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supporting principles of democratic government

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Rebuttal against the necessity of HOA foreclosure rights

Mr. Berding, an attorney, has prepared a comprehensive and lengthy six-page justification (herein noted as "Foreclosure")[1] for the need, and therefore the right, for HOA foreclosure. As a non-lawyer, homeowner rights advocate of long-standing, I commend Mr. Berding for tackling this controversial issue. The detailed attention paid to this issue, including the question of the morality of the right to foreclose, indicates how effective advocates have been in raising this legitimate act of gross injustice. A right given to the HOA government that is embedded in the developer's CC&R imposed adhesion "agreement", and which is backed by state law.

HOAs are vital to our national security

The premise of Mr. Berding's argument: foreclosure is necessary in order for the HOA to survive. *"What any rational version of the debate centers upon is not whether we should enforce these obligations, but rather the means of that enforcement . . . . because enforcement today often means using some means of foreclosure . . ."* (Foreclosure, p.2). His justification is a very weak: *"what's the alternative?"*

I ask: Why should HOAs be given "special dispensation"? Especially when foreclosure is a highly discriminatory method that affects only those who have diligently paid their mortgages and assessments over the years. It allows those with high mortgage balances, the larger segment of homeowners, to go untouched. This is grossly unjust, but then again, the CC&R contract does not require the HOA to be just or compassionate. Furthermore, how many HOAs have foreclosed on a highly indebted home without paying off the debts of the prior lien holders, as Mr. Berding so well explained the foreclosure process? (I know of two who bypassed the payment of the mortgage company, one of whom was reported to the DOJ)[2].

Another unjust, and arguably unconstitutional method, is the extent to which the HOA is "made good" whereby a homeowner can lose all his equity in his home for nonpayment of assessments. Many times, especially when the attorney fees, which can easily amount to 2 - 5 times the debt owed the association, are included as part of the indebtedness. The damages to the homeowner often exceed more than 10 times his indebtedness. A $200,000 home foreclosed

on by the HOA for $5,000 in HOA/attorney fees exceeds the guidelines for punitive damages set forth by the US Supreme Court, with respect to insurance company awards of damages.[3] If one accepts the ineffectiveness, the impracticality, the unjustness of foreclosure, then the defense of this draconian method surfaces as merely a method to intimidate and punish those late in making payments.

Mr. Berding also makes the argument that the HOA needs money to operate and survive. *"There's no room in this debate for arguments that cash flow isn't necessary"* (Foreclosure, p. 2), he imperiously writes. *"And cash flow means owner assessments that can be relied on"* (Foreclosure, p. 2). With all due respect, his angry statements can easily be applied to any other profit or nonprofit business, yet they are not afforded this heightened degree of protection. They must rely on liens without foreclosure rights since it has been a well established traditional doctrine to protect one's home from creditors -- not to make it collateral for the survival of a private organization, the HOA. How many small businesses out there that are floundering, trying to stay in business, who employ people who can then pay their mortgage and their HOA assessments, and hopefully provide food for the table? Businesses who would dearly love to have income that "*they can rely on*"?

Foreclosure rights should be removed and the HOA make use of other time-tested methods used by numerous business and organizations, including municipalities. Even CAI in its own financial statements, uses "provisions for bad debts" or "reserves for bad debts" to deal with fluctuating and imprecise income streams. But, as long as the HOA believes in the efficacy of foreclosure, it will never look to establishing this time-tested and prudent management technique. This is gross injustice!

Mr. Berding seems to be arguing "convenience" rather than "necessity" when he dismisses alternative creditor protections as, "*it will cost the association more to collect . . ."* and that the *"shortfall that the other owners would* have *to cover would be greater . . ."* Well, Mr. Berding, isn't that the nature of the HOA legal concept? The obligations of the HOA are communal and can be made to be carried by all those who can make the payments. Any court appointed receiver would simply raise the assessments on the smaller number of "viable" homeowners to cover the shortfalls. While the argument of "its not fair to pay for deadbeats" plays to the irrational hot buttons of the members, it is an unsound financial argument given the HOA's failure to set reserves to minimize any shortfalls -- called "reserves for bad debts." You know, its sort of like insurance to maintain property values, but the HOA seems never to have heard of the concept of "insurance." Is that because it would require an additional payment to protect property values? You know, as insurance is widely used to protect against losses from life, disability, and director errors, including "loss of income"? Never heard of that concept, "loss of income insurance", have they? The promoters, defenders, HOA advisor attorneys, and boards do not come with clean hands with their arguments for foreclosure. It's a convenience rather than a sound financial technique!

The harsh statements quoted in the above paragraph evince a critical concern for the survival of the homeowners association legal scheme. This concern can be traced back to the "drafters" of the HOA legal model who, in 1964, prepared and marketed the current HOA model constitution for New America.[4] This Handbook required mandatory membership and compulsory dues. It also required the legal structure governing the subdivision to be embedded in the law of equitable servitudes and not in constitutional law, which creates a top-down imposition of "laws", rules, obligations and restrictions. It contained other undemocratic

provisions as special privileges for the developer; a mandated life of the HOA for at least 20 years; a lack of genuine due process and a just and fair election process; a requirement that a developer covenant be included in the CC&Rs "to run with the land" in order to bind home buyers without their having to have read or agreed to the "agreement", etc. In fact, under the chapter headed "Legal", two complete pages are spent on the importance of the right to foreclose. The HOA home is offered on a "take it or leave it basis".

Over the years an extensive rewrite of the laws and advice pertaining to HOAs by "legal-academic aristocrats" took place, in an attempt to offset the defects of the legal scheme. In this rewrite, it was advised that constitutional law be given deference to the new laws of equitable servitudes.[5] The CC&Rs of the profit-seeking developer was even found to trump the very precise homestead protection laws and constitution (exempting a certain amount of proceeds from the foreclosure sale) of Texas. Laws to prevent a "creditor taking" of one's home that is fundamental to our values and traditions of the sanctity of the home and family.[6] Mr. Berding doesn't inform the reader (Foreclosure, p.3) that homestead protections do not provide for an exemption in an HOA foreclosure. The homeowner gets nothing for the supposedly greater benefit of the HOA.

What makes the HOA so special? Is the industry, the institution of planned communities, critical to the security of this country that it needs special assistance, special laws, that permit the loss of constitutional protections of one's private property rights? Of the freedom of speech? Of due process protections that are available to all other peoples in this country who do not live in a planned community under authoritarian regimes? Our government has granted these special favors, and has allowed such foreclosure covenants within the developer written CC&Rs, without the protections of the members' individual rights and freedoms. It is shameful!

It is interesting to note that the original arguments advanced in 1964 (n. 5) to get everyone on board with this new incarnation of utopian communities are also offered in this defense. The "sales pitch", then and now, offers a weak justification for this as the need for the special treatment of HOAs:

> With a diminishing amount of land or availability of government services, the creation and perpetuation of community associations made sense. By giving associations 'municipal functions', they also had to be given the powers to 'tax' to perform these functions and so state legislatures gave associations the power to levy and collect assessments. (Foreclosure, p. 2).

First, this 'giving' and 'given' powers are not mandated in any state law. If they were, then, indeed, HOAs would clearly be a state actor and subject to the 14th Amendment. The statutes careful mimic the declaration of CC&Rs, but are careful not to use the "shall" word, which designates a mandate by the legislature. Second, Mr. Berding recognizes that the HOA is providing services for the benefit of the municipality, and, as we know, vice versa. This can be seen as a symbiotic relationship, a mutual support, cooperation and coercion, and with many of the statutes, a close nexus with the operations of the HOA -- all of which would also make the HOA a state actor. In this instance, if indeed the HOA were recognized as a state actor whereby its members were protected by the 14th Amendment, then perhaps, and only then, would the right to foreclose be acceptable. What is the objection to accepting the facts that HOAs are indeed de facto governments? Why are the special interests so vehement in opposing any attempt to have them so recognized as a public entity or state actor? Why isn't our government

vehemently resisting such a view, as required by their vow to support and defend the Constitution?

Consensual liens and consent to be governed

I personally spent over two years before the Arizona Legislature arguing for the repeal and invalidation of the right to foreclose by HOAs, where this question of a bona fide consensual lien and, more broadly, the consent to the surrender of one's rights and freedoms, was a hot item.

The legal basis for the right to foreclose is presented by Mr. Berding in several passive statements, such as: *"the homeowners association is given a contractual or statutory right to secure . . ."* and *"associations are thus given the status of a secured creditor."* What Mr. Berding doesn't present is the explicit wording within the CC&RS, to the effect, that the homeowner hereby gives the right to the HOA to foreclose for nonpayment of assessments and other HOA debts. (Many states have declared foreclosure for debts other than nonpayment of assessments to be invalid as an unconscionable provision, contrary to public policy). The debate continues, however, but is ignored by Mr. Berding, as to both the moral and legal grounds for this special right to foreclose for the assessments, given the questionable nature of homeowner consent. (I keep wondering where isn't an outcry against government interference with respect to statutory foreclosure?)

If the state imposed, or statutory lien,[7] were to be challenged in court, the state would have to not only show a legitimate government interest, but a compelling reason that it is a necessity rather than a convenience, particularly since the statute denies constitutional rights. The state would also have to show that the classification of citizen living in HOAs, as distinguished from all other homeowners, was a legitimate classification to avoid unconstitutional special laws applied to an invalid classification of certain people. What is the necessity for the people living in an HOA to be subjected to foreclosure to a private organization service organization, and not to subject all other service organizations to foreclosure? Like landscapers (grass cutters), auto repair shops, dry cleaners, etc.

We know, as Mr. Berding points out, the special case of a mechanic's lien, but the HOA is not a materialman or laborer to be reimbursed for materials and labor. For one, it is not a licensed contractor as required by law. Contrary to HOA foreclosure rights, the "mechanic" must provide an individual notice of filing a lien, and must specific the acts of the mechanic -- the costs of the material, the labor, and the tools, for a specific purpose, namely some construction, improvement or repair of a building. What does the HOA notice for its demand for the right to lien or foreclose? Nothing!

The HOA acts with equivalent local government powers and functions, as Mr. Berding acknowledges early in his defense, but without the homeowner protections found in the public realm. Furthermore, the HOA does not advance any funds as do banks and mortgage companies. Why should it be granted the draconian right to foreclose?

He also misses the point that while there are laws to protect the tenant, they are laws that are truly enforced against the landlord in a legal atmosphere completely contrary to that of the HOA, where there is a lack of homeowner protections and state enforcement against violations of the law by the HOA.

As to consent by the homeowner to the lien and the grant of a right of foreclosure comes under the doctrine of consensual liens, not mandated statutory liens. And the question of consent is not a simple question as HOA proponents would like the reader to believe. First, although the courts enforce the CC&Rs as if it were a contract, they have not addressed the issue that the "consent" to the so-called contract does not meet the legal requirements of contract law: a meeting of the minds, a bargaining process, no fraud or misrepresentation that covers failure to disclose material facts, and a signature. Instead, the servitude doctrine of a simple filing of the CC&Rs with the county clerk's office -- referred to as "constructive notice" -- is found to be binding on all those taking possession of their deed, constitutional concerns notwithstanding.

Shouldn't it be disturbing that a buyer must not only sign his purchase contract of some nine pages, and consisting of some 400 lines of legalese, and then must initial every page, yet the buyer need not even see the CC&Rs in order to be bound by them? Your CC&Rs is not the purchase contract nor is it made part of it. If this occurred, then a buyer would then have to sign and initial all the pages, too. This may be legal according to equitable servitudes, but not contract law, and it violates basic ethical and moral laws of right and wrong. Furthermore, it violates constitutional law when it comes to surrendering one's rights: there is no explicit consent!

Facing this defense of a consensual agreement, the faithful defenders of HOA-land apply a public, non-contractually based doctrine to the consent to be governed and to be subject to the HOA. "Well, if you don't like it move out", they shout. And if the homeowner doesn't move out, then he's held to have agreed to being bound to the HOA government. All and any contractual provisions are ignored altogether. Of course, it could be argued that "not moving" is equivalent to "not objecting" to new events or conditions, which under contract law can constitute a new agreement. But, that brings us back to the issue of a contract void ab initio (from the get-go) since it fails to pass "contract 101" requirements, doesn't it?

A quick study of state laws and your CC&Rs will reveal the fact that the laws closely mimic the CC&Rs provisions. Why do you think there was a need for such "duplicative" state laws? Could it be that in the event the CC&Rs were declared unconscionable adhesion contracts and void, the HOA could fall back on state law?

What has become of America when this conduct, this abysmal treatment of individuals in our society, is allowed to occur without an outcry from our elected officials, the political scientists, or the public interest organizations? What is causing well-meaning people to demand the draconian measure of HOA foreclosure in an unsound attempt to "balance the HOA budget", while ignoring the serious concerns, briefly touched upon above, that are establishing a New America. A New America that stands in opposition to and repudiates the America of our forefathers?

A viable alternative: returning HOA secesionist regimes to the Union

Mr. Berding ends this enewsletter with a call for opposing arguments, which will be welcomed, printed, and discussed so long as they contain suggested workable alternatives. But he sets no panel for determining "workable" alternatives. Years ago in 2006, I informed the CAI *Common Ground* editor that I declined his offer to be interviewed in preference for a debate

forum, where I would be able to respond to questions and statements made by the "establishment."[8] I did not receive any response, in spite of the fact that CAI runs annual HOA conferences. With this understanding, I would most likely not be given "equal time" here.

Mr. Berding summarily dismisses (Foreclosure, p. 5) my arguments, without acknowledgement, for the "muni-zation"[9] or conversion of the HOA legal scheme into a state entity -- a special taxing district -- that would allow the same private use of amenities, the same rules and regulations, now local "ordinances", and the continued payment of assessments, now special taxes for those living in the HOA taxing district. The one exception is that the HOA would now be subject to the 14th Amendment, and all the public laws, procedures and processes would apply to the HOA as all government entities are subject. The members would have their rights, and their privileges and immunities, restored! Mr. Berding dismisses special taxing districts simply because he feels it won't really help the HOA with respect to his narrower focus on the necessity to foreclosure. The government already has this right, he states. Yes, but not enthusiastically employed against homeowners, and where there are additional public domain protections. And where sound financial budgeting procedures and protections against revenue shortfalls are in place.

Mr. Berding, there are no guarantees in this world, not even for HOAs. HOA boards must act in a prudent manner, as is their obligation, and deal with this reality. However, he believes that the board is incapable of prudently managing the HOA -- *"the answer is they can't"* (Foreclosure, p. 4) -- and must resort to foreclosure, even after he admits to its discriminatory affect on a small percentage of the membership.

Mr. Berding has attempted to argue the necessity for HOA foreclosure in his enewsletter, but has failed to justify the compelling need to repudiate the constitution.

Endnotes

[1] *The Great Foreclosure Debate: Should Community Associations use Alternatives to Foreclosure to Protect Their Cash Flow*?, Berding-Weil enewsletter, January 2010, http://www.berding-weil.net/newsletter/2010/01/35/ (Jan. 8, 2010).

[2] "*HOA foreclosures new findings*", George K. Staropoli, *Constitutional Local Government,* http://pvtgov.wordpress.com/2009/11/14/hoa-foreclosures-new-findings/ (Jan 8, 2010).

[3] *State Farm Ins. Co. v. Campbell*, 538 U.S. 408 (2003).

[4] *The Homes Association Handbook*, Technical Bulletin 50, Urban Land Institute, 1964.

[5] *The Restatement third, Property (Servitudes),* § 3.1, comment h, American Law Institute (2000).

6 Inwood v. Harris, 736 S.W.2d 632 (Tex. 1987).

[7] The statutory lien can be as simple as the single sentence in ARS 33-1807(A): *The association has a lien on a unit for any assessment levied against that unit from the time the assessment becomes due*.

[8] "I declined the interviewed ... and said that I'd prefer a seminar or debate format where I can present my views and answer questions directly. The magazine format was not the right vehicle for that. He said that he'd read the materials and perhaps ask some questions via email.", "short conversation with Chris Durso of CAI", Feb. 24, 2006 email to HOANET@yahoogroups.com email list.

[9] "*A proposal for the "Muni-zation" of HOAs; Stop developers from granting private government charters*", George K. Staropoli, *Constitutional Local Government*, Aug. 2, 2004. http://pvtgov.wordpress.com/2004/08/02/a-proposal-for-the-muni-zation-of-hoas-stop-developers-from-granting-private-government-charters/.