

Citizens Against Private Government HOAs, Inc
5419 E. Piping Rock Road, Scottsdale, AZ 85254-2952
602-228-2891 / 602-996-3007 (f)
info@pvtgov.org <http://pvtgov.org>

January 17, 2006

Senator Liz Figueroa, Chair
Joint Committee on Boards, Commissions, and Consumer Protections
California Senate

EMAIL LETTER

RE: Nov. 17, 2005 Background Paper on CID
Ombudsman

Dear Senator Figueroa:

Please view this letter as an “amicus curiea” response to your background paper on creating a CID Ombudsman. I confine my response solely to Question I.

A. Are homeowners protected by their rights to participate in the political process?

The statements presented reflect the problems with CIDs. However, the conclusion falls somewhat short of what is necessary to resolve the problem.

The discussion begins with the presumption that CIDs reflect the same democratic basis as our American system of government: the protection of individual freedoms and liberties with the application of the Bill of Rights. This is not so. The Bill of Rights does not apply to private government organizations, only to state entities under the 14th Amendment. And, as Dr. Rizzo, the Florida Ombudsman, wrote in a letter to the Sun-Sentinel that, “*The office recommends against mandatory funding until adequate safeguards are put into place Those who are upset at the ombudsman's position are obviously unaware of the complexity of this issue*”¹ in a clear statement of the lack of safeguards to protect homeowner funds. Furthermore, the CC&Rs can easily be construed as an unconscionable adhesion contract and, as such, unenforceable². To make the simplistic argument that a homeowner can vote in a CID and, therefore, democracy as we know it in municipal government, with all its protections, exists within the CID. It does not. The CID “constitution” reflects an authoritarian form of government designed to coerce compliance rather than cooperation

¹ *Maintenance Reserves Complex*, Dr. Virgil Rizzo, Condominium Ombudsman State of Florida, South Florida Sun - Sentinel. Fort Lauderdale, Fla.: Dec 20, 2005. p. 22.A.

² See the 1994 NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS UCIOA version at <http://www.consumersforhousingchoice.org/UCIOA%2094.htm> (1/06); cf, *Pardee Construction v. Rodriguez* Cal App 4th D039273 (2002) and *Maxwell v. Fidelity Financial Services, Inc.*, 907 P.2d 51 (Ariz. 1995).

among homeowners. How can there be cooperation when all the powers belong to the CID government? Are there any laws that hold a board violation of the law subject to meaningful penalties? Can a board member's house be taken from him if he violates the law? Or the director prohibited from serving in any CID capacity for 2 or 5 years?

Will the recommended education be required before a consumer buys in a CID? Will the state circulate and make widely known all those issues and differences in the form of governance between the CID and municipal government, indicating what rights and protections are, such as independent tribunals for due process and oversight of CID elections? The recommendations are not preventative, and only serve to inform the homeowner of his sad, second-class citizenry state within a CID after he has already committed to CID living. The only option is for the homeowner to leave, but this is equivalent to having to leave the state or country if one does not like the governor or the president.

B. The problem of volunteerism.

Excerpts from page 8 are well worth repeating:

It is extremely hard for a homeowner to challenge the rules under which they live, if they have been approved by the HOA, and the stakes for every homeowner can be very high.

CID boards of directors have the ability to limit a freedom which no counterpart for nearly any other kind of government authority – the liberty of an individual homeowner to use his own property.

While most people who get involved in political activity at the local level, state or federal level do so as an individual choice—and many decide not to make that choice – participation in an HOA [the governmental body of the CID] is a necessity of ownership in CIDs.

[I]t is clear that a substantial number of CID owners do not fully comprehend how powerful the terms in the CC&Rs, the HOA and its board of directors can be – and how critical it can be to them to be an active member.

The report gets right to the heart of the problem of CID/HOA governance, one that is underplayed in the disclosures: the profound impact of “communal” government where your neighbors can take away your property rights without compensation and without any justification except, “it will benefit the community”³. When the required level of political involvement exceeds the normal turnout in the general elections, we have a bar to the

³ *OSCA Development v. Blehm*, E032843, Cal. App. 4th, DIV 2 (2003) (Desert Crest case; validity of CC&R amendments with non-unanimous approval; not for publication); *Villa de Las Palmas v. Terifaj*, CA SC S109123 (2004) (amended restrictions are binding on all); *Rancho Santa Fe v. Dolan-King* (2004) D040637/D041486 Cal App (restrictions for good of community).

effective exercise of democratic government, allowing for a minority faction to control the community. Without the vast body of public laws to protect the people from abusive government, absent in the CID “constitution” and in existing statutes, corruption flourishes. Concern for the trampling on minority rights -- those unalienable rights -- or for the unequal protection of the law for all persons is clearly stated by James Madison in the Federalist papers. And, that concern is also extended to the legislature” when it no longer protects those minority rights that are a fundamental principle of American democracy . “*The tyranny of the legislature is really the danger most to be feared . . .*”⁴

From The Federalist papers, No. 51⁵

It is of great importance in a republic . . . to guard one part of the society against the injustice of the other part. Justice is the end [goal] of government. Justice is the end [goal] of civil society.

If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary.

The HOA form of governance is an enormous stain on the principles of American democracy. It lacks the necessary checks and balances, the separation of powers doctrine and the primary concern for the rights and freedoms of its citizens that are fundamental to our system of government. Yet, these boards have been placed on the same level as the angels.

The report accurately states the serious problem of a lack of education by the boards as to their duties and responsibilities, especially beyond the governing documents to statutes and common laws that govern boards of directors, their fiduciary duties, and to tort law in general all under which the board and officers can be held. I feel that the report misses an important factor when it states, “*Everyone takes classes in school on the way that government works, and therefore has a rudimentary knowledge of what it means to be a citizen*” (p. 9). That rudimentary knowledge brings with it the presumption of a democratic government with the same laws and functions as the public has come to expect of government in America. That form of American government does not exist in the authoritarian HOA government as set forth in its “constitution” -- the governing documents. HOAs have been allowed to exist and operate outside the American system of government on the false basis that they are the result of a fully informed and consensual private contract, and that the state has no role in protecting the rights of home buyers as it does with many other unenforceable private contracts.

With respect to the failure of boards to release HOA records, the report does identify what can be viewed as the criminal frame of mind reflecting “no records, no law suits”. The

⁴ Letter from Jefferson to Madison, March 15, 1789 cited in *Democracy in America*, infra 5.

⁵ *Democracy in America*, Ch. 15, “The Greatest Dangers of the American Republics Proceed from the Omnipotence of the Majority”, Alexis de Tocqueville (1835) citing *The Federalist Papers*, No. 51, written by James Madison.

freedom of access to HOA records is of paramount importance to exposing the wrongful acts that the report characterizes as “all allegations at this point”. Without penalties against this failure to perform by the board, the rogue director simply laughs and tells the homeowner requesting these financial records, “So what that I am violating the law. There are no sanctions.” The report correctly recommends, and I wholeheartedly support, that *“Enforcement of and punishment for such transgressions should be among the very highest priority of the laws related to CIDS.”*

It is unfortunate that neither of the Ombudsman bills, AB770 or SB551, contains any such provisions for penalties against violations of state law by HOA boards, directors and officers. While the requirement that the Ombudsman make a recommendation as to providing for enforcement, these bills specifically declare that the Ombudsman’s advice and opinions are not subject to the rulemaking provisions of the Administrative Procedure Act. I had specifically urged CLRC that effective due process can be attained immediately by subjecting CIDs to the Administrative Procedures Act.⁶

C. The Problem of resolving disputes within CIDs under current law and under the proposed Ombudsman

This problem has an inherent bias: the unconscionable adhesion contract nature of the CC&Rs weighted heavily in favor of the CID⁷, and in my opinion, necessary to coerce compliance with the authoritarian HOA regime. The use of mediation services cannot address this inherent inequality and oppressive nature of the CC&Rs that removes those rights a homeowner has come to expect under the laws of the municipal and state governments. In too many instances, the homeowner will not find satisfaction when told that he had agreed to give the HOA immense and broad authority over his personal life and property when he took the deed to his home, since the law of equitable servitudes does not require a signed contract.

In regard to posting of all the governing documents on a web site, this is a step in the right direction. However, it is after the fact if it is not available to purchasers and if it does not contain a warning, in effect and quite appropriate, that he is leaving the American Zone and entering a private principality⁸ not subject to the prohibitions of the Fourteenth Amendment to the US Constitution. The lack of information to a buyer as to the true nature of CID living, which is not covered in any of the required disclosure documents, affects his market choice and negates any studies of homeowner satisfaction that the industry proponents claim. Furthermore, a disclaimer must be made with respect to how the HOA complies with its governing documents, in effect saying that, “Any resemblance to the conduct and operations of the HOA board of directors and its governing documents is purely coincidental.”

⁶ George K. Staropoli email letter of July 6, 2005 to CLRC, First Supplement to Memorandum 2005-25, July 12, 2005; G. K. Staropoli, unpublished email letter of March 14, 2005 to CLRC, Common Interest Development Law: Catalogue of Issues, Memorandum 2005-03, March 7, 2005.

⁷ See supra n. 2.

⁸ George K. Staropoli, *The HOA Principality*, http://pvtgov.blogspot.com/2005_01_01_pvtgov_archive.html (January 2005)

In conclusion, I found this report quite satisfactory, and I'm disappointed with the two bills now before the Legislature, AB770 and SB551, with their lack of enforcement provisions. I am also disappointed that CLRC has not taken up the promised consideration of a Homeowners Bill of Rights⁹ before these bills are subject to a vote.

Respectfully submitted,

George K. Staropoli
President

Cc: Assemblyman Mullin
Senator Lowenthal
Brian Hebert, Ass't Executive Sec'y, CLRC

⁹ See First Supplement to Memorandum 2005-25 in supra n. 6