ARIZONA SUPREME COURT

TIM TARTER, et al., **Plaintiffs/Appellees,** **vs.** **DOUGLAS BENDT, et al.,** **Defendants/Appellants**.	Arizona Supreme Court No. CV-21-0049-PR No. 1 CA-CV 19-0703 Maricopa County Superior Court No. CV2018-002596 **AMICUS CURIAE BRIEF OF GEORGE K. STAROPOLI IN SUPPORT OF APPELLANTS**

George K. Staropoli's amicus curiae brief in support of the Appellant.

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I. Interest of Staropoli

Staropoli should be granted leave to file the amicus brief for the 168 Ariz. 71, following reasons. Staropoli lives in an HOA and will be affected by the decision of the Court.

Mr. Staropoli is a 21-year nationally recognized homeowners rights authority and advocate. Since April 2000 he has testified before legislative committees in Arizona, Florida and Nevada and his opinions and views have appeared in the national and local media. He has been quoted in *Private Neighborhoods and the Transformation of Local Government* (2005); AARP Policy Institute Homeowners Bill of Rights proposal (2006); acknowledged as a leading advocate in the Thomson – West legal treatise, *California Common Interest Developments – Homeowner's Guide* (2006); in Evan McKenzie's *Beyond Privatopia* (2011), and in *Critical Housing Analysis* (Vol. 1, Issue 1, 2019). Invited by Uniform Law Commission as an Observer participant in UCIOA revision committee, 2020.

In 2011 Mr. Staropoli's amicus curiae brief was accepted by the AZ Supreme Court in *Gelb v. AZ DBFLS* (CV 10-0371-PR) pertaining to the constitutionality of ALJ adjudication of HOA disputes. With the help of Tim Hogan, ACLPI, in 2013 he filed suit (*Staropoli v. State of Arizona*, CV 2013-009991) against the State of Arizona for an unconstitutional bill, SB1454. The HOA portions of the bill were declared unconstitutional and invalid per the Arizona Constitution.

Emmy winning investigative reporter Ward Lucas (Neighbors at War!, 2012) writes about Staropoli saying,

> "his knowledge is sophisticated . . . [he] has been able to articulate the deficiencies and the pending bombshells contained in the Legislature's denial of the obvious: that the HOA system is badly broken and in desperate need of an overhaul."

In 2005, after years of criticism that CAI was a business trade group with consumer HOAs as members in violation of its tax-exempt status, CAI removed HOAs, per se, as a membership category. (CAI Membership web page is no longer available online, but HOA Constitutional Government post of June 22, 2005, HOAS no longer accepted for CAI membership, records the event).

Mr. Staropoli was a Vice President of an international securities brokerage firm, Shearson Hayden Stone (since merged and absorbed into Morgan Stanley Wealth Management); a member of the CEO Club, NY, NY; served as Treasurer and board member of a Penn. HOA; and served as a board member of the NYC Data Processing Assn and the Valley Citizens League, Phoenix, AZ. He holds a MS in Management from Polytechnic University, Brooklyn, NY (now NYU Tandon School - Polytechnic).

II. Reasons for acceptance of Staropoli's amicus brief .

The issues addressed in this case are of general importance and statewide but also national concern, as the impact on community associations is certainly substantial and states look to other states for guidance in this developing area of law. The policy makers have failed to understand that the HOA CC&Rs have crossed over the line between purely property restrictions to establishing unregulated and authoritarian private governments.

Professor Evan McKenzie in his landmark 1994 book (*Privatopia: Homeowners Associations and the Rise of Residential Private Government* (1994)) acknowledged the fact that "HOAs currently engage in many activities that would be prohibited if they were viewed by the courts as the equivalent of local governments."

Appellant Bendt's statements were made as a result of the conduct and statements by Appellee Tarter as the president and a director of their HOA yet the appellate opinion ignored this important factor, nor did it consider that the Tarters' complaint had anti-slapp implications. Staropoli files this amicus curiae that can provide information, perspective, or argument that can help the Court beyond the help that the parties' lawyers provide.

This brief serves to assist the Court in understanding the broader political and social environment created by the lack of constitutional protections for citizens seeking justice living under private government HOA regimes. In 2000 Mr.

Staropoli founded and is president of the nonprofit Citizens for Constitutional Local Government, Inc., Scottsdale, AZ, a nonprofit organization seeking to inform the legislators and public about common interest property issues and to expose the prevalent myths and propaganda about carefree living in an HOA. Citizens believes in supporting principles of American democracy. Staropoli is a publisher and author of books, eBooks, internet blog posts, emails, etc. that contain case histories, statutes, secondary authorities, and correspondence and communications by quoted personas that document and support his opinions on HOA constitutionality issues. [Appendix p. 1].

Although not an attorney he is highly informed and knowledgeable in the HOA legal scheme and practices. He published his HOA bill of rights history from 1992 – 2021. [Appendix p. 3]. Staropoli has studied the recent statutes and cases pertaining to HOAs as public forums, free political speech concerning HOA governance, and limited-person public figures that have been raised in *Tarter* and was ignored in Tarter's Response. The entire issue of the constitutionality of separate laws for HOAs has not been properly addressed by the courts, even though the Arizona Constitution prohibits special laws for special organizations (Ariz. Const Art. 2, Section 13, Equal Privileges and immunities). The HOA model of government has been described as sui generis by attorneys Siegel (pro-constitution) in 1998 and Weil (pro-HOA) in 2005 [Appendix p. 11] with the implication of the

alleged need for separate laws to make HOAs viable. Over the years HOAs have ben treated by state legislators and the courts sui generis permitting them to function outside the laws of the land and Constitution, or as outlaw governments. There has been no proffer of a necessary and compelling justification for the unequal protection of the laws.

There is strong documentation to assert a bias and indoctrination leading to an attitude that *HOAs can do no wrong*. The Forward to the Restatement 3rd Property: Servitudes (2000) is opinion rather reflecting facts, "Therefore this Restatement is enabling toward private government, so long as there is full disclosure." Section 6.13, comment a, states: "The question whether a servitude unreasonably burdens a fundamental constitutional right is determined as a matter of property law, and not constitutional law". Section 3.1, comment h, states: "in the event of a conflict between servitudes law and the law applicable to the association form, servitudes law should control."

The impetus behind this view can be laid to the heavy lobbying of state legislators, judges, the public and the media the Community Associations Institute (CAI). In response to my Arizona Supreme Court pro se amicus brief in *Gelb v. DFBLS* (CV-10-0371-PR) CAI attorney Jason Smith wrote,

> "*It is clear from the that the amicus curiae simply wants to impose constitutional protections on members in homeowners associations. The law has never supported that proposition."*

Former CAI President and active defender of the HOA scheme, Richardson wrote, trying to explain what surprises lurk in your CC&Rs,

> "*CC&Rs bind all owners, regardless of whether they read it, understood it, or received a full copy of it.";* [CC&Rs are] *"Normally enforced by courts, even if they seem unreasonable. . . . Original developer-supplied CC&Rs often are boilerplate with parts not applicable to the community," (*The Press-Enterprise, News, Housing, Opinion, Kelly G. Richardson (April 23, 2021).

because they seek real estate approvals to sell homes. In its amicus brief to the NJ appellate court in Twin Rivers (*Committee for a Better Twin Rivers v. Twin Rivers Homeowners' Association,* 383 N.J. Super. 22 (App. Div. 2006)), it advised the court,

> In the context of community associations, the unwise extension of constitutional rights to the use of private property by members (as opposed to the public) raises the likelihood that judicial intervention will become the norm, and serve as the preferred mechanism for

> decision-making, rather than members effectuating change through the democratic process. (p. 19).

The above statements and acts are consistent with CAI's public policy contained its "manifesto" (**Community Next: 2020 and Beyond,** May 5, 2016). In its effort to motivate pro-HOA members, it speaks of a need to defend their HOA,

> "Most legislators do not thoroughly understand common-interest communities or who their patchwork legislation is actually protecting. Legislators too often shoot from the hip, passing laws that ricochet and cause collateral damage. And they will continue to do so in the future unless the CIC interests undertake vigorous lobbying and education programs and awareness campaigns to enhance their understanding
>
> In an effort to help constituents, lawmakers may introduce legislation addressing association governance that may increase and undermine the well-established and proven model of community association governance. . . . Legislative responses to individual constituents contribute to community associations being perceived as over-restrictive micro-governments focused on covenant enforcement.

I believe these constitutional questions of free speech and public participation have been introduced in *Tarter* and are ripe for the Court to address.

III. Issues Presented

The issues addressed in this case are of general importance and statewide but also national concern, as the impact on community associations is certainly substantial and states look to other states for guidance in this developing area of law.

A. Is an HOA a public forum under the limited-purpose public figure doctrine?

It seems that the Appellate Court paid scant attention to HOAs as public forums and the limited-purpose public figure doctrine, referring in its opinion solely to the question of the disclosure of Bendt's insurance. Its opinion focused entirely on the narrow question of defamation per se, treating Tarter as a private person without discussing the potentially mitigating influences from the application of the doctrine or from the broader question of protected free speech. As with the issue in Dombey (Dombey v. Phoenix Newspapers, Inc., 724 P.2d 502 (Ariz. 1986)), failing to present the question of Tarter's status as a possible public figure denied the jury from considering the issues of protected free speech on public issues.

B. Was Tarter's lawsuit a strategic lawsuit against public participation (SLAPP)?

The issue of an HOA SLAPP lawsuit against a member is in the interest of general public and of statewide importance, and also of national concern, the impact on community associations is certainly substantial. This Court should, sua sponte,

consider Tarter's legal action as a HOA politically motivated strategic lawsuit against member participation.

IV. Arguments

A. Was the jury properly informed of the culture within HOAs and the lack of meaningful ability to participate in its governance?

The Appellee in its Response did not speak to the constitutional free speech arguments raised in the Petition, nor even to comment that they were irrelevant or without merit. Absent an order for justice to be served for citizens who are subjected to private government authoritarian regimes, they indeed have merit and must be considered by the Court.

This public figure doctrine was presented by Bendt and ignore by Tarter in their Petition and Response, respectively. The Appellate Court gave a slight notice to the public forum status of an HOA in its opinion without discussing the broader first amendment protections with respect to HOAs as public forum.

Kosor was a NV Supreme Court defamation suit by a Nevada HOA and an anti-slapp motion that prevailed, and is instructive. Kosor was sued on the basis of his criticism and distribution of a pamphlet and letter at a board meeting seeking a seat on the board of directors. (*Kosor v. Olympia Companies*, 478 P.3d 390 (2020)).

> Because we conclude that each of Kosor's statements was "made in direct connection with an issue of public interest in a place open to the public or in a public forum," we reverse the district court's decision to the contrary and remand for further proceedings consistent with this opinion.

The Nevada anti-slapp statute, NRS 41.637(4), reads in part, "any ... [c]ommunication made in direct connection with an issue of public interest in a place open to the public or in a public forum." (p. 5). The Court quoted Cohen (Cohen v. Kite Hill Cmty. Ass'n, 191 Cal. Rptr. 209, 214 (Ct. App. 1983)): “The HOA here is no less of ‘a quasi-government entity’ than that in Damon, ‘paralleling in almost every case the powers, duties, and responsibilities of a municipal government.’" (p. 8). And the Court added, addressing social media as public forums, “Looking toward this federal guidance, we believe that Kosor's Nextdoor.com post qualifies as a public forum for the purposes of anti-slapp protections.” (p. 14).

California’s Damon goes further,

> “The Board meetings fit into this definition. The Board meetings were televised and open to all interested parties, and the meetings served as a place where members could communicate their ideas. Further, the Board meetings served a function similar to that of a governmental body. . . . As our Supreme Court has recognized, owners of planned

development units " 'comprise a little democratic subsociety . . . .' " (citations omitted).” (*Damon v. Ocean Hills Journalism Club*, 102 Cal. Rptr. 2d 205 (Ct. App. 2000) at “A. Public Forum”).

California’s fair elections bill for HOAs restricts an HOA from filing a lawsuit against a member’s dispute of an election. “The bill would also prohibit an association from filing a civil action regarding a dispute in which the member has requested dispute resolution.” (CA Civil Code, Ch. 848 (2019) at (3)).

Why did the Court fail to entertain the possible motivation by Tartar beyond the stated defamation charges that, as HOA president and board director, his lawsuit was actually aimed against public participation in matters of HOA governance and of public interest to the members? In 2017 California Civil Code was amended (Calif. Civil Code Ch. 236, SB 407Nevada) to protect the rights of homeowner-members. The state Legislature’s intent was quite clear (Section 4515):

(a) It is the intent of the Legislature to ensure that members and residents of common interest developments have the ability to exercise their rights under law to peacefully assemble and freely communicate with one another and with others with respect to common interest development living or for social, political, or educational purposes.

(d) A member or resident of a common interest development who is prevented by the association or its agents from engaging in any of the

activities described in this section may bring a civil or small claims court action to enjoin the enforcement of a governing document, including a bylaw and operating rule, that violates this section.

Was it because of a failure to fully understand the HOA legal concept and culture created as a result of long-term conditioning and indoctrination by the national lobbying organization, CAI? The Hannaman 2002 study (NJ) was quite frank and revealing describing problems and complaint still in existence some 19 years later in spite of efforts by the self-proclaimed HOA experts and educators, national CAI. It describes the efforts by HOA boards to prevent criticism and the extent they would go to in preventing member participation in governing matters of public interest to the members. What can a member do but to complain and make public, perhaps as a result of frustrations because of no meaningful recourse to state protections. (Appendix p. 17).

A similar study on HOA conditions and problems seeking to find a solution was conducted during the Fall of 2015 by the South Carolina General Assembly Study Committee on Homeowners Associations. The committee was a selected focus group Its members' "diverse backgrounds helped reveal the scope of concerns that property owners, board members, managers, developers, realtors, and others dealing with homeowners associations face." Among its findings were

> While the Community Association Institute (CAI) and other private entities offer educational resources to homeowners and managers, state government cannot place the sole responsibility of educating homeowners and board members on a private entity. See, Article III, Section 1 of the South Carolina Constitution prohibiting the delegation of legislative authority.

Another topic considered and discussed by the Study Committee included "a bill of rights balanced with a bill of duties for HOA members (similar to how responsibilities and obligations were handled in the provisions of the Residential Landlord and Tenant Act."

("Study On Homeowners Associations", Luke A. Rankin, Chair, South Carolina General Assembly (December 18, 2015)).

This Court acknowledged the reality that life, society, and politics change, as noted in Brown when it held,

> We recognize that the standards of defamation necessarily fluctuate with the vicissitudes of time and public opinion. [citations omitted] We, of course, have no brief to determine when and whether societal attitudes should change. We must consider actual damage to reputation in the real world by measuring the defamatory aspect of a publication

> by its natural and probable effect on the mind of the average recipient. . . . Again, the question is "whether or not a reasonable fact-finder could conclude" that the statements at issue state or imply an assertion of actual fact. (Yetman v. English, 168 Ariz. 71 (1991) at 77).

If the jury and Court had opened up to these conditions then perhaps we have good cause for mitigation, and remand Tarter for the trial court to consider the role of HOA authoritarian CC&Rs and a "hands-off" public policy by the legislature. The issues raised here are of general importance and statewide but also national concern, as the impact on community associations is certainly substantial and states look to other states for guidance in this developing area of law.

B. Brendt raised the possible issue that Tarter filed lawsuit a strategic lawsuit against public participation (SLAPP).

In the Appellate brief supporting, but not filed, Appellate' s arguments provided reasonable suspicion of a SLAPP motivation by Tarter.

> she [Bendt] believed [Tarter] failed to adequately protect the community's interests and risked driving down property values. (p. 1).

> She [Bendt] later learned, however, that they were surreptitiously obtained and forwarded without her permission to President Tarter for use in this lawsuit. . . . statements she made as a concerned member of

the HOA community regarding President Tarter's and his Board's performance in her newsletter. (p. 2).

Her goal was to improve transparency and adherence to the rules by HOA Board members, so she could help keep the Bendts' and other members' fees reasonable and property values high. (p. 13).

Instead of getting results from her newsletter and attempts to have a voice and input into the HOA Board decisions affecting the Bendts and their community,

Ms. Bendt and her husband were sued for defamation by the Tarters. (p. 14).

Although not presented by the Appellant where three plaintiffs are lawyers, and based on claims of false and inexcusable character assassination against Tarter, at this level of jurisprudence this Court has reasonable suspicion to remand the case for a determination the validity of an anti-slapp motion. The Arizona public participation statutes, ARS Title 12, Article 15, are narrowly construed when compared to other states as found,

in California's Civil Code:

Statements before a government body or official proceeding . . . or in a place open to the public or public forum in connection with issue of public interest; or

any other conduct in furtherance of petition/free speech in connection with issue of public interest, are protected. (CA Civil Code § 425.16).

SLAPPbacks: Prohibits the use of certain provisions of the anti-SLAPP law against a SLAPPback brought in the form of a malicious prosecution claim.[emphasis added]. (free speech in connection with issue of public interest, are protected. (CA Civil Code § 425.18).

in Florida's FLA. Stat. Ann.:

Protects homeowners from lawsuits by individuals, businesses, and government entities based on homeowners' "appearance and presentation before a governmental entity on matters related to the homeowners' association."(Fla. Stat. Ann. § 720.304(4).

Prohibits lawsuits brought against individuals for exercising their right of free speech in connection with a public issue or their rights to peacefully assemble, to instruct representatives of government, or to petition the government for a redress of grievances. Fla. Stat. Ann. § 768.295(3).

in Texas' of the Texas Civil Practice and Remedies Code (TCPA, Chapter 27 §27.001.

(7) "Matter of public concern" means a statement or activity regarding:

(A) a public official, public figure, or other person who has drawn substantial public attention due to the person's official acts, fame, notoriety, or celebrity;

(B) a matter of political, social, or other interest to the community; or

(C) a subject of concern to the public

This Court, or any court, cannot allow a group of individuals or organizations to create a devise in order to escape constitutional protections and enter into a contract, constitutionally valid in all other aspects, to form private local governments whose members remain citizens of this country as well as of their respective states. It, as it stands in regard to HOAs, makes a mockery of the Constitution and our principles of a democratic society.

V. Conclusion

The long ignored constitutional issues and demand for justice for homeowners living in HOAs now sits before the Court. The free speech issues of limited-purpose public figure and of HOAs and social media as public forums with respect to political HOA governance issues have been raised and need to be addressed.

In spite of the *we love our HOA* satisfaction polls and surveys conducted by CAI and its research affiliate, the HOA legal scheme set forth in the HOA "bible" — The Homes Association Handbook — has established HOAs as authoritarian

regimes that are hostile to opposition, criticisms, and bona fide complaints with the authority to inflict severe financial and emotional upon their members. State legislatures have been woefully remiss in protecting the rights, freedoms, privileges and immunities of its citizen-members.

With all due respect I am reminded of Justice Jackson's comment on infallibility of supreme courts. *"We are not final because we are infallible, but we are infallible because we are final."* (*Brown v. Allen* (334 US 443)). The late Justice Ruth Bader Ginsburg made this point with her dissent: "*Title VII [Employment equal pay for women discrimination act] was meant to govern real world employment practices and that world is what the court [US Supreme Court] ignores today*." (Ledbetter v. Goodyear, No. 05–1074 92007).

I urge the Court to apply the long overdue correction of *Plessy v. Ferguson* (163 U.S. 537 (896)) by *Brown v. Bd of Education* (347 U.S. 483 (1954)) to the long overdue and needed corrections to the HOA unconstitutional legal scheme. As with *Brown*, America's culture and environment has changed dramatically from 1964's *Homes Association Handbook* and the formation in 1973 of Community Associations Institute (CAI) to deal with rising HOA problems and constitutional concerns after only 9 years. In 1992 CAI dropped its 501(c)3 educational status for 501(c)6 trade organization so it could lobby state legislators.

RESPECTFULLY SUBMITTED, this 17th day of June 2021

/s/ George K. Staropoli

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CERTIFICATE OF COMPLIANCE

I certify that the attached *amicus curiae* brief uses proportionately spaced type of 14 points or more, is double-spaced using a roman font (Times New Roman) and contains 3,686 words.

DATED this 17th day of June 2021

/s/ George K. Staropoli
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CERTIFICATE OF SERVICE

The undersigned certifies that the foregoing *amicus curiae* brief was filed and served on this _17_ day of June 2021 as follows:

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Appendix

George K. Staropoli, author and publisher

- 2000 Proposed Homeowner Bill of Rights before AZ legislature HOA interim committee
- 2005 Instrumental in passing HOA due process OAH bill in AZ
- 2006 Analysis of the Homes Association Handbook, ULI (1964). (https://pvtgov.wordpress.com/2006/08/21/analysis-of-the-homes-association-handbook/).
- 2008 Published "Establishing the New America of independent HOA principalities"
- 2010 Published Understanding the New America of HOA-Lands
- 2011 Amicus curiae accepted by AZ Supreme Court HOA Constitutionality challenge
- 2005 – 2012 Appeared in several books and treatises on HOA issues
- 2013 Won HOA constitutionality suit against Arizona Legislature
- 2013 Published "HOA Common Sense: rejecting private government"
- 2015 Published educational series, "HOAGOV Education Series: understanding the real lives of HOA members."
- 2019 Published "The HOA-Land Nation Within America"

- 2020 Published *A Plan Toward Restructuring the HOA Model of Governance*, (Amazon ebook*).*
- *2020* Published *HOA Member Bill of Rights* (ULC proposal for study).
- 2021 Published Continuing Homeowner Education & Reorientation Series webpage, (http://starman.com/mgmt/chers/chers%20promo.htm).

HOA bill of rights history[i]

It should be noted when reading this brief history that in 1992 Community Associations Institute (CAI) modified its tax-exempt status from education (501(c)3) to a business trade entity (501(c)6) with increased lobbying rights.[ii]

Prior to 2000

In 1992, Roger Dilger wrote,

> "For example, most of those who advocate the formation of RCAs [HOAs] assume that RCAs . . . incorporate all the rights and privileges embodied in the US Constitution, including . . . the rights of due process and equal protection under the law found in the Fourteenth Amendment;"[iii]

In 1994 Evan McKenzie said it plainly, and is true today,

> "T]he property rights of the developer, and later the board of directors, swallow up the rights of the people, and public government is left as a bystander. . . . [Consequently,] this often leads to people becoming angry at board meetings claiming that their 'rights' have been violated – rights that they wrongly believe they have in a [HOA]. (p. 148)."[iv]

Editors Barton and Silverman published *Common Interest Communities* in 1994, a report on 12 early HOA (CID) research studies addressing the debate between HOAs as private governments in relation to public government.[v] Their conclusions in regard to the environment and culture of HOAs included:

> "Our research shows the tension created by combining neighboring and political social relations into this form of organization [common interest homeowner's association].
>
> "This means that the association's objectives can only be decided on through [sic] discussions among the homeowners. As a result, the homeowners' association needs to meet the basic democratic standards of openness, fairness, and representativeness to its members.
>
> "The model of the informed consumer choosing the mandatory homeowners' association and its detailed restrictions, the 'servitude regime', fails to describe reality.
>
> [T]hey [certain homeowners] reacted with strong, negative emotions to apparent infringements on their own rights as private property owners. These residents treated the governing bard of directors not as trustees of the public interest but as neighbors who had unfair powers over them.

> "Our findings pf pervasive conflict and fear of conflict, accompanied by apathy and avoidance within the community, run counter to the normal picture of community organization."

Steven Siegel wrote in 1998,

> Many RCAs exercise powers traditionally associated with local government. . . . Although the traditional view of RCAs is that each homeowner consents to the regime or chooses to reside elsewhere, Siegel rejects this view and suggests instead that RCAs are the product of forces other than consumer choice, including local government land use policies and fiscal pressure on local governments leading to the privatization of local government services. Because of the traditional view, RCAs rarely have been deemed state actors subject to the requirements of the Constitution. As private entities, RCAs regulate behavior in a way that is anathema to traditional constitutional strictures.[vi]

As early as 1999 homeowner advocates, the late Lois Pratt and Samuel Pratt, made their case for a homeowner bill of rights, writing,[vii]

> 'The association shall exercise its powers and discharge its functions in a manner that protects and furthers the health, safety and general welfare of the residents of the community'[citing NJ law]. . . . In

essence, this is the standard that defines the fundamental right of homeowners and the obligation of those in power. Every action of an association must conform to the standard: Does it promote the welfare and protect the rights of the members of the association?

While the topic of 'Homeowner Rights and Responsibilities' is frequently presented for discussion - in books, articles, and conferences on RCA management and operations, in state laws, in association by-laws, and in board minutes - the focus of attention consistently turns to the obligations of homeowners, and scant attention is given to homeowners' rights. To date we have found no document that presents a thorough treatment of homeowner rights.

2000 and later

In 2000, before the Arizona Legislature's HOA hearing committee I made an appeal for a member bill of rights:

"[Homeowner rights advocates] first looked to the existing government, the HOA Board, and having failed to obtain satisfaction therein, must seek other means of redress – a radical change in the concept and legal structure of the homeowner association and its controlling document, the CC&Rs. What is needed is an inclusion of a homeowners Bill of Rights and the removal of such onerous provisions

> that make the homeowner nothing more than an indentured servant, living at the suffrage of the board – pleased if the board is benevolent; living in fear if the board is oppressive."[viii]

In 2005, some 5 years after my introductory statement to the Arizona Legislature, HOA member rights — an HOA Bill of Rights, a constitutional issue — took hold. Nothing developed until The California Law Review Committee (CLRC), in 2005, timidly announced a "Chapter 2, Members Rights, Article 1, Bill of Rights," in its preliminary draft to revising the applicable Davis-Stirling Act. It immediately disappeared from the initial draft of revisions, but upon repeated exchanges on homeowner rights by the late Mrs. Elizabeth McMahon and Donnie Vanitzian, and yours truly. CLRC finally responded in 2005: "CLRC responded with, '*However, a bill of rights would probably go beyond the substantive rights that are currently provided in the law*' (MM05-03)," and,

> "George Staropoli objects [2008] to the lack of any substantive extension of homeowner rights. In particular he objects to the lack of any provision addressing the relationship of CID law to the state and federal constitutions. See Exhibit p. 1. As indicated at Exhibit p. 2, Mr. Staropoli first raised these issues in 2005 and was informed at that time that they were beyond the scope of the recodification project. (First Supplement to Memorandum 2008-12)."

In July 2006 AARP released its *A Bill Of Rights For Homeowners In Associations: Basic Principles of Consumer Protection and Sample Model Statute,* authored by Texas attorney, David A. Kahne.[ix]

Furthermore in a 2006 article in CAI's Common Ground,

> "CAI's Tom Skiba thinks Staropoli's logic is flawed. 'The fact is that by statute, common law, contract, and decades of practice, community associations are not-for-profit entities,' Skiba says, 'and are and should be subject to the relevant and applicable business law, contract law, and specific community association or common-interest-development law in each state.'"[x]

In 2007 I urged the need for an HOA Bill of Rights, citing the intents and purposes of *The Preamble to the US Bill of Rights*:[xi]

> *THE Conventions of a number of States, having at the time of adopting the Constitution, expressed a desire, in order to prevent misconstruction or abuse of its powers, that further declaratory and restrictive clauses should be added: And as extending the ground of public confidence in the Government, will best insure the beneficent ends of its institution:"*

In 2007 a currently active CAI member and former President had this to say, "Thus, the question of whether a particular covenant in a contractually-

created community violates an owner's constitutional rights of expression finds its answer in well-established property law jurisprudence."[xii]

In 2008, after a few years drafting, the Uniform Law Commission produced it bill of rights, ***Uniform Common Interest Bill of Rights Act*** **(UCIOBORA)** as a result of pressures from homeowner rights advocates, AARP, and others to provide homeowners with a bill of rights.

"The Need for a Free-Standing Home Owner Bill of Rights. . . . The reason is that each of these complex Acts has its detractors who have historically blocked adoption of these Acts in any state. . . . [And] of the difficulty drafters in the States may encounter in integrating any new adoption of the existing Uniform Acts with the laws that may already exist in a particular state. For these reasons, ULC promulgated a free-standing and relatively short Uniform Act that addresses all of the 'association versus unit owner' [hints at similarity of 'management vs employees'] issues touched on during the drafting of the 2008 UCIOA amendments.[xiii]

Tom Skiba, again in an unbelievable 2008 doubletalk statement declared:

"Community associations are not governments — many years of legislation and court rulings have established that fact beyond a reasonable doubt. Yet they are clearly democratic in their operations, electing their leadership from among

the homeowners on a periodic basis. . . . The solution to that problem is not to replace democracy with tyranny, royalty, or some other form of government, but to work to make the democratic process better and to hold those elected accountable."[xiv]

In 2008 Paula Franzese and Steven Siegel wrote with respect to the NJ Supreme Court opinion in Twin Rivers,,

"The laissez-fare approach to CIC regulation is reflected in the statutory law, which affords exceedingly few rights and protections to homeowners association residents."[xv]

In 2015 Deborah Goonan appealed to homeowners to write their Congressmen about the injustices in HOA-Land.[xvi] *Her sample letter included,*

"We have become a nation obsessed with property values to the exclusion of traditional American values," and

"Governance of HOAs is not currently required to be bound by Constitutional law, thereby resulting in a nation where 67 million people are not subject to equal protection under the law. In HOAs, The Bill of Rights Need Not Apply. The resulting inequality contributes to abusive governance, frequent conflict and abuse of the legal system."

Goonan again in 2020, referencing Arizona's SB 1412 (held in Rules due to COVID-19 premature session closing) and addressing Florida's SB 623 (having since failed) wrote,

"It's a 52-page bill that, among other things, seeks equal protection of Constitutional rights for all residents of HOA-governed communities. . . The Bill of Rights would apply to all Florida HOA-governed communities."[xvii]

Criticism followed UCIOBORA. "In short, UCIOA wasn't selling. It seems that UCIOBORA is the sad result of the political motives to get UCIOA selling again. It's a document that does not at all read like the US *Bill of Rights*, or any state constitution's Declaration of Rights (state constitution equivalent of the Bill of Rights), or even the *Declaration of the Rights of Man and Citizen* (France, 1793). Far from it. Rather it reads like your current CC&Rs and UCIOA with a number of concessions to reality."[xviii]

NOTES

[i] Adapted from "HOA Bill of Rights redux," George K. Staropoli, *HOA Constitutional Government* (2020).

[ii] Evan McKenzie, supra n.1, pp. 115 -119; Donald R. Stabile, *Community Associations: The Emergence and Acceptance of a Quiet Innovation in Housing, p. 144* (2000). Funded by CAI and ULI.

[iii] Roger Jay Dilger, *Neighborhood Politics: Residential Community Associations in American Governance*, p. 160, New York Univ. Press (1992). Formerly WVU Prof. Political Science and Director of Political Affairs.

[iv] Evan McKenzie, supra n. 1.

[v] Stephen E. Barton & Carol J. Silverman, eds., *Common Interest Communities: Private Governments and the Public Interest*, Ch. 13, section, "Private Property and Public Life in the Common Interest Development," Institute of Government Studies Press, Univ. of Calif., Berkeley (1994).

[vi] Steven Siegel, "The Constitution and Private Government: Toward the Recognition of Constitutional Rights in Private Residential Communities Fifty years After Marsh v. Alabama," Wm & Mary Bill of Rights J., Vol. 6, Issue 2 (1998).

[vii] Lois Pratt and Samuel Pratt, A Bill Of Rights For Homeowners In Residential Community Associations (1999).

[viii] Homeowner's Declaration Of Independence, George K. Staropoli, statement to the Arizona HOA Interim Hearing Committee, Sept. 7, 2000.

[ix] [1] David A. Kahne "AARP HOA Bill of Rights," *AARP Public Policy Institute* (2006).

[x] "Call &Response," Christopher Durso, Ed., Common Ground — July – August 2006.

[xi] See "Why is there a need for a Homeowners Bill of Rights?," George K. Staropoli, *HOA Constitutional Government*.

[xii] "Former CAI president reaffirms property law superior to Constitution." (2007). Article on NJ Twin Rivers decision, 2007; Link to CAI blog not found Sept. 9, 2020.

[xiii] UCIOBORA, Prefatory Note, page 1.

[xiv] CAI CEO Skiba in his April 2, 2008, *Ungated* blog entry.

[xv] Paula A. Franzese and Steven Siegel**, "**The Twin Rivers Case**:** Of Homeowners Associations, Free Speech Rights And Privatized Mini-Governments", 5 RUTGERS J.L. & PUB. POL'Y 630 (2008).

[xvi] "Let's Get Some National Attention on HOA, Housing Issues," Deborah Goonan, Independent American Communities (2015).

[xvii] "Florida Legislature Considers HOA 'Equal Protection' Bill," Deborah Goonan, *Independent American Communities* (February 7, 2020).

[xviii] See "co-opting the HOA 'homeowners bill of rights.'", George K. Staropoli, *HOA Constitutional Government* (2011).

HOAS as sui generis

> Because the ascendancy of the RCA [residential community association] is an exceedingly important legal and political development that touches core constitutional values and because RCAs are, in essence, sui generis, this Article concludes that a sui generis constitutional doctrine is necessary to properly assess the constitutional issues at stake.
>
> (Steven Siegel, *The Constitution and Private Government: Toward the Recognition of Constitutional Rights in Private Residential Communities Fifty Years After Marsh v. Alabama*, 6 Wm. & Mary Bill Rts. J. 461 (1998),

> There is no modern analogy to a community association. It is more than a quasi-governmental agency. It is more than an investment. It is more than a social organization. A common interest development is a unique blend of law, business and sociology. It is a multidimensional mix of principles of real estate law (restrictions on the use of private property), corporate law (the community association), business and economics (project management and funding), sociology (communal living) and psychology (individual interests and expectations), all marinating in an active political environment.

("The Uncertain Future of Common Interest Developments," Berding-Weil blog, Tyler P. Berding, Esq.(2005)).

State and Municipal Perspectives - Homeowners Associations

Overwhelmingly, however, the frustrations posed by the duplicative complainants or by the complainants' misunderstandings are dwarfed by the pictures they reveal of the undemocratic life faced by owners in many associations. Letters routinely express a frustration and outrage easily explainable by the inability to secure the attention of boards or property managers, to acknowledge no less address their complaints. . . . Perhaps most alarming is the revelation that boards, or board presidents desirous of acting contrary to law, their governing documents or to fundamental democratic principles, are unstoppable without extreme owner effort and often costly litigation.

In a disturbing number of instances, those owners with board positions use their influence to punish other owners with whom they disagree. The complete absence of even minimally required standards, training or even orientations for those sitting on boards and the lack of independent oversight is readily apparent in the way boards exercise control.

Owners are disheartened when they find the system designed to protect them consists of a procedure written by the board and implemented by those selected and appointed by the board. Invariably, the association attorney participates by presenting the board's position thereby placing lay owners at a distinct disadvantage.

Edward R. Hannaman, *State and Municipal Perspectives - Homeowners Associations*, presented to Rutgers University Center for Government Services, March 19, 2002) (Pa231-241). Ed Hannaman who works for the Department of Community Affairs for the State of New Jersey.

ENDNOTES Bill of Rights History

[i] Adapted from "HOA Bill of Rights redux," George K. Staropoli, *HOA Constitutional Government* (2020).

[ii] Evan McKenzie, supra n.1, pp. 115 -119; Donald R. Stabile, *Community Associations: The Emergence and Acceptance of a Quiet Innovation in Housing, p. 144* (2000). Funded by CAI and ULI.

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[iv] Evan McKenzie, supra n. 1.

[v] Stephen E. Barton & Carol J. Silverman, eds., *Common Interest Communities: Private Governments and the Public Interest*, Ch. 13, section, "Private Property and Public Life in the Common Interest Development," Institute of Government Studies Press, Univ. of Calif., Berkeley (1994).

[vi] Steven Siegel, "The Constitution and Private Government: Toward the Recognition of Constitutional Rights in Private Residential Communities Fifty years After Marsh v. Alabama," Wm & Mary Bill of Rights J., Vol. 6, Issue 2 (1998).

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[xviii] See "co-opting the HOA 'homeowners bill of rights.'", George K. Staropoli, *HOA Constitutional Government* (2011).