforceable if it is not enforced for that purpose.¹⁸¹ Similarly, CCRs designed to protect the general welfare of homeowners may be unenforceable if they are not enforced for that purpose.¹⁸² Further, CCRs and ordinances of this type are unenforceable when they are used to harass homeowners.¹⁸³

In Florida, the Local Florida-Friendly Landscaping Ordinance is a statute that created guidelines for cities to create ordinances to protect the general welfare of communities by encouraging Floridians to create wildlife habitats, which would decrease the amounts of irrigation used in lawns.¹⁸⁴ Further, these ordinances protect the general welfare of communities by requiring homeowners to use plants native to Florida in their lawns to conserve water and improve water quality, which will protect the general welfare of communities in Florida.¹⁸⁵ Therefore, if a homeowner used non-native plants in their wildlife habitat, the

¹⁷⁷ See *Gulf View Estates Homeowners Ass'n.*, 2001 WL 950275, at *2 (explaining a CCR is unenforceable when it is enforced to achieve a "purpose for which it was not designed.").

¹⁷⁸ FLA. STAT. § 373.185 (2009).

¹⁷⁹ *Humphrey*, 131 P. at 762.

¹⁸⁰ *Gulf View Estates Homeowners Ass'n.*, 2001 WL 950275, at *2.

¹⁸¹ *Vill. of Euclid*, 272 U.S. at 395.

¹⁸² *Hidden Harbour Estates, Inc.*, 309 So.2d at 181.

¹⁸³ *Gulf View Estates Homeowners Ass'n.*, 2001 WL 950275, at *2.

¹⁸⁴ FitzRoy, *supra* note 10.

¹⁸⁵ FLA. STAT. § 373.185 (2009).

homeowner would violate this ordinance and harm the general welfare of the community.¹⁸⁶ Further, cities and municipalities would have the right to enforce these types of ordinances for the purpose of protecting the general welfare. However, those ordinances may not be enforced for a different purpose or to harass homeowners.¹⁸⁷

C. PUBLIC HEALTH OF A COMMUNITY

An ordinance may be unenforceable if “provisions are clearly arbitrary and unreasonable, having no substantial relation to the public health” of the community.”¹⁸⁸ For example, the statutes created pursuant to the Local Florida-Friendly Landscaping Ordinance possess a substantial relation to the public health of the community.¹⁸⁹

The Florida’s Water Rights Bill modified the Local Florida-Friendly Landscaping Ordinance.¹⁹⁰ The modifications were made for a variety of reasons.¹⁹¹ One reason was to encourage Floridians to create wildlife habitats to decrease the amounts pesticides used in lawns.¹⁹² The decrease in the amount of pesticides used in lawns protects the health of children and pets.¹⁹³ Thus, it is an ordinance to protect the health of the community. Therefore, this ordinance may not be enforced for a different purpose or to harass homeowners.¹⁹⁴

VII. THE PROTECTION OF PROPERTY VALUES THROUGH THE PROTECTION OF PROPERTY

A CCR “must have some reasonable relationship to the protection of . . . property” to be enforceable.¹⁹⁵ Thus, if a CCR does not have some reasonable relationship to the protection of property, it is unenforceable.¹⁹⁶ Some neighbors have argued trees which obstruct

¹⁸⁶ *Id.*

¹⁸⁷ *Gulf View Estates Homeowners Ass’n.*, 2001 WL 950275, at *2.

¹⁸⁸ *Vill. of Euclid*, 272 U.S. at 395.

¹⁸⁹ FitzRoy, *supra* note 10.

¹⁹⁰ FLA. STAT. § 373.185 (2009).

¹⁹¹ *See generally* FitzRoy, *supra* note 10 (explaining that Florida wanted to increase lawns with native plants that require less fertilizer, maintenance and water).

¹⁹² *Id.*

¹⁹³ *Good News For Wildlife Habitats*, *supra* note 14.

¹⁹⁴ *Gulf View Estates Homeowners Ass’n.*, 2001 WL 950275, at *2.

¹⁹⁵ *Hidden Harbour Estates, Inc.*, 309 So.2d at 181.

¹⁹⁶ *Id.*

views of scenery create a loss of property value.¹⁹⁷ However, neighborhood wildlife habitats result in significant increases in property value.¹⁹⁸ Also, people are willing to pay more for homes with wildlife habitats.¹⁹⁹ Additionally, strategically planting trees and shrubs in a wildlife habitat can reduce heating and cooling costs.²⁰⁰ Thus, an ordinance or a CCR may be used to protect property values when they allow homeowners to have wildlife habitats in their yards. On the other hand, an ordinance or CCR may not be enforced for a purpose for which it was not designed or to harass homeowners.²⁰¹

VIII. CONCLUSION

Homeowners may seek to create wildlife habits in their lawns for property tax exemptions or to increase biodiversity in their neighborhood. However, a CCR or ordinance may create plant restrictions that make it difficult or impossible to create a wildlife habitat. CCRs or ordinances may make it difficult or impossible for a homeowner to create a wildlife habitat if they prohibit the plants necessary to that wildlife habitat. Further, a violation of that CCR or ordinance may result in forced removal of their plants, fines, or foreclosure. In order to avoid these consequences, many homeowners will simply remove their plants. However, the CCR or ordinance itself most likely has a purpose other than the prevention of wildlife habitats in a neighborhood. Instead, that prevention may actually be an unfortunate byproduct of the plant restrictions in the CCR or ordinance. Generally, plant restrictions in a CCR or ordinances have three purposes: (1) aesthetics: maintaining uniform landscapes; (2) protection

¹⁹⁷ See *Tint*, 259 Cal. Rptr. at 903 (a man claimed his neighbor's row of trees blocked his view of San Francisco, which he claimed resulted in a loss of property value).

¹⁹⁸ See e.g., Janet Marinelli, *Backyard Habit: Making Dollars and Sense in Your Yard*, the National Wildlife Federation (July 15, 2011), <http://www.nwf.org/news-and-magazines/national-wildlife/gardening/archives/2011/making-dollars-and-sense.aspx> (noting neighborhood wildlife habitats “reduce storm-water runoff” and “increase area property values by \$4.6 million.”).

¹⁹⁹ *Id.* (noting “[i]n a 2010 National Association of Realtors survey, 88 percent of buyers said environmentally friendly features were an important consideration when purchasing a home.”).

²⁰⁰ *Id.*

²⁰¹ *Gulf View Estates Homeowners Ass'n.*, 2001 WL 950275, at *2.

of the enjoyment of property; or (3) protection of property values. Further, the plant restrictions are presumed to be valid unless they are unreasonable. If the plant restriction is unreasonable, then it is unenforceable. Therefore, a homeowner will be able to create a wildlife habitat in their lawn under that circumstance.

There are several ways that a CCR can be unreasonable. One way a CCR may be unreasonable is if its terms are not clearly stated. Other ways a CCR may be unreasonable is if it does not have a reasonable relationship to the protection of life, property, or the general welfare of the resident of a community. However, a CCR may be reasonable but its enforcement is unreasonable. The enforcement of CCRs through litigation is unreasonable, arbitrary, or inequitable if: (1) it was “pursued merely to harass or maliciously injure” a homeowner; or (2) it seeks to “accomplish a purpose for which [the covenant] was not designed.” Therefore, the homeowners may not have to remove their plants if the CCR or ordinance is unreasonable. Further, even if a CCR is reasonable, a homeowner may not have to remove their wildlife habitat if the enforcement of the CCR is unreasonable.

Alternatively, ordinances are unreasonable under a different set of circumstances than CCRs. Specifically, an ordinance is unreasonable if “provisions are clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare” of a community. Thus, if an ordinance prohibits the plants required for a neighborhood wildlife habitat, a homeowner may challenge the ordinance if they can show the ordinance is unreasonable. A homeowner may demonstrate an ordinance is unreasonable if the terms in the ordinance are not substantially related to the public health, safety, morals, or general welfare of their community.

Whether the barrier to a neighborhood wildlife habitat is a CCR or ordinance, the leading cause of biodiversity loss is suburbanization resulting from the complete destruction of natural wildlife habitats. This destruction of natural wildlife habitats renders the land uninhabitable for the animals and insects that used to live there. Thus, those animals can choose to leave the inhabitable land in search for a new natural habitat or choose to remain and perish. On the other hand, some animals choose to remain and seek out alternative food sources. For example, bears and other wild animals may search for food in garbage cans outside of homes, which results in dangerous human encounters. Animals naturally look for food sources and shelter. Neighborhood wildlife habitats provide food and shelter which closely resembles an animal’s natural habitat. However, it is best that neighborhood wildlife habitats provide

food and shelter to animals which do not pose a physical danger to humans. On the other hand, creating wildlife habitats outside of neighborhoods for dangerous animals may deter those animals from entering neighborhoods in the first place. This comment focused on wildlife habitats in neighborhoods but wildlife habitats serve many useful purposes outside of neighborhoods other than conservation.

In neighborhoods, artificially created wildlife habitats may be used to house animals who lost their natural wildlife habitats through suburbanization. Unfortunately, unless barriers to neighborhood wildlife habitats are completely removed, CCRs and ordinances can continue to preclude homeowners from creating the artificial wildlife habitats needed for those animals. Until that day comes, the only recourse to homeowners with wildlife habitats in their lawns is to challenge the enforceability of the ordinance or CCR if it was enforced for a purpose for which it was not designed or to harass them. Further, homeowners who live in Floridian cities that adopted an ordinance in compliance with the Florida-friendly landscaping ordinance statute may create wildlife habitats on their lawns. The homeowner is restricted to using native plants strategically placed to maintain a landscape uniform with the landscape of other lawns in their neighborhood. Therefore, the homeowner wouldn't be able to use exotic non-native plants. However, the benefit of the restriction is the homeowner's protection from CCRs or ordinances that can force the removal of their wildlife habitats.