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Business Judgment Rule wrong for sui generis HOAs

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In this treatise I argue that the commercial business judgment rule as applied to sui generis HOAs — enforced and supported by state legislatures and the extension of judicial deference — as a result of the heavy influence of and industry domination by the pro-HOA national lobbying organization, Community Associations Institute (CAI) is inappropriate and constitutes a due process of law violation. The CAI agenda in support of the HOA legal structure is tacitly seditious and secessionist.

This examination of the business judgment rule is a supplement to my amicus curiae brief to the AZ Supreme Court (Taylor v. Bendt, CV-21-0049) in which I provided guidance in regard to 1) HOAs are sui generis created by rejecting Constitutional protections and instituting and supporting separate laws for special organizations, 2) HOA-Land has been under the heavy influence and domination of the national lobbying entity, Community Associations Institute (CAI), and 3) as a result of the above a pro-HOA mindset has crept into our judicial system resulting in bad laws setting bad precedent.

*** See Appendix E for Staropoli profile.**

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Preface

This paper is a supplement to my *Tarter v. Bendt* (CV 21-0049) pro se amicus curiae brief to the Arizona Supreme Court in which I raised questions with respect to 1) HOAs as public forums, 2) HOA presidents as limited-purpose public persons, and 3) HOAs stifling public speech concerning HOA governance issues by means of SLAPP lawsuits. Here I focus on the misguided application of the business judgment rule as applied to HOAs that is heavily promoted by the pro-HOA lobbying organization, CAI, and widely accepted by the courts and state legislatures.

My objective has been to educate and reorient state legislators, the courts, the media, the HOA boards, and the public-at-large in understanding the broader political and social environment created by the lack of constitutional protections for citizens living under private government HOA regimes. There is strong documentation to assert a bias and indoctrination leading to an attitude that *HOAs can do no wrong*.

The pro-HOA bias is clearly demonstrated in the Forward to the Restatement 3rd Property: Servitudes (2000), which 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*."

Additionally, the indoctrination of Americans by the *CAI School of HOA Governance* is further displayed by its public policy contained its "manifesto" (**Community Next: 2020 and Beyond,** May 5, 2016). In its effort to motivate pro-HOA members to control and dominate their personal agenda, CAI 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 have come to this point in exposing the injustice of the business judgment rule as a result of my 21 years *in the trenches* fighting for HOA reform legislation; through extensive research into case histories, public statements by the policy makers and CAI, and the publications by recognized authorities.

In the course of my quest for the truth, I acknowledge the impact of Evan McKenzie, Director of Political Science, UIC and highly respected international authority on homeowner associations. McKenzie has played an important role in my education with respect to questions of HOA constitutionality. In his 1994 landmark book, *Privatopia: Homeowner Associations and the Rise of Residential Private Government,* McKenzie's history of HOAs, the creation and role of CAI, and the outstanding criticisms of HOAs as private governments continues through today with *Beyond Privatopia: Rethinking Residential Private Government* (2011), and as co-author describing the broad manner of the demise of public local government, *Private Metropolis: The Eclipse of Local Democratic Government* (2021).

I also learned much from the journal papers of Steven Seigel: *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., Spring 1998. As co-author with Paula A. Franseze, their criticism of the Twin Rivers NJ supreme court decision, *The Twin Rivers Case: Of Homeowners Associations, Free Speech Rights and Privatized Mini-Governments*, Paula A. Franseze and Steven Siegel, 5 RUTGERS J.L. & PUB. POL'Y 630 (2008) and *Trust and Community: The Common Interest Community as Metaphor and Paradox. (*Paula A. Franzese and Steven Siegel, Missouri Law Review, Vol. 72 at 1111 (2007)).

I. Sui generis HOAs

From the very early stages of the formation of Community Associations Institute (CAI) in 1973, concerns were raised from 1975 onwards by its incorporators and founders as to the question of HOAs as a mini or quasi-government, or as a business. This period saw the very beginnings of the realization that a sui generis rationalization was necessary in order for the HOA legal scheme to work as set forth in the HOA "bible", *The Homes Association Handbook*.

> It is our firm belief that the information and recommendations contained in the handbook will be of major value to land developers, planners, home builders, appraisers, mortgage lenders, realtors, attorneys, association officers, and public officials concerned with the planning, development, and operation of stable and attractive residential areas for the home owner [sic] and the community. (Forward by ULI President, *The Homes Association Handbook*," Maryjo Cornish, Editor, Urban Land Institute, TB#50 (1964)).

Wayne Hyatt was a prominent figure in the promotion and development of the of HOA legal structure and served as a 1975 "homeowners representative" and a former CAI president (1978-79). He developed many of Dell Webb's master planned and resort/active adult association CC&Rs over the years. Hyatt's 1975 Emory Law Journal article, *Condominium and Home Owners Associations: Formation and Development,* 2 years after the formation of CAI, presents his highly influential view on HOA constitutionality while recognizing that HOAs are mini-governments. It provides readers with a good idea of HOA constitutionality and local government concerns that seemed to have evaporated over the years as CAI's influence increased dramatically

"[T]he declaration and particularly the by-laws create not only a corporate structure but also a governmental authority that requires and deserves competent, experienced persons." (See Appendix A for details on Hyatt's role in developing HOA-Land and his discussion on the nature of HOAs).

Additionally, the Hyatt and Rhodes article in the Wake Forest Law Review (***Concepts of Liability in the Development and Administration of Condominium and Home Owners [sic] Associations*** 12 Wake Forest Law Review at page 915, (1976)), as quoted in *Cohen v. Kite Hill,* p. 5-6, 142 Cal App 3d 642 (1983), identifies HOAs as quasi or mini-governments: [W]ith powers vested in the board of directors, council of co-owners, board of managers, or other similar body clearly analogous to the governing body of a municipality." (See Appendix A for details.)

> In a thoughtful article . . . Hyatt and Rhoads note the increasingly "quasi-governmental" nature of the responsibilities of such associations: "The other

> essential role directly relates to the association's regulatory powers; and upon analysis of the association's functions, one clearly sees the association as a quasi-government entity paralleling in almost every case the powers, duties, and responsibilities of a municipal government. As a 'mini-government,' the association provides to its members, in almost every case, utility services, road maintenance, street and common area lighting, and refuse removal. In many cases, it also provides security services and various forms of communication within the community. There is, moreover, a clear analogy to the municipal police and public safety functions. All of these functions are financed through assessments or taxes levied upon the members of the community, with powers vested in the board of directors, council of co-owners, board of managers, or other similar body clearly analogous to the governing body of a municipality. Terminology varies from region to region; however, the duties and responsibilities remain the same." (Cohen, p. 918).

The 1994 research compendium dating back as early as 1967, editors Stephen E. Barton & Carol J. Silverman, present 13 early research articles critical of the HOA model of governance in practice. Selected excerpts:

> Because the ascendancy of the RCA [residential community associations] is an exceedingly important legal and political development that touches core constitutional issues 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,* Wm & Mary Bill of Rights J., Vol. 6, Issue 2 at 563 (1998)).

> The remedy appears to implicate an entirely new standard, wholly distinct from the established *Coalition* framework. It can be presumed that the standard is *sui generis* with respect to homeowners associations. (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)).

(*Common Interest Communities: Private Governments and the Public Interest*, Institute of Government Studies Press, Univ. of Calif., Berkeley (1994)).

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. (Tyler P.

Berding, "The Uncertain Future of Common Interest Developments," Berding-Weil.com (2005)). (Berding is a longtime active CAI member).

Perhaps layman Wolfe's quote of a 1978 mayor's comment sheds some light on Wolfe's motive: *"traditional local government is finding, for the first time, a major competitor in the delivery of public services*

> The Community association is coming more and more to resemble a new, more local form of government. As such, it has the potential of noticeably altering the structure of American life. *(*David B. Wolfe *Condominiums and Homeowner Associations That Work on Paper and Action,* Ch. 1, An Open Question (ULI & CAI, 1978)).

ULI Senior Director Spink, in his foreword, includes this book as one of the "three books, in combination with the HUD report, [that] provide in many ways a complete replacement for the Homes Association Handbook." This very important and practical issue — the status and recognition of HOAs as a government — "remains a vexing issue for CAs", as Stabile writes in 2000 [8], even today in 2010. Stabile sheds a bright light on this sensitive issue, referencing Wolfe's 1978 handbook mentioned above.

> "By the late 1970s, according to Wolfe, CAs had taken on many functions that resemble the provision of public goods much as local governments did. Whether this entitled them to the legal status of a government was open to debate within the CA movement and in the courts. Wolfe then presented both sides of the debate over the definitions of CAs as governments. One legal opinion offered in support of construing CAs as a government noted that the Supreme Court had required constitutional procedures in a 'company town' and with 'political parties' [Marsh v. Alabama, 1946]; from this view CA actions were 'public' in a constitutional sense. At the same time CAs were corporations . . . . Wolfe concluded that a new definition of a CA as a government was needed to bring about Lewis Mumford's [9] vision of a democracy."
>
> "In some cases, courts interpreted CAs as a business, but 'with regard to individual rights and obligations, the courts may hold associations to the standards of public government law'. Legal cases were forcing them to do more . . . . 'These suggest that the consideration and adoption of resolutions, in the manner associated with traditional governmental and political processes have a place in CA government'."

(Donald R. Stabile, *Community Associations: The Emergence and Acceptance of a Quiet Innovation in Housing* (Greenwood Press, 2000), p.164-167). A joint publication of ULI and CAI). (Citing Donald B. Wolfe as the author of the joint ULI and CAI handbook, "*Condominiums and Homeowner Associations That Work on Paper and Action*" (ULI & CAI, 1978).

In his own words in his Preface to his 1978 publication, Wolfe understands the key factors in making the HOA legal scheme work and addresses the board directors "who have often left the legal concerns to the attorneys . . . without knowing [that] they might be prejudicing both their own safety from tort liability and that of . . . the board of directors." Today, the dominance of the HOA attorney has increased with their advice to the directors to seek legal advice to avoid personal liabilities. In Chapter 1 he raises the still controversial and unanswered question of HOAs as de facto governments

> Few would argue that an association with responsibility for most of the above services would be much less than a "government de facto" as defined by Black. [Black's Law Dictionary]. At what point are the services provided by a CA not sufficient for it to be considered as a "government de facto?"
>
> Issues of due process and reasonability on behalf of members (the constituents) in actions of the corporate board of directors (the representative governmental body) have been raised by at least some courts in a way without counterpart in traditional corporate operation.

Sadly after 43 years and a redirection in 1992 by CAI to find solutions to continuing HOA problems, CAI has failed to accomplish its mission, its reason for being. ULI Senior Director Spink writes *"In 1973 in response to the obvious need for a clearinghouse for information and advice, CAI was formed."* But the advice on good governance was given in Wolfe's book in appendix A, Book of Resolutions, Policy Resolution 2. Excerpts are contained in Appendix D.

. . . .

<u>The HOA-Land Nation</u>

The assault on the Constitution did not start in 2016 but in 1964 with the publication of *The Homes Association Handbook* that formulated the current legal model of local authoritarian, private governments commonly known today as homeowners associations (HOAs). Today there exists an *HOA-Land Nation within America* that is comprised of fragmented and local HOA governments across the country, and has designated them collectively as *HOA-Land*.

The commonality of their declarations of CC&Rs, flowing from the Handbook, their shared beliefs, values, traditions, and institutions qualify HOA-Land as a nation. The private contractual legality of the HOA allows it to function outside the US and state Constitutions and laws of the land as if it were a principality. States have granted the HOA more freedoms and rights than possessed by local governments. HOAs have more freedoms than allowed to communities electing to be held subject to home rule statutes holding them subject to the Constitution and the laws of the land.

The consequence of this treatment as a principality has been a loss of constitutional rights and freedoms for the members of the HOA, relegating them to a second-class citizen status. Could the subdivisions now known as HOAs exist within the constitutional structure of our 232-year democratic institutions, or was it necessary to adopt authoritarian methods to overcome the defects of the HOA model of governance.

II. Judicial mindset: belief over facts

Alan Ides quotes Timothy Sanderfur (now VP for litigation at the Goldwater Institute), on *the law of the land* doctrine, *"The words, 'due process of law,' were undoubtedly' intended to convey the same meaning as the words 'by the law of the land,' as in Magna Carta,"* and that it was meant "*as a bulwark against arbitrary exercises of power*." Referring to Lochner that the law must rest on 'some reasonable grounds,' Ides clarifies this evasive doctrine qualifying reasonable as based on '*some fact-premised grounds*.' If not, then the law is arbitrary. Yet, the Lochner majority decision interjected "common sense" as a decider stating that "*common sense dictated that there were no reasonable grounds."* Ides comments that judges should not simply apply common sense to their decisions. (at 72).

> In Dukes (427 U.S. 297) the court adopted a conceivability standard (Dues 303-304) where "*anything the court might imagine that the lawmakers [Congress or state legislators] could have considered in supporting the ordinance*." Ikes concludes with, "*Rational basis should not be based on a hypothetical set of facts, but on the actual facts as likely (not conceivably) relied on by the lawmaker's*." (at 75).
>
> Hammer argues that Justice Gorsuch extended the meaning of "sex" to include "sexual orientation ("Common Good Originalism: Our Tradition and Our Path Moving Forward," Josh Hammer,44 HARV. J.L. & PUB. POL'Y, 919, number 3, Summer 2021). And McDonald argues that the Kelo 5th Amendment eminent domain "public use" decision extended "use" to include "purpose" ("What is Public Use? Eminent Domain and the Kelo Decision," John F. McDonald, Cornell Real Estate Review, vol. 5, art. 3 (2007).

(Alan Ides, *The Constitutional Bedrock of Due Process,* 43 HARV. J.L. & PUB. POL'Y, 67 number 1, Winter 2020).

Finally, Chief Justice Roberts decided Obamacare constitutionality by rejecting WH intent that the payments were not a tax.

> "OBAMA: No. That's not true, George. The - for us to say that you've got to take a responsibility to get health insurance is absolutely not a tax increase. . . . OBAMA: George, the fact that you looked up Merriam's Dictionary, the definition of tax increase, indicates to me that you're stretching a little bit right now. Otherwise, you

> wouldn't have gone to the dictionary to check on the definition. . . . STEPHANOPOULOS: But you reject that it's a tax increase? OBAMA: I absolutely reject that notion." ("Obama in 2009: The Individual Mandate Is Not a Tax" (ABC News interview with George Stephanopoulos).

III. Business judgment rule (BJR)

a. Judicial deference and the business judgment rule

According to Montesquieu, a necessary condition for the existence of a republican government, whether democratic or aristocratic, is that the people in whom supreme power is lodged possess the quality of "public virtue," meaning that they are motivated by a desire to achieve the public good. Although public virtue may not be necessary in a monarchy and is certainly absent in despotic regimes, it must be present . . . to a large degree in democratic republics.

Locke draws the conclusion that political society—i.e., government—insofar as it is legitimate, represents a social contract among those who have "consented to make one Community or Government.

Democracy - The legitimacy of government | Britannica (viewed July 2, 2021).

In suits alleging a corporation's director violated his duty of care to the company, courts will evaluate the case **based on the business judgment rule**. Under this standard, a court will uphold the decisions of a director as long as they are made (1) in good faith, (2) with the care that a reasonably prudent person would use, and (3) with the reasonable belief that the director is acting in the best interests of the corporation.

> There are a number of ways to defeat the business judgment presumption. If the plaintiff can prove that the director acted in gross negligence or bad faith, then the court will not uphold the business judgment presumption. Similarly, if the plaintiff can *prove that the director had a conflict of interest, then the court will not uphold the business judgment presumption.*
>
> *When the corporation pleads the business judgment rule, if the court finds that the presumption applies, the plaintiff then must prove that the business judgment rule does not apply. However, if the court finds that the presumption does not apply, then the board needs to prove that the process and the substance of the transaction was fair.*

Business Judgment Rule (Legal Information Institute).

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> [Judicial deference] — now commonly associated with the Supreme Court's opinion in *Chevron v. Natural Resources* Defense Council—provides that a reviewing court must "defer" to an administrative agency's reasonable

> interpretation of the organic statute that it administers. (467 U.S. 837 (1984). There is a "long tradition of deference to agency interpretations."
>
> As Justice Douglas put the point, the "principle at stake" in judicial deference cases "is no different than if mandamus were sought—a remedy long restricted, in the main, to situations where ministerial duties of a nondiscretionary nature are involved." (Panama Canal Co., 356 U.S. at 318).
>
> The relevant text of the APA seems simple enough: it provides that a "reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action." (5 U.S.C. § 706 (2012).

(Aditya Bamzai, *The Origins of Judicial Deference to Executive Interpretation*, 126 HARV Y.J. 4 (Feb. 2017)).

> "It is a presumption that in making a business decision the directors of a corporation acted on an informed basis, in good faith, and in the honest belief that the action taken was in the best interests of the company." (Citing Aronson v. Lewis, 473 A.2d 805, 812 (Del. 1984)).
>
> A conscious decision by the board to ignore the red flag [a potential liability], however, is a business decision and like all business decisions should be reviewed by the court with deference under the business judgment rule.
>
> [To] require, judges to substitute their business judgment for that of the board. Such a role for judges would go against the basic principles of the business judgment rule. Judges would be evaluating the performance of directors with the benefit of perfect hindsight. (Citing Stephen M. Bainbridge, The Business Judgment Rule as Abstention Doctrine, 57 VAND. L. REV. 83 (2004)).

(Eric J. Pan, *Rethinking the Board's Duty to Monitor: A Critical Assessment of the Delaware Doctrine,* 38 FLORIDA STATE UNIVERSITY LAW REVIEW 2, (Winter 2011)).

b. <u>Business judgment rule in HOA-Land</u>

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

While we see CAI's hand in many cases involving the business judgment rule, in Point I of the CAI amicus brief to the NJ appellate court, CAI lays out the predominate attitude and holdings of the business judgment rule.

> 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. This result is not mandated by existing case law, and it is respectfully submitted that this Court should decline Plaintiffs' invitation to create such a new rule in this case. (p. 19). (CBTW v. Twin Rivers, Docket No. C-121-00 (N.J. Super. Ct. App. Div. 2004).

The infamous NJ Supreme court opinion in Twin Rivers fully supported the Rule. "First, the business judgment rule protects members from arbitrary decision-making.... Our Appellate Division has uniformly invoked the business judgment rule in cases involving homeowners' associations." (*CBTR v. Twin Rivers*, 929 A.2d 1060, II, (N.J. 2007)).

> The trial court eventually dismissed Surowiecki's claim and cited the business judgment rule for their reasoning. The two principal issues addressed in the brief are whether the business judgment rule applies to the association (and not just the board members) and whether the business judgment rule requires that the boards' decisions be "reasonable."
>
> An Official Comment to the Model Business Corporation Act states that corporate "decisions will not be disturbed by a court substituting its own notions of what is or is not sound business judgment if the board's decisions can be attributed to **any rational business purpose**" (emphasis added).

(Surowiecki v. Hat Island, No. 99138-3, CAI Amicus Brief IV(D), (Wash. 4/12/2021.)

> We hold that, where a duly constituted community association board, upon reasonable investigation, in good faith and with regard for the best interests of the community association and its members, exercises discretion within the scope of its authority under relevant statutes, covenants and restrictions to select among means for discharging an obligation to maintain and repair a development's common areas, courts should defer to the board's authority and presumed expertise. (¶ 20).
>
> The business judgment approach is not the only approach taken by courts. A number of courts have adopted a more objective "reasonableness" standard by which to judge the discretionary actions of community associations. See, e.g., Beachwood Villas Condo. v. Poor, 448 So.2d 1143, 1144 (Fla. Dist.Ct.App.1984) ("When a court is called upon to assess the validity of a rule enacted by a board of directors, it first determines whether the board acted within its scope of authority

> and, second, whether the rule reflects reasoned or arbitrary and capricious decision making."). (¶ 22).
>
> The Restatement approach essentially "provide[s] the advantages of the business-judgment rule, but at less potential cost to the interests of individual members." (¶26)
>
> We find the Restatement approach to be well-reasoned and see no reason to adopt a different standard by which to review the discretionary decisions of a community association. See Scott B. Carpenter, Community Association Law in Arizona 157 (2d ed.2005) (suggesting that Arizona courts should follow the Restatement (Third) of-Property: Servitudes absent contrary authority in "cases that deal with community associations and restrictive covenants"). ¶(27)

(Tierra Ranchos v. Kitchukov, 165 P.3d 173 (Ariz. App. Div. 1 2007)).

> This Court has recognized that residents of common interest communities also have a number of non-constitutional protections against unreasonable restrictions. A governing board's regulations are enforceable only if they satisfy the business judgment rule, that is, they are authorized by statute or the governing documents and the board's action is not fraudulent, self-dealing or unconscionable. (p. 19).
>
> Rather, the Association is attempting to balance the rights of all owners. It should be allowed to do so, provided it complies with the business judgment rule and treats all owners equally. (p. 24).

(CAI Amicus Brief, Mazdabrook v. Kasim, No.67,084 (N.J. 2011)).

> From a practical perspective, the reasonableness standard is often parred down even further to focus specifically on the last prong. Better known as the Business Judgment Rule, this narrow focus on the last prong creates a presumption that board decisions are based on sound business judgment and entitled to deference.
>
> Furthermore, many governing documents incorporate the Business Judgment Rule and expressly immunize board members from personal liability for poor decisions – provided they are made in good faith after reasonable due diligence.

("Duty of Care and What it Really Means for Board Members," Olga Tseliak, CAI Quorum Magazine, October 2020.)

> "Undoubtedly, the specter of personal liability would serve to greatly discourage active and meaningful participation by those most capable of shaping and directing homeowners' activities" (citing (Jaffe v. Huxley Architecture (1988) 200 Cal.App.3d 1188).
>
> "It is the public policy of this state to provide incentive and protection to the individuals who perform these important functions." The common law business

> judgment rule, most commonly associated with Delaware's articulation of the rule, is a judicial construct that as originally constituted is consistent with the above-stated public policy. (See, e.g., Cuker v. Mikalauskas (1997) 547 Pa. 600, 607.)
>
> "The business judgment rule is a presumption that in making a business decision the directors of a corporation acted on an informed basis, in good faith, and in the honest belief that the action taken was in the best interests of the company." (Katz v. Chevron Corp. (1994) 22 Cal.App.4th 352, 1366.

(Kulick & Mesken, *'For Whom The Bell Tolls' – Is The Business Judgment Rule Dead?,* Community Association Law Seminar January 31 – February 3, 2018.)

> "This trend [legislator response to proposed bills by individuals] is expected to continue as long as a legislative response is considered necessary to respond to negative perceptions produced by media out of lone circumstances. Legislative responses to individual constituents contribute to community associations being perceived as over-restrictive micro-governments focused on covenant enforcement. This perception may accelerate legislative efforts aimed at greater oversight of community association governance and require greater transparency."

(Community Next: 2020 and Beyond (May 5, 2016). (Interpretated as the "CAI Manifesto."))

IV. Business judgment rule does not apply to sui generis HOAs

a. The 'community' in community associations

It is understandable that the courts should not be put into the position of a "shadow board" of a business board of directors. However, the courts should get involved in matters of community government where the managing board of directors possesses powers not granted to commercial enterprises nor to nonprofit corporations. Unfortunately, to escape involvement in governance of an HOA community that is not a business, the courts have opted to treat the HOA as a business, implying that the homeowner, like a business shareholder, has an understanding of the risks involved and that decisions will not always be in their favor of a bona fide business enterprise.

Why not consider the HOA as a government entity since, like a municipality, it has some business functions? Like a municipality, the HOA sells no product or service, as a bona fide business entity must do, but relies on assessments -- member mandatory taxes – for its revenues, and is not allowed to make a profit for its owner-members. The HOA is not a business — an entity organized to make a profit — even if it conducts business functions. The HOA is sui generis in its nature as a result of the business oriented legislation and judicial holdings supporting the commercial BJR.

By many of its rulings, the courts have attributed a greater wisdom to the HOA board that greatly varies depending on the capabilities of drafted volunteer or drafted directors when the required number of directors are not filled by volunteers. HOA directors do not have to show any particular educational achievements or licensing, or experience resume, or any "moving up the ladder" as qualifications for the highly desirable position of board director. There are no protocols in place, no traditions, no customs, and no staff to assist and guide new directors as found in public government. In fact, HOA directors are more like our elected officials than business executives. While even nonprofit board candidates must show some qualifications, HOA board members need only to offer their bodies at the board meeting, with no more than three consecutive absences in many cases.

The only guiding principles for director conduct, comes from the CAI pro-HOA biased, authoritarian "advice," collectively found in the *CAI School of HOA Governance* programs and agenda. The foundation and principles of the *School* can be traced back to CAI's Public Policies, The *CAI Manifesto* (its 2016 "white paper"), its numerous seminars and conferences, its Factbooks and surveys, its amicus briefs to the courts, and its advisories, letters, emails, newsletters, blogs etc. I have designated these foundations and principles collectively as the *CAI School of HOA Governance*.

I have maintained that the BOD's mission statement, vision and values are one-sided and heavily influenced by the mindset created by the *CAI School of HOA Governance* that neglects constitutional protections for the members. The alleged benefits for the members as contained in the CC&Rs do very little to provide the benefits of a democratic government. In fact, they restrict or deny the application of constitutional rights and freedoms, and the privileges and immunities of citizens of this country and their state.

Speaking of director duties, Kelly G. Richardson wrote:

> If the director were a fiduciary to the individual member, that pursuit of delinquency or violation would breach the duty of loyalty toward that member, but the loyalty is to the corporation … After being outvoted by the board majority, a director strongly believing the decision is in error can be tempted to believe their "fiduciary" duty requires them to continue arguing the issue after the decision, even taking the issue to the membership at large. However, the director's loyalty is to the corporation, and the corporation has decided.
>
> The duty of care requires directors to have sufficient information from qualified persons to make the decision. Sometimes the cost of this expertise is not anticipated and not budgeted, and the temptation is to try to avoid the expense. Reasonable care requires the use of appropriate necessary expertise.
>
> (*Homefront Fiduciary duty: What It Is and Is Not*, Richardson)

In contrast, the role, functions, duties and obligations of public government city managers are well defined according to Orville W. Powell (*City Management: Keys to Success*, AuthorHouse (2002). Powell "is recognized in this country and internationally as an expert in the field of city administration.").

b. unreasonable conduct by directors unqualified to govern

Should the business judgment rule rather than the alternative, reasonableness test for decision-making be the standard for HOA board actions? The courts grant HOA boards broad rights over homeowners by currently holding that the board is the best decider of what's good for the HOA, not the courts, regardless of any test of the reasonableness of actions. We believe that the rational for this position was reached by faulty analysis and a bias toward treating the HOA government as the best arbiter of "the stability of the common living arrangement."

A careful examination of the court rulings leads to the absurd conclusion that an HOA board may act in an unreasonable manner, reach an unreasonable decision, as long as it acted in good faith, didn't violate the governing documents, acted in the best interests of the community, and "upon reasonable investigation" only. The court speaks of risks to justify the application of a business judgment standard rather than the negligence, reasonableness standard. But tort law already deals with risks and unreasonable behavior.

> "[Negligence] has been defined a 'conduct which involves an unreasonable great risk of causing damage" … which falls below the standard established by law for the protection of others against unreasonable risk of harm" (Unreasonable Risk, § 31, Prosser and Keeton On Torts, West 5th ed., 2004, citing Restatement (Second) of Torts §282).

The appellate opinion in Desert Mountain (*Nicdon v. Desert Mountain,* No. 1 CA-CV 20-0129 (April 29, 2021)) felt that the homeowner had mystical powers to reasonably anticipate amendments:

> "*Although no such restrictions explicitly appeared in the Declaration when Nicdon's principals purchased their home, they could have reasonably anticipated further restriction or expansion on matters within the scope of the Declaration's regulation. In adopting the Amendment, Desert Mountain properly followed the procedures laid out in its governing documents*."
>
> *Given these provisions, as well as the comprehensive nature of the Declaration and its amendment procedures, a prospective purchaser of a lot in the community would reasonably be on notice their property would be regulated by extensive use restrictions, including limitations on renting of homes, subject to amendment in accordance with the Section 5.20 process."*

To argue that a buyer would "*reasonably be on notice their property would* be *regulated by extensive use restrictions"* is an abuse of discretion in that reasonableness is with regard to the content of the amendment and not the notice of an amendment. It is obvious that there is no provision for negotiations with the

homeowner. The governing documents amendment provisions are set up as if it were a local government and not a one-to-one contract. It needs further explanation.

Under contract law this can be seen as an invalid "agreement to agree." The homeowner had raised the issue of an unreasonable addition to the CC&Rs, but the Court saw it differently. The real argument, in my mind, was the invalid agreement to agree and therefore, a taking of personal property without compensation not permitted under the federal and Arizona constitutions.

We believe this holding deprives homeowners of their due process rights, especially when board the decisions affect rules and regulations regarding use of private property and the conduct of the homeowner, or in total disregard of the laws and governing documents — rogue boards. Industry attorneys and supporters have dominated the planned community and homeowners association area of law. A homeowner's view of the business judgment rule can be found in the fairly recent publication, *California Common Interest Development: Homeowner's Guide*, Donie Vanitzian (West 2006). Sections 5:22 to 5:26 carry an analysis of this rule.

In "Directors' Individual Liability", § 5:21, the author reminds the reader that the HOA is not a business:

> "Homeowners associations are simply not businesses in the classical or statutory sense of the word 'business'.... Reliance on the business judgment rule in determining whether or not an association's board has acted legally ignores the fact that the board, as a non-profit corporation, was formed not to run a business .... Nothing in the development documentation states that the association or its minions are directed to make a profit or increase the value of the property."

In contrast, the Levandusky court (*Levandusky v. One Fifth Avenue*, 75 N.Y.2d 530 (N.Y. App. 1990)) addressing the standard for review of a cooperative dispute, rationalized its decision in favor of BJR as follows,

> "Allowing an owner who is simply dissatisfied with particular board action a second opportunity to reopen the matter completely before a court, which – generally without knowing the property – may or may not agree with the reasonableness of the board's determination, threatens the stability of the common living arrangement."
>
> "[T]his reasonableness standard – originating in the quite different world of government agency decision-making has found favor with courts reviewing board decisions.... The more limited judicial review embodied in the business judgment rule is preferable. In the context of the decisions of a for-profit corporation, 'courts are ill equipped and infrequently called on to evaluate what are and must be essentially business judgments ...'"

The courts have confused the actions of a reasonable act versus actions "reasonably related to" or as a "reasonable means to further" the objectives of the HOA. Requiring a

specified dimension for any modification to landscaping, say gates or plants, would be upheld as reasonably related to the purposes of the HOA, since some limitation must be set. But would it be a reasonable decision to require a gate, for example, to be 3 feet 8 inches high and not 3 feet 9 or 3 feet 7 inches high? Or only red roses, but not bougainvillea (another red flower)? Would such a variance have a negative affect on property values? On the aesthetics of the community? The answer would generally be "no" unless the HOA is characterized as having an obsessive compulsion about uniformity.

The business judgment rule, or any variation of it, is the wrong standard to measure wrongful behavior by HOA boards that have a fiduciary duty to the homeowners. It deprives a homeowner in an HOA from the due process he would have received if he had violated a municipality rule and regulation, an ordinance. Furthermore, in a bona fide business, an unreasonable action by the board does not place the shareholder at risk of losing his home or subjecting him to financial hardships in terms of fines and liens on his home. He sells his shares, if a public business, or hopes to sell his private shares back to the other business owners.

c. <u>denial of constitutional protections in favor of HOA stability</u>

In *Desert Mountain* the court proclaims that the homeowner implicitly consents even without legally required to have read or explicitly agreed to be bound.

"*By accepting a deed in the Desert Mountain planned community, Nicdon became bound by the Declaration, including properly adopted amendments. . . . when [a] homeowner takes [a] deed containing restriction allowing amendment by majority vote, homeowner implicitly consents to any subsequent majority vote to modify or extinguish deed restrictions".*

Levandusky is another biased ruling that presupposes that the homeowner is "simply dissatisfied" and rejects alleged damages and a loss of rights by the unreasonable conduct of the board. The homeowner is not entitled to his right to due process before the courts. It essentially says that the board can never legally act in an unreasonable manner, that the board is untouchable and without error, and that there is no need for a homeowner to protect his home by means of the equal protection of the laws, and the reasonableness test of tort law and negligence. This deference rises to the level of treating the HOA as an absolute monarchy, or a dictatorship, or the sovereign that can do no wrong and is above the law.

The courts have repeatedly echoed their concern about a privately contracted HOA government's stability, regardless of that the fact that the HOA offers no bill of rights and operates outside the 14th amendment protections for homeowners. In contrast if gross negligence occurs, government agency negligence is not wrongful conduct subject to misdemeanor penalties. Yet, the homeowner is denied even this level of protection applicable to our government agencies!

* * * *

The policy makers have failed to realize and accept the similarities between HOAs and other forms of local government. In the council-manager form the mayor is a figure head; the powers to rule the city are divided between the elected city council and a city manager appointed by the council. Many HOA Bylaws follow the council-manager form of local government, which is true of the many large HOAs and the retirement/resort subdivisions. (See Appendix C for a comparison).

V. Conclusion

The opposing treatment of the business judgment rule by the courts falls into two distinct views, 1) disregarding the sui generis nature of the HOA legal model as a result of pro-HOA statutes and treating the HOA as just another commercial business, and 2) upholding the property rights of members and protecting their fundamental and constitutional rights *to due process of law* and *the equal protection of the laws*.

The adoption of BJR ignores black and white laws, applies servitudes law over contract law, views the survival of the HOA as matter of statewide survival and assessments must flow, holds the members to a highly questionable "agreed to be bound" obligation in spite of prevalent evidence of misrepresentation and fraud in the selling process, fair elections and member ability to effectively participate in governing is set as a high bar, and that the BJR is convenient for the implied knowledgeable and informed, fairly elected board of directors to act in good faith for the benefit of the members.

Public policy today rejects constitutional government for HOAs allowing them to operate outside the law of the land. 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. In order to return to a democratic and fair community government, the business judgment rule must not be applied to HOAs. It will require federal intervention to bring order and constitutional protections for citizens who live in an authoritarian HOA in the form of an equivalent landlord-tenet act.

However, needed change can be accomplished by means of the Uniform Law Commission (ULC) that has produced the 2015 Uniform Residential Landlord And Tenant Act (URLTA), accepted in total or in part by all states. With proper regard for the rights of members, URLTA can serve as the basis for a Uniform Common Interest Community – Member Act.

VI. APPENDICES

a. Appendix A. Wayne S. Hyatt

Wayne S. Hyatt's 1975 Emory Law Journal article, *Condominium and Home Owners Associations: Formation and Development,* 2 years after the formation of CAI, presents his highly influential view on HOA constitutionality while recognizing that HOAs are mini-governments.

Wayne Hyatt "the most prominent advocate in CAI" serving as a 1975 "homeowners representative" and a former president (1978-79) (Privatopia, p. 219, 138 respectively). Hyatt devoted his practice to working with developers of condominiums, master planned communities, resorts . . . to create community governance structures and community stewardship organizations. While actively practicing law, he was also a member of 1) the American Law Institute (that wrote the pro-HOA Restatement of Servitudes, 2) the College of Community Association Lawyers (CAI affiliate) , the Community Associations Institute (CAI, created in 1973 by the National Association of Home Builders [grant of] $30,000), and 3) ULI - the Urban Land Institute (sponsor of the 1964 "HOA bible*," The Homes Association Handbook*) and served as a ULI Trustee.

He also served as an Advisor 1) to the Restatement of the Law (Third) Property: Servitudes, and 2) to the Special Committees on a Uniform Condominium Act and a Uniform Planned Community Act of the National Conference of Commissioners on Uniform State Laws (Uniform Law Commission, UCIOA and UCA). Hyatt received several awards from CAI.

Hyatt developed many of the Dell Webb's master planned and resort/active adult association CC&Rs over the years.

His 1975 Emory Law Journal article gives readers a good idea of constitutionality and local government concerns that seemed to have evaporated over the years as CAI's influence increased dramatically. A few important excerpts:

- "The California Code provides for an association and affords it the powers and duties of the mini-government." {T]he [Georgia] legislature has in effect provided a large measure of home rule for what is in essence a category of small municipalities, and each has established a system of officers and directors in the nature of a mayor and council to oversee the exercise of this rule." (At 988).
- "'Has the state permitted, even by inaction, a private party to exercise such power over matters of a high public interest that to render meaningful' constitutional rights, private action must be public?"(Footnote 33 at 983). [In simple terms, private government HOAs must be subject to local government protections].

- "The Declaration is not a contract but, as a covenant running with the land, is effectively a constitution establishing a regime to govern property held and enjoyed in common. It further sets forth procedures to administer, operate, and maintain the property. . . . the declaration and particularly the by-laws create not only a corporate structure but also a governmental authority that requires and deserves competent, experienced persons . . ." (at 990).
- "The power of 'levy' is a distinctive characteristic of the association and removes it from a mere voluntary neighborhood group. . . . The imposition of penalties, whether fines . . . or a denial of use of facilities enforced by injunction, certainly represents quasi-judicial power to affect an individual's property rights. . . . The possession and exercise of such power has substantial consequences with clear constitutional implications. The courts have not yet considered a direct constitutional challenge to an association's action." (at 983).
- "[T]he constitutional issue is most acute in rule enforcement; however the association's established procedures, declaration, and by-laws should insure compliance with at least rudimentary constitutional principles, and there must be a procedure to protect members' rights." (at 984).

b. Appendix B. Rejecting BJR in Johnson, an Arizona ruling (emphasis added)

“The court defers to the decisions of others only in limited circumstances. For example, if parties have provided for dispute resolution … Similarly, the superior court will uphold the determinations of a state administrative agency ….”

“(citing Divizio v. Kewin Enters., Inc., 136 Ariz. 476, 481, 666 P.2d 1085, 1090 (App. 1983)). The interpretation of restrictive covenants is a question of law for the court. Id. (‘The interpretation of a contract is a matter of law and not a question of fact.’). In interpreting the meaning of a covenant, the superior court does not defer to the interpretation given by the association.”

“In the absence of declaration provisions providing alternative means of resolving disputes arising from the enforcement of restrictive covenants, both homeowners and their associations are entitled to bring their case before the courts without either party’s position receiving deference. The civil courts afford a neutral interpretation of the development’s declaration and ‘significant protection against overreaching’ by either homeowners or their association. See Lamden, 980 P.2d at 952.”

“Because of its considerable power in managing and regulating a common interest development, the governing board of an owners association must guard against the potential for the abuse of that power. Nahrstedt v. Lakeside Village Condo. Ass’n.”

"Thus, while Lamden protects the discretion to act given to a governing association by its declaration, Lamden does not even infer that an association’s interpretation of its own restrictive covenants in a dispute with a homeowner is entitled to deference from the superior court. Such deference is inappropriate. … {citing Divizio v. Kewin Enters., Inc., 136 Ariz. 476, 481, 666 P.2d 1085, 1090 (App. 1983)). The interpretation of restrictive covenants is a question of law for the court."

“[T]he superior court erred when it gave deference to the determinations of the Association in entering judgment on behalf of Defendants.”

"Similarly, the superior court will uphold the determinations of a state administrative agency 'unless after reviewing the administrative record and supplementing evidence presented at [an] evidentiary hearing the court concludes that the action is not supported by substantial evidence, is contrary to law, is arbitrary and capricious or is an abuse of discretion'. See, e.g., Riss v. Angel, 912 P.2d 1028, 1033 (Wash. Ct. App. 1996) (determinations of homeowners board not entitled to deference under state administrative procedures act)".

(*Johnson v. The Pointe Community Assn., Inc.*, CA-CV 02-0160 (Ariz. App. Div. 1 2003)).

c. Appendix C HOAs as an alternate form of local government

As a comparison, the Brooklyn Center, MN form of government is based on the council-manager system. We are more familiar with the mayor–council or mayor–manager forms of local government where the mayor is elected and plays a major role in governing the city.

However, in the council-manager form the mayor is a figure head with the powers to rule the city are divided between the elected city council and a city manager appointed by the council. Sound familiar? Many HOA Bylaws follow the council-manager form of local government, except that the Bylaws do provide for corporation laws governing the duties of officers. This is true of the many large HOAs and the retirement/resort subdivisions where the division of labor and authority follows the public form in that the council holds ultimate responsibility for the conduct of the government. But the council (HOA board of directors) is restricted to policy issues, while the appointed manager (HOA CAM) actually runs the HOA. A good example can be found in an Arizona active-adult HOA of some 17,000 people.

> "The affairs of the Association shall be managed by a Board of Directors which shall serve as the corporate policy-making body of the Association. . . . The Board is not responsible for nor authorized to perform day-to-day operations of the Association. The day-to-day operations of the Association shall be carried out by CAM or agents retained by the Association under the supervision of the Board.
>
> "Subject to the Board's responsibilities concerning operational policies, it shall be the policy of the Association . . . that the Board refrain from unreasonably interfering with the performance of delegated functions by CAM."

The major difference between local public government Brooklyn Center, MN and the Arizona HOA lies in the private contractual nature of the HOA that absolves it from application of the US Constitution as well as the state constitution. HOA members are, as compared to non-HOA members, therefore second-class citizens lacking constitutional protections within their own state.[2]

It needs to be answered: Why is there so much opposition to requiring the HOA to be subject to the Constitution like all other forms of local government?

d. Appendix D. David Wolfe's Book of Resolutions

Wolfe served as the property manager representative in the "design group," a team of representative from the 5 constituencies involved in the creation and structure of CAI in 1973.

In conjunction with his Community Management Corporation, Wolfe was the author/co-author of several books produced by ULI and CAI from 1975 – 1978:

- *Financial Management of Condominium and Homeowners' Associations* (1975*)*
- *Creating a Community Association: The Developers Role in Condominium and Homeowner Associations* (1976), and
- *Condominiums and Homeowner Associations That Work on Paper and Action* (1978).

The following photos were taken from *Paper and Action,* Appendix A, Policy Resolutions. Policy Resolutions were *"adopted by the BOARD which specifically relate to the plan of governance and governance policy of the ASSOCIATION."* The book was designed as an update to and mimic the format and style of *The Homes Association Handbook*. What Wolfe proposed was clearly adopted from the statewide Administrative Procedures Acts (APA) for public agency rule making.

As is quite evident today, the common place CC&Rs and by-laws boilerplate reflect Wolfe's concern for **due process of the law** for HOA members. What happened over the years? I believe the strong evidence shows the dominance of the national lobbying organization, CAI, as it redesigned itself from an educational nonprofit to a business trade group in 1992. It still advertises itself as an educational organization although, as of only a few years ago, admitting that it was a 501(c)6 nonprofit.

> CAI provides information, education and resources to the homeowner volunteers who govern communities and the professionals who support them. . . . CAI serves community associations and homeowners by: Advancing excellence through seminars, workshops, conferences and education programs, most of which lead to professional designations for community managers and other industry professionals. (Caionline.org, About CAI, July 20,2021).
>
> This page does not mention that CAI is a business trade entity that lobbies for pro-HOA legislation in all 50 states, often to the detriment to the common interests of the members.

Policy Resolution 2
Policy Resolutions

WHEREAS, Article IV, Section 4.18 of the BYLAWS grants the BOARD "All powers for the conduct of the affairs of the ASSOCIATION which are granted by law and the HEATHERWOOD PROPERTY DOCUMENTS"; and

WHEREAS, there is a need to adopt formal rules and procedures for making and recording POLICY RESOLUTIONS of the BOARD; and

WHEREAS, it is the intent of the BOARD to institute such rules and procedures;

NOW THEREFORE, BE IT RESOLVED THAT the following procedures for the adoption of POLICY RESOLUTIONS be adopted:

1. *First Reading*. The proposed POLICY RESOLUTION shall be read into the minutes of a regular BOARD meeting by a member of the BOARD. At that meeting the BOARD shall set a time, date and place, such time to be no less than fifteen (15) days hence, for a hearing of the MEMBERS on the proposed resolution.

2. *Publication*. The proposed POLICY RESOLUTION shall be printed in its entirety in the ASSOCIATION newsletter, together with notice of the time, date and place of the membership hearing as set by the BOARD.

3. *Consistency*. The secretary or legal counsel shall be responsible for reviewing the proposed resolution for consistency with previously adopted resolutions and with the PROPERTY DOCUMENTS and submitting a written report at the public hearing.

4. *Public Hearing*. All MEMBERS attending the hearing shall receive printed copies of the agenda, on which the proposed resolution shall appear. MEMBERS shall have an opportunity to comment on the proposed resolution, subject to guidelines stated by the BOARD or designated committee at the beginning of the hearing. The BOARD may delegate to an appropriate committee the authority to hold the hearing.

5. *BOARD Action*. At a meeting of the BOARD to be held no ear-

5. *BOARD Action.* At a meeting of the BOARD to be held no earlier than seven (7) days from date of the hearing and no later than the next regular BOARD meeting, the BOARD shall take action on the proposed POLICY RESOLUTION. To be adopted, the resolution must have the approval of a majority of the BOARD. If the resolution is adopted, copies of the resolution shall be distributed to all MEMBERS and placed in the BOOK OF RESOLUTIONS.

6. *Waiver.* POLICY RESOLUTIONS adopted by the BOARD at the BOARD meetings prior to the election of the first resident MEMBERS to the BOARD shall not be subject to requirements 1, 2 and 4 above, nor the hearing requirements of 3 above; however, such resolutions shall be explained by the BOARD or a BOARD designee to any resident advisory committees existing during that period.

7. *Re-Adoption.* After the election of the first residents to the BOARD and prior to the expiration of resolutions adopted under 6 above, the BOARD shall undertake a thorough review of all such resolutions and, with the advice and recommendations of resident committees, make such changes or additions as seem necessary or appropriate. Prior to re-adoption, all resolutions adopted under 6 above, in their original or revised form, as applicable, shall be subject to the hearing requirements under 4 above.

8. *Duration.* With the exception of POLICY RESOLUTIONS adopted under 6 above, POLICY RESOLUTIONS shall remain in effect for a period of three years from the date of adoption or any subsequent amendment by the BOARD, unless a lesser period is indicated in the resolution; except that POLICY RESOLUTIONS No. 1 and 2, as they may be amended from time to time, shall remain in effect perpetually. Any resolution due to expire shall be brought to the BOARD by the secretary for consideration at a meeting within forty-five (45) days prior to the date of expiration. If, at the meeting when the POLICY RESOLUTION is reviewed, there are no proposed amendments of a substantive nature, the BOARD may re-adopt the resolution with approval of a majority of its members.

9. *Amendment.* To amend a POLICY RESOLUTION substantively the BOARD will follow the procedures for adoption of a POLICY RESOLUTION.

e. Appendix E. George K. Staropoli

Mr. Staropoli is a 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* pertaining to the constitutionality of ALJ adjudication of HOA disputes. In 2013 he filed suit (*Staropoli v. State of Arizona*) 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.

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.

He is a publisher of HOA issues and has authored: *"Understanding the New America of HOA-Lands"* (eBook, 2010), *"Establishing the New America of independent HOA principalities" (2008),* and he is author of *HOA Common Sense: rejecting private government* (eBook, 2013)**.** George published an education course outline in 2015: *The HOA-Land Nation Within America (2019).* George also publishes on the internet.

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).

Web pages: http://pvtgov.org; http://pvtgov.wordpress.com

Accomplishments of George K. Staropoli June 2, 2021

Date	Event
1. 2000	Proposed Homeowner Bill of Rights before AZ legislature HOA interim committee
2. 2005	Instrumental in passing HOA due process OAH bill in AZ
3. 2008	Published "*Establishing the New America of independent HOA principalities"*
4. 2010	Published *Understanding the New America of HOA-Lands*
5. 2011	Amicus curiae accepted by AZ Supreme Court HOA Constitutionality challenge
6. 2005 – 2012	Appeared in several books and treatises on HOA issues
7. 2013	Won HOA constitutionality suit against Arizona Legislature
8. 2013	Published "*HOA Common Sense: rejecting private government*"
9. 2015	Published educational series*, "HOAGOV Education Series: understanding the real lives of HOA members."*
10. 2019	Published "The HOA-Land Nation Within America"
11. 2020	Published *HOA Member Bill of* Rights proposal to ULC's UCIOA.
11. 2021	Pro Se amicus brief to AZ Supreme Court in Taylor v. Bendt accepted.

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