HALRIS LEGAL RESEARCH MEMO

No. 1 March 24, 2016 http://pvtgov.org/ info@pvtgov.org

Case study on judicial acceptance of retroactive HOA amendments

Judicial acceptance of HOA ex post facto laws and eminent domain takings would be prohibited if HOAs were recognized as state entities

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It should be readily apparent that the HOA Establishment prefers, supports, and defends the HOA legal scheme. It should also be readily apparent that the Establishment, in so doing, has rejected the Constitution. It should also be readily apparent that the status quo will not change unless constitutional challenges are advanced and the HOA Establishment is vanquished, thereby successfully returning America to its foundations as set forth in US Organic Law.

In contrast to current legislation in Idaho and Arizona,[1] this 2002 Florida case study reveals how the application of pro-HOA laws and, as a consequence, subsequent court decisions form the court's opinion and rationale as related to the acceptance of HOA *ex post facto laws* and *eminent domain takings.* This acceptance and the validity of retroactive CC&Rs amendments would be prohibited if HOAs were recognized as state entities.[2]

This Florida Supreme Court[3] case, supporting such amendments as valid, touches on important constitutional questions of due process and the equal protection of the laws, relating to 1) genuine contractual agreement, 2) HOAs as "creatures of statutes" or state actor concerns, 3) sufficient and adequate notice to legally bind owners, 4) retroactive CC&Rs amendments, and 4) takings of owner property interests without consent or compensation. The views expressed by this court can be found in the attitudes and decisions by the courts in other states.

In order to better understand the issues presented by the case I will itemize the major points. My comments are in italicized square brackets following the quotes from the court's opinion.

A. *Ex post facto* amendment

1. **[Owners] also asserted the lease restriction was confiscatory and deprived them of lawful uses which were permissible at the time of purchase. . . . [And] requiring the Association to compensate respondents for the fair market value of their units.**
2. **The Second District [appellate court] affirmed the trial court's final summary judgment and held that the lease restriction could not be enforced because it was adopted after the respondents acquired their units and no significant lease restrictions existed when respondents purchased their units. *[Decisions prior to supreme court appeal].***

   [This holding by the appellate court has it right in terms of an ex post facto amendment that deprives an owner of his property rights without his consent. It is consistent with constitutional protections. The

supreme court opinion says nothing further about the question of HOA amendments being valid if procedure was followed.

However, a reading of the appellate opinion[4] reveals the appellate court's opinion that the amendment "substantially amended to destroy those rights without affording any avenue of relief." Here again is the question of being fairly compensated for the loss of rights.

The appellate court further held that an owner would be "unable to rely upon restrictions contained in a declaration subject to amendment, leaving the unit owners' property rights in a condition of "continuous flux."

This opinion re-addresses this question.]

3. **The declaration, which some courts have referred to as the condominium's "constitution," strictly governs the relationships among the condominium unit owners and the condominium association.**
4. **Absent consent, or an amendment of the declaration of condominium as may be provided for in such declaration, or as may be provided by statute in the absence of such a provision, this enjoyment and use cannot be impaired or diminished.**
5. **[Citing the law] If the declaration fails to provide a method of amendment, the declaration may be amended as to all matters . . . if the amendment is approved by the owners of not less than two-thirds of the units.**

[This opinion addressed issues raised in 2 cited cases as follows:

The attainment of this community goal ['unique problems with condominium living' and 'problems endemic to a tourist related community'] outweighs the social value of retaining for the individual unit owner the absolutely unqualified right to dispose of his property in any way and for such duration or purpose as he alone so desires." (In other words, this appellate opinion was activist oriented to save the condominium industry at the expense of constitutional property rights). (Seagate opinion).

***The court reasoned that since Flagler Federal was on notice of the recorded declaration's provisions for amendments to the declaration [it] was bound by the subsequent amendments to the declaration.*]**

B. Consent to be bound

1. **Respondents [owners] in this case purchased their units subject to the Declaration which expressly provides that it can be amended and sets forth the procedure for doing so.**
2. **Thus, we find that respondents were on notice that the unique form of ownership they acquired when they purchased their units in the Woodside Village Condominium was subject to change through the amendment process, and that they would be bound by properly adopted amendments.**

[Here we have the fundamental basis for HOA legitimacy -- a valid consent by the owner. But, the validity itself is not argued before the court! The question of a valid surrender or waiver of rights that would pass judicial scrutiny is not argued before the court. Furthermore, in B(4) below, the court actually accepts "constructive notice" as passing judicial review for a valid waiver of rights!]

3. **Hence, we conclude that the lease restriction amendment was properly enacted under the amendment provisions of the Declaration, and that the respondents took title to their units subject to the amendment provision set out in the Declaration and authorized by statute.**

***[Another gross miscarriage of justice! An HOA amendment is valid by simply complying with the CC&Rs covenant governing amendments, or the statute governing amendments, neither of which addresses the unconstitutionality of special laws for HOA residents, or of violating a fundamental constitutional right. The court presumes that any amendment, including those ex post facto or eminent domain amendments, are valid because procedure was followed, totally ignoring the content of the amendment.* (See D(10) below on valid covenants).**

Apparently, public policy is not violated when permitting HOA retroactive amendments, which if enacted by a public entity would be

invalid. Oh yes, the poor, misguided owners agreed to waive their ex post facto rights.]

4. **Hence, persons acquiring units in condominiums are on constructive notice of the extensive restrictions that go with this unique, and some would say, restrictive, form of residential property ownership and living. Accordingly, we conclude the amendment is valid and enforceable against respondents.**
5. **We also conclude that the respondents have failed to demonstrate that the restriction, in and of itself, violates public policy or respondents' constitutional rights, at least as asserted herein.**

C. Legislative Pro-HOA statutes

1. **We recognize the concerns that owners, such as respondents, who purchased their individual condominium units for investments have regarding the imposition of lease restrictions through subsequent declaration amendments without the consent of all unit owners.**
2. **Although we believe such concerns are not without merit, we are constrained to the view that they are better addressed by the Legislature. If condominium owners are to be restrained in their enactment of such lease restrictions, it is appropriate that such restraint be set out in the legislative scheme that created and regulates condominiums and condominium living.**
3. **However, as noted, in this instance no provision in the Condominium Act prohibits the adoption of an amendment imposing a lease restriction, nor does any provision require the consent of all unit owners to adopt such an amendment. To the contrary, the Condominium Act provides broad authority for amending a declaration of condominium.**
4. **I write simply to urge the Legislature to seriously consider placing some restrictions on present and/or future condominium owners' ability to alter the rights of existing condominium owners. One of the owners purchased his units in 1979 and had enjoyed this leasing right for eighteen years before the Declaration of Condominium was amended. [Concurring opinion by judge].**
5. **As the district court pointed out the amendment has deprived these owners of a valuable right that existed at the time of purchase. . . . As the**

district court suggested, there should at least be some type of "escape" provision for those "unit owners whose substantial property rights are altered by amendments to declarations adopted after they acquire their property." [Concurring opinion by judge]

[The Florida Supreme Court recognizes that HOA laws are unjust, but rejects judicial activism to do justice. Instead, in contrast to an activist US Supreme Court that has made new law on a number of controversial issues, the Florida court punts to the legislature to fix the problem. It reflects either a questionable innocence with respect to HOA special interests domination of the legislature, or a knowing, based on 40 years of failed legislation, that nothing will happen.]

D. State Actors

1. **As a preliminary matter, it should be noted that some courts and commentators have expressed considerable doubt as to whether the actions of a community association, such as a condominium association, constitute state action necessary for constitutional claims.**
2. **Condominiums and the forms of ownership interests therein are strictly creatures of statute.**
3. **Hence, because condominiums are a creature of statute courts must look to the statutory scheme as well as the condominium declaration and other documents to determine the legal rights of owners and the association.**

[The court seems to be implying that state action exists because the legislature has set forth operating procedures and rules for governing the HOA, which includes the amendment process that permits retroactive amendments. It couches its opinion based on Florida statutes (similar statutes can be found in other states). In other words: it's not the court, it's the law of the land forcing it to decide. But, isn't that the jest of state action? Enforcement of laws violating the constitution? The court escapes a decision here by relying on the failure of the owners to make a case (see B(5) above).]

4. **On the other hand, some courts have either assumed state action exists or have chosen not to address the issue. For example, in White Egret, this Court analyzed a due process and equal protection challenge to an age restriction contained in a declaration without specifically discussing the issue of state action.**
5. **We recognize that amendments which grant different benefits or impose different restrictions on truly similarly situated unit owners may be subject to challenge.**
6. **Condominium unit owners comprise a little democratic sub society of necessity more restrictive as it pertains to use of condominium property than may be existent outside the condominium organization.**
7. **Courts have also consistently recognized that restrictions contained within a declaration of condominium should be clothed with a very strong presumption of validity when challenged.**

[The court is ascribing attributes of public government to the contractual HOA private government, and yet denies state action claims by the owners (see B(5) above). Bills passed in state legislatures have a presumption of constitutionality, and it is the heavy burden of a challenger to prove by clear and convincing evidence that a bill is unconstitutional.

The "validity" of an HOA amendment is similarly treated, but, somehow, the court forgets that HOAs are not public entities but private contractual governments. This application of public entity doctrine to private government HOAs is quite common and is used, as befitting, to defend the HOA legal scheme.]

8. **The restrictions are clothed with a very strong presumption of validity which arises from the fact that each individual unit owner purchases his unit knowing of and accepting the restrictions to be imposed. Such restrictions are very much in the nature of covenants running with the land and they will not be invalidated absent a showing that they are wholly arbitrary in their application, in violation of public policy, or that they abrogate some fundamental constitutional right[5].**

[The Constitution, Article I, Section 9, Clause 3 and Section 10, Clause 1, prohibit ex post facto laws, and the 5th Amendment prohibits the taking of private property; and the 14th Amendment prohibits a state from taking of private property and from enforcing "any law which shall abridge the privileges and immunities of citizens." It is quite clear that the taking of private property and ex post facto laws are fundamental constitutional rights subject to "strict judicial scrutiny."

Unfortunately, the owners failed to raise these extremely important questions before the Florida Supreme Court. And to the detriment of homeowner rights advocates and HOA members, these questions are still not being raised in the courts.]

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After spending the time and making the effort to read through this important case analysis, it should be readily apparent that the HOA Establishment prefers, supports, and defends the HOA legal scheme. It should also be readily apparent that the Establishment in doing so has rejected the Constitution, no longer "*supporting the principles of democratic government.*" America seems to have become an oligarchy, ruled by the few, perhaps even a plutocracy ruled by the wealthy.

Welcome to the New America of HOA-Land

It should also be readily apparent that the status quo will not change unless constitutional challenges are advanced and the HOA Establishment is vanquished, thereby successfully returning America to its foundations as set forth in US Organic Law[6].

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Notes.

[1] See state legislatures rejecting HOA "ex post facto" amendments.

[2] "*CIDS [HOAs] currently engage in many activities that would be prohibited if they were viewed by the courts as the equivalent of local governments*." Evan McKenzie, *Privatopia: Homeowners Associations and the Rise of Residential Private Government* (Yale Univ. Press 1994).

[3] *Woodside Village Condominium Assn v. Jahren*, 806 So.2d 452 (Fla. 2002). This case concerns the controversial question, still alive some 14 years later, of an owner's right to lease his home in a condo or HOA.

[4] *Woodside Village Condominium Assn v. Jahren*, 754 So.2d 831 (Fla. 2 Dist. App. 2000).

[5] A fundamental right is any right that the Supreme Court declares to be such a right – it is fluid. *"Fundamental rights are a group of rights that have been recognized by the Supreme Court as requiring a high degree of protection from government encroachment. These rights are specifically identified in the Constitution (especially in the Bill of Rights), or have been found under Due Process. Laws limiting these rights generally must pass strict scrutiny to be upheld as constitutional. Examples of fundamental rights not specifically listed in the Constitution include the right to marry and the right to privacy, which includes a right to contraception and the right to interstate travel."* ("Fundamental Right," Legal Law Institute, Cornell Univ. Law School).

[6] Organic law is the fundamental basis of a government. The U.S. Code defines the organic laws of the United States to include the Declaration of Independence, the Articles of Confederation, the Northwest Ordinance of 1787, and the U.S. Constitution. (US Statutes At Large, 1789 –1875, Vol. 18, Part I, Revised Statutes (43rd Congress, 1st session), p. v and vi). In contrast, HOA organic law is based on the 1964 publication, *The Homes Association Handbook*. See Analysis of The Homes Association Handbook.