

What the Public Doesn't Know About Homeowners Associations and Why

*Is it good public policy to support undemocratic, private governments
that deny homeowners their fundamental liberties?*



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I. COMMON INTEREST PLANNED COMMUNITIES: UNDEMOCRATIC PRIVATE GOVERNMENTS IN AMERICA

A brief history

CIPCs have evolved from a utopian socialistic ideal at the turn of the century of a planned city with commerce and industrial segments at the core and a greenbelt around its perimeter. (Prof. McKenzie describes this beginning in his book, *Privatopia: Homeowner Associations and the Rise of Residential Private Government*). Its government could be described as a democratically controlled technocracy where the “technical experts” were in charge. The constitution/charter would be like a business corporation. The central council would govern the community. The ideal was the rational management of practical matters by experts.

Needless to say, this model was not in keeping with American principles of government. In contrast, the Founding Fathers, with all their idealism, recognized the problems with despotic governments and the basic nature of human beings and setup our system of government accordingly.

As this basic concept evolved into today’s CIPCs, problems arose in the model and CAI was formed to deal with them in 1973. Its idealistic formation dealt with the inclusion of all interested parties – the associations, developers, property managers, public officials and professionals – and that it had to represent the consensus of these parties. The founder was concerned that the associations had sufficient influence for educational purposes. In short, teach the boards how to run an association. In 1992 CAI was having problems being viable and it was reorganized by the property managers and attorneys as a business trade group with a strong lobby presence in Congress and in the state legislatures. Many feel that this turn of events pitted CAI against homeowner rights activists seeking reform of the CIPC model toward more democratic principles of government.

Undemocratic, private community governments

Today, CIPCs are undemocratic, private government existing outside the American system of government, without “separation of powers” or “checks and balances” doctrines, and without a Bill of Rights or a proper election certification mechanism. In place of these fundamental American principles, CIPCs are a nonprofit corporation whose primary purpose is the maintenance of property values without any protections for the rights of its member-owners who live in the community.

There is ample support from political science researchers and court cases in several states for the assertion that CIPCs function in many ways as a government entity. I will deal with these in more detail later. Yet, homeowners are viewed as having entered into a private contract with the CIPC as a corporation and not a government. Homeowners are held to having voluntarily and with full knowledge entered into a contract with the CIPC when the buyer signed his purchase agreement that informed him 1) that he was bound by the CC&Rs and 2) that he automatically became a member of the CIPC. Not one homeowner would tell you that he understood that he was entering into a contract with a private corporation thereby surrendering his Bill of Rights.

Not one homeowner can recall signing a separate document clearly stating that this is a contract with the CIPC. In contrast, when a person accused of a crime agrees to plead guilty, he is asked to sign a statement that he was surrendering his rights under the Constitution. But not the home buyer.

The end result is that the homeowner cannot make use of his state's attorney general or county attorneys to file complaints against abusive and wayward boards of directors. It's not enough that the homeowner is not protected by his government, but any violations of the few state laws proscribing what directors may or may not do, do not contain any enforcement provisions. Therefore, the CIPC board is free to do as its conscience dictates. It may function as a benevolent dictator looking after the interests of the homeowners and to establish a pleasant community, or as a despotic dictator inflicting all sorts of pain and suffering it so chooses to inflict. In either case, the homeowner lives at the suffrage of the CIPC's board of directors, because the CIPC lacks fundamental democratic principles of government as set forth by our Founding Fathers.

People have asked, Why is there no public outcry? No one is getting hurt, except for a small minority. They say we must look to the greater benefit to society and the community that CIPC's provide. I, and other advocates say, that this is the tyranny of the majority at work, suppressing the Bill of Rights for the supposed greater benefit of the community. But we are not at war. There is no terrorist attack on the community. Why must the Bill of Rights be suspended for the greater benefit of the community? Why are our state legislatures allowing this to continue by not upholding and defending the Bill of Rights and Constitution? No, this is the tyranny of the majority at work to suppress our guaranteed civil liberties.

What do the courts say? In three states, the courts have found that the right of a CIPC to fine its members as a punishment constituted "an unconstitutional delegation of government powers". A federal appeals court recently found, "***The fact that property is private is not sufficient to justify the State's permitting a corporation to govern a community of citizens so as to restrict their fundamental liberties.***" Just needs to be applied to CIPCs. A New Jersey case is underway that argues that CIPCs are indeed private governments. An Arizona case will be appealed questioning the unconstitutionality of statutes that interfere with the private contract nature of CIPCs. This case is important in that it will assert that if there are no contractual provisions in the CC&Rs, then the state must enforce its laws against CIPCs or be subject to violating the 14th amendment guaranteeing the equal protection of the law.

Why is this happening? Because as many researchers and homeowner rights advocates have argued, the CIPC model of community governance is defective, just like the communist form of government. It is defective because of the above denial of civil liberties is needed to force obedience to the overall objective of protecting property values over the protection of owner-member's civil rights. Why does the government allow the developer to write such onerous CC&Rs, when he will leave the community in a relatively short time? Why do mortgage lenders need to interfere in homeowners property and activities in order to provide financing at affordable rates? Why do cities and towns not give taxes credits to homeowners in CIPCs so that they are not double-taxed? Why does the government allow CIPC boards to operate outside the American system of government? Why? It must stop today!

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II. DENIAL OF HOMEOWNER CIVIL RIGHTS USED TO OBTAIN HOA COMPLIANCE

The denial of homeowner civil rights is the prevalent and effective method used to sustain and nourish the patently un-American common ownership properties – homeowners associations, common interest developments -- that have grown so rapidly across this country. It is estimated that are some 50 million Americans living in 205,000 HOAs/CIDs. This form of property or home ownership is supported by mortgage lenders and city and town governments at the expense of the rights and civil liberties of homeowners under a legal interpretation that the CC&Rs constitute a private, adhesion contract between the buyer and the HOA/CID. This prohibits, as homeowners have been told, state interference into the private affairs of an HOA/CID and allows for the denial of the homeowner's civil liberties.

This outrageous state of affairs, here within the United States of America, bastion of democracy and people's rights, has come about, in part, by providing partial information and the omission of important facts about HOA/CID to homebuyers, that negatively reflects life in an HOA/CID. Such as, the fact that there are very limited state laws to protect homeowners, the non-enforcement of state laws and the non-existence of penalties against HOAs/CIDs when its directors violate state law or the HOA/CID governing documents.

Further restricting the rights of homeowners are the HOA governing documents that grant very broad powers to the HOA board of directors, while not providing for any protection of the fundamental rights of homeowners, the owners of the HOA. As a leading political scientist on HOAs, Evan McKenzie, wrote, "*CIDS [HOAs] currently engage in many activities that would be prohibited if they were viewed by the courts as the equivalent of local governments.*"

The facts and evidence are out there, available for all to see, and have been for as early as 1982. There are numerous academic research studies, publications and papers concerning the private government aspect of HOAs/CIDs, questions of US constitutionality of certain powers allowed by these entities, court cases in several states, and these facts are even found in the Community Association Institute's (CAI) own Research Foundation studies and reports. Some of these studies show many community relations problems resulting from boards of directors overstepping their responsibilities and the fact that homeowners were not aware of what they agreed to allow HOA/CID boards to do.

Adding to further insult, the courts have held buyers to a binding adhesion contract – one that one party, the buyer, simply accepts and cannot negotiate – that, unknowing to the buyer, gives away his civil rights. Yet, supporters of HOAs/CIDs point to the democratic nature of these entities, simply because there is a voting mechanism to elect directors. Well, Cuba and China have elected representatives, but I can't imagine anyone calling them democratic. How can there be a democracy, as practiced here in this country for over 225 years, when the citizen-homeowner is bound to a contract he didn't have a hand in drafting, was not told the full details that he was, in fact, entering into a contractual arrangement whereby he agreed to surrender his guaranteed civil liberties?

Supporters of these undemocratic nonprofit corporations have argued that,

1. It's the buyer's fault for not reading some 100+ pages of legal documents,
2. Homeowners can always move if they don't like the restrictions, arrogantly saying, "HOA/CID living is not for everyone",
3. The homeowner can vote to remove the board or change the governing documents, and
4. HOAs/CID maintain property values.

In answer,

1. Are these supporters adopting a "buyer beware" attitude when speaking about the advantages and niceties of living in an HOA/CID? B) Or is this deliberate misrepresentation, because these required documents do not warn buyers about the severely limited recourse available to them in event of problems with the HOA/CID?
2. More and more communities are mandating only common ownership properties for new homes. B) Why should a homeowner move when he did no wrong?
3. A) How can anyone base an activity or obligation on another fully knowing that it's not a commonly accepted behavior of society; that it requires a behavior, a communal response, far exceeding what can be expected of a community when contrasted to the response of the general population in our general elections? Further, normal political voting is based on the percent of those voting, not a percent of all eligible voters as is commonly contained in the governing documents? There is no independent vote counting or "agency" to insure the integrity of the voting process – the "board machine" controls everything.

B) Here again they go mixing governmental functioning with private contractual obligations. Why must third parties be included to renegotiate a contract, the CC&Rs, between the HOA/CID and the individual homeowner? You know, this is the same private contractual "fact" used to keep the government from intervening in HOAs, now being applied in favor of the HOAs. This "individual" contract now becomes a "social contract" amongst all HOA members, as if the HOA were now functioning as government and not functioning on the basis of a private contract.
4. A) The true factors affecting real estate property values have to do with market factors, and the economy, of which location is most important. B) Need there be an HOA/CID to enforce CC&R restrictions regarding property values, because, by law, each homeowner can sue to enforce these restrictions? C) There are many well kept communities without an HOA/CID and the unnecessary intrusion of "outsiders" into one's home.

In a democracy there is no written, legally bound contract between the government and the citizen that makes third parties, other members of the HOA/CID, a part of this adhesion contract. This is a pervasion of democratic principles and is very important when you realize that the supporters are making use of democratic principles when it suits their objectives while denying democratic principles when it does not suit their interests. For example, a Tucson judge has supported a statute that interferes with the governing documents to the detriment of the homeowner plaintiff; the legislature tells homeowner advocates that penalties cannot be used because the HOA directors because they are not government employees.

Special interests refer to "private contract" to allow HOAs/CIDs to deny civil liberties and prevent government regulation and oversight, and refer to democratic government when

speaking of a homeowner's voice in the operation of the HOA/CID. The entire concept and legal structure of common ownership properties is a mess of corporate law and political governance concepts, all slanted in favor of the HOA/CID and against the rights of citizens. In a democracy there is the Bill of Rights, there is a separation of powers between executive, legislative and judicial branches and checks and balances. None of which exists in a HOA/CID to protect homeowners. HOAs are governed by corporation laws with some poorly conceived modifications, and we all know that corporations are not democratic.

How is this all maintained? Much to the pleasure of the special interest parties, the mortgage lenders, the HOA management firms, the HOA attorneys, the cities and counties, and the legislators, only a small number speak up, justifying the argument that there is only a small disgruntled group of malcontents seeking to make things bad for the rest of the HOAs/CIDs.

Why are there not more people coming forward to complain? There are several reasons.

- Some people accept the rules and regulations as a “given” and are more concerned about stability, order and property values. But then,
- Some people, at some later time after buying into an HOA-controlled property, take offense or object to some of the procedures, decisions or activities of the board of directors. When they complain or object they find out that there is very little that can be done legally, without the expenditure of a large amount of money in legal fees just to get the board to follow the governing documents. They accept the reality of these conditions.
- Some of the people in (2) above become outspoken and try to point out these problems to other HOA/CID members and find out that they become scorned by neighbors and are the object of arbitrary fines and penalties with hefty attorney's fees attached. A technique that is designed to intimidate the outspoken and justifiable homeowner, into compliance.

In the case of (2) and (3) above, there is always the real threat of foreclosure on their house for failure to pay these fines and penalties, with interest attached, resulting simply because they objected to the HOA's actions. Some people will argue that this power of the HOA/CID to foreclose because of fines, and sell a homeowner's property that will benefit a third party, is an unreasonable seizure of property and a violation of the 4th Amendment. Others feel it is an unconstitutional delegation of government powers to a private organization, as courts in two states have ruled.

Considering the above, the power of the HOA/CID to foreclose, even by means of a non-judicial process in some states, **then it is an inescapable conclusion that these factors represent a “legalized extortion” of homeowners not to speak up, to obey the HOA/CID board of directors and to pay their assessments without complaint.** In short, pay up or else! Not to do so brings the real threat of fines and foreclosure. While supporters may argue that this does not happen in the majority of common ownership properties, the threat is always there, just waiting for an incident or a new board to make use of it against some outspoken member, or for personal reasons. The threat is always there and amounts to legalized extortion. And while they can get away with it, it is unjust, unfair and makes homeowners second-class citizens! Minorities, women, the handicapped and gays have more rights than these 50 million Americans!

If one considers all the factors presented above, the inescapable conclusion is that the HOA/CID concept or product is defective and that marketplace forces have been tampered with in order to force the acceptance of HOAs/CIDs. If homebuyers knew the full truth, would they so readily accept this form of home ownership? If the facts were readily publicly available to buyers, would there still be governmental support for these undemocratic organizations? The inescapable conclusion is that this concept is so flawed that special, unreasonable and unjust laws interpretations of these laws have been enacted in order to force compliance with these horrendous provisions of the HOA governing documents.

That's why there is no public discussion of these aspects of HOA government. The special interests don't want the truth to be known. But, in order for a democracy to function properly, there must be public, open discussion of all the issues.

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III. WILL THE DISSOLUTION OF CC&RS IMPERIL THE UNION OR ARIZONA?

BILLS BEFORE THE ARIZONA LEGISLATURE CALLING FOR THE DISSOLUTION OF CC&RS AND HOAS SUPPORTED BY MANY HOMEOWNER RIGHTS ADVOCATES

Let's examine this issue of the dissolution of CC&Rs and HOAs from an historical parallel. While I have referred to a "the conspiracy of silence" with respect to the undemocratic, private HOA governance, Joseph J. Ellis, Ford Foundation Professor of History, Mount Holyoke College, writes about another forbidden topic in our nation's beginnings in *Founding Brothers* (Alfred A. Knopf, 2001).

Chapter 3, is called "Silence", and deals with the slavery issue from day one to a petition by 2 Quakers to address the issue before Congress in 1790. I found this chapter to present a disturbing historical parallel to the question of the dissolution of CC&Rs that call for the establishment of homeowner associations.

The issue before Congress in 1790 was what to do with the slave problem, which was considered a moral and an economic issue, and included 1) being an unmentionable topic in public, the word "slave" doesn't even appear in the Constitution [Art 1, Sect 2.3, refers to "the number of free persons ... excluding Indians not taxed, three-fifths of all other persons"]; 2) a "gentlemen's agreement" in 1787 not to bring up the issue of the slave trade until 1808; 3) arguments that the relocation of freed slaves would cause economic chaos in the Southern States and would be cost prohibitive, because the use of slaves had gotten to be too big a problem to handle [a biracial society was not even contemplated at that time], and 4) the use of slaves was still growing in 1790.

Does this sound all too familiar? Those who have been following my arguments and events in Arizona can't help missing the parallels. Just replace "slave" with "HOA private government". Very disturbing indeed. We all know how long it took to free the slaves and how it finally came about.

The reason offered by Professor Ellis as to why nothing was done in 1790 was the fear of destroying the Union, because as early as 1790, the first time the issue was addressed in public (the Constitutional Convention of 1787 was a "closed door" affair), Georgia and South Carolina were already making these threats. He writes, *"Whether even a heroic level of leadership stood any chance was uncertain because -- and here was the cruelist irony -- the effort to make the Revolution truly complete seemed diametrically opposed to remaining a united nation"*.

The issues raised by the Quakers was tabled until 1808 to coincide with the issue on the ending of the slave trade. Ellis writes, *"Madison knew what the American Revolution had promised, that slavery violated that promise, and Franklin ... [reminded] all concerned that silence was a betrayal of the revolutionary legacy"*.

In our modern, faster paced society we cannot wait any longer for a redress of grievances. In our modern, enlightened society, action must be taken today by the various state legislatures. The Union is not in peril today! The states are not in peril today! If Arizona can survive the \$100 million dollar plus alternate fuels fiasco, it will survive the dissolution of these undemocratic, private governments, and so can the other states.