



**eBook Edition**

**Buyer's Guide**  
To Living in a  
**Community Association**

*"You surrender your civil liberties when entering a community association, and your government doesn't want you to know that."*

**George K. Staropoli, editor**

# **Buyer's Guide to Living in a Community Association**

George K. Staropoli, Editor  
Citizens Against Private Government HOAs, Inc  
Scottsdale, AZ

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Published by  
StarMan Publishing, LLC  
5419 E. Piping Rock Rd  
Scottsdale, AZ 85254



Printed in the United States of America

ISBN 0-9744488-0-X



## ***ACKNOWLEDGEMENT & PURPOSE***

This book is a collection of articles, papers, emails from a number of internet email lists – HOANET, HOAA, AHRC -- and from a number of web sites – PVTGOV.ORG, CCFJ.NET, AHRC.COM, ConsumersForHousingChoice.com; as well as excerpts from published newspaper and trade magazine articles.

The editor attempts to provide the reader with a view of life as a member of a community association, the “government” of a common interest property, not in agreement with the “carefree living”, happy community relations and beautiful environments as presented by the industry special interest groups – the HOA attorneys, the HOA management firms, and the HOA boards of directors. These one-sided views fail to inform prospective buyers, the media and state legislators of the loss of civil liberties, the lack of assistance from state governments when a dispute arises and the imbalance of power given to the HOAs over homeowner-citizens, in order to “make it work”.

### **DISCLAIMER**

The editor has made every effort to be factual and has obtained materials believed to be factual or are the opinions of the writer, and from sources deemed to be reliable.

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# **I. The HOA Saga**

## **a view of life in an HOA**

by Mika Sadai, Tucson, AZ

### **PART I: IN THE BEGINNING**

In the I there was a developer. He was thinking to himself: how can I keep control over my project while I am developing & selling? The new buyers will destroy my beautiful creation! They will have flowers in their front yards! They will have garbage cans! Their children will play basketball! And ride bikes! They will have dogs and cats! They will have flags on their roofs on the Forth!

He really didn't know what to do, so he went to consult with his lawyer.

The lawyer said: why don't you create a homeowners association and force all your buyers to be members and abide by your rules and restrictions? You can also pass on your development and maintenance expenses to your potential I buyers, and keep everybody under your thumb!

But how can I? Asked the developer – there are no homes or homeowners yet, only vacant lots. It will be a fraud!

Don't worry, said the lawyer, we'll make it legal. You are the homeowners. It will be a nonprofit corporation, and you and I will share the profit, while the poor homeowners pay their dues. We'll create CC&Rs that

will be recorded on their deeds. We'll create rules and liens, and if they violate any of your rules, you will be able to foreclose. This will teach them a lesson.

So the lawyer drafted a long, detailed document, and called it CcandRs. The developer, who became now the “declarant”, elected himself, his wife and son to the board of directors, which, in turn, appointed him, his cousin and brother to the Architectural Control Committee, and so on. The CC&Rs stated clearly that all the affairs of the Association shall be determined by the board of directors, which will also have the sole authority to set the rules at its discretion. The board voted to double the members' dues (the declarant was exempt, because he was “class A”), and to forbid nudity in the common area. In addition to the regular assessment dues, violators were fined, which considerably helped to enhance the financial position of the Developer's Association.

We did it! Said the developer, but what will happen after I complete selling all the lots? There is nothing in these CC&Rs for the homeowners, they were designed strictly for my benefit and interest. In fact, as I read them, I think that a more proper name would have been – “Anti-homeowners Association”. But being recorded and running with the land, how will they ever be able to get rid of them?

Who cares? Said the lawyer.



## **Part II How The HOA Scam was sold**

**Amazingly**, It worked. The lawyer and the developer created a highly profitable private nonprofit corporation, which was designed to subjugate its subjects to the interests and whims of the developer (hereinafter – the Declarant). The idea was to force all potential homeowners into a concentration camp and then fine them for violations, non-compliance and disobedience. The Declarant became the absolute governor, with unlimited powers – and it was all done legally! In the United States of America, the land of the free!

But, said the developer to the lawyer, who will come to live under such conditions, and even pay good money and take a mortgage?

Don't you worry, said the lawyer, we'll sell the idea. We just need PR.

But how? Well, they held a press conference and proudly announced that their carefully planned community, with its manicured yards, clean streets and well-behaved kids (who will be out of sight) will preserve market values of the property. Now, who wouldn't want this? They also explained to the City and county officials how beneficial it will be to them: the HOA will take care of itself and will pay for its own needs, thus relieving the city/county from providing services for the community. The beauty

of it (said the Declarant) is that my homeowners will still pay you their taxes, but you won't owe them any service!

So, everybody liked the idea, and the buyers came with their money and exchanged their dignity and liberty for cleanliness and preservation of market value.

There could still have been a happy-ending to this saga (since everybody lived happily ever after), but then –

The busybodies took over! How?

### **PART III: THE BUSYBODIES ARE COMING! THE BUSYBODIES ARE COMING!**

In all fairness, most homeowners did not realize that they had just traded their liberty and dignity in exchange for anticipated preservation of market value, because nowhere in the CC&Rs, which they had agreed to be recorded with their deeds, did it say so specifically. Beside, they were preoccupied with choosing the color for their carpeting and filling the mortgage forms, and the CC&Rs that were handed to them seemed like one of these formal documents that you never get around to read, let alone understand and analyze.

But some did read the CC&Rs (between us, I was one of them). It seemed like a reasonable document, setting up democratic procedures for electing a board of directors of volunteers who will take care of the community needs.

Even the assessment fees were reasonable. Sure, there were some restrictions, such as no-weed or mess (who could be against it?) and a requirement of architectural approval for any addition/alteration – so what? Don't you need a permit for such things anyhow? And, yes, if you fail to pay, the association could place a lien and even foreclose – but who was planning on not paying?

Above all, it seemed sensible and fair. You could even appeal, if you didn't like something. It was democratic. Annual meetings and elections. Homeowners managing their business for their common good. Utopia.

But there were other provisions that escaped the reader between selecting the kitchen vinyl floor and checking the school district for the kids. It said that “the board shall have the exclusive right to determining and managing the affairs of the association” – so what? The board will be elected democratically by the members, right? And if a board member misbehaves – out! You could have petitions and recalls and special meetings and what not, all provided in formal Bylaws. Besides, there were associations like this all over the place, so it must be OK, right? [the fact that the board is the developer, and that he had 3 votes per lot, somehow did not seem significant at that stage. Yet.] It was clear that the CC&Rs or any of its provisions could be amended by 2/3 of the members, so, obviously, the sensible homeowners will move to amend whatever is unacceptable, and there was nothing to worry about. But hidden was the provision

that the board had the exclusive power to create, add, modify amend etc. the Rules of the association, and these Rules “shall have the same force and effect as if they were set forth in and were part of the Declaration”, (which is another name for the CC&Rs). But since nobody paid attention to such unimportant details, everything moved along smoothly, until the big day came.

The Big Day was the day in which the developer lost the majority of the votes (after selling the lots to real homeowners), and the governance of the association was to be transferred to the homeowners. From now on they will make their own decisions and independently determine their destination. It was really exciting, and everybody was in anticipation for the General Membership Meeting and elections.

“Everybody” included the busybodies, who prepared themselves for the big takeover, since they had nothing better to do with their lives. It is a well established known fact that busybodies do not like music, sex or dogs, but they like to pick into their neighbors backyard and tell them how to live their lives. Now, when the Big Day comes, they will be able to do it legally, and this was really inspiring.

*Nov. 2000*

“CIDS currently engage in many activities that would be prohibited if they were viewed by the courts as the equivalent of local governments.”

... *Privatopia*, Evan McKenzie

## II. Consumers For Housing Choice

### **Our mission:**

Consumers For Housing Choice is organized to increase and preserve the ability of consumers throughout the United States to choose homes from within a variety of price ranges that are not situated in developments governed by mandatory membership homeowners associations.

The primary objectives of this corporation shall be:

- To enhance the ability of consumers throughout the United States to choose to purchase housing not situated in mandatory membership residential common interest developments (CIDs);
- To seek reforms of residential real-estate marketing practices to more clearly differentiate CIDs from housing not so situated and which more fully describe the obligations entailed in the purchase of housing in CIDs;
- To encourage grassroots lobbying efforts to urge local governments to adopt land use policies that provide consumers greater choice between CID housing and non-CID housing at all price ranges and to support candidates for local office to support this principle and oppose those who do not;
- To educate consumers, the media and public policymakers about the complexities and obligations entailed in the purchase of CIDs in order to allow

## Housing Choice

consumers to make more informed choices in their homebuying decisions and public policymakers better informed of residential land use decisions through news releases, letters to the editor, opinion articles, speeches, media interviews, symposia and other forms of communication;

- To commission surveys of selected housing markets to quantify the amount for sale housing within the jurisdiction of mandatory membership CIDs versus dwelling units not so situated;
- To do all lawful things in promotion of or incidental to the foregoing activities or purposes.

### **Homeowners Associations are not for Everyone**

In many regions of the United States, consumers are finding it increasingly difficult to locate housing located outside of common interest developments governed by mandatory membership homeowners associations.

An experimental type of housing development popularized by the Federal Housing Administration in the early 1960s, master planned communities, condominium and townhome developments are now so prevalent that in some housing markets, consumers are having a hard time finding homes in traditional subdivisions governed by municipalities. According to a common interest development housing industry group, the Alexandria VA-

## Housing Choice

based Community Associations Institute, there were an estimated 205,000 common interest developments in the United States as of last year, well above the 10,000 that existed in 1970.

Consumers for Housing Choice (CHC) is a new national grassroots non profit consumer organization formed to increase the ability of housing consumers to opt not to purchase this unique form of housing in which homebuyers automatically become members of a volunteer-run corporation called a homeowners association. These “private governments” as they been called by political scientists in many respects resemble city and town councils, replete with elected governing boards, committees and the ability to promulgate and enforce regulations governing use of property and behavior within the community.

“Most consumers do not fully appreciate the restrictions and obligations entailed with a homeowners association membership,” notes Kathy Johnson, CHC’s founder and president. “They are simply seeking housing that’s within their price range in a good location and nice neighborhood. Each consumer should have the ability to choose housing not located in mandatory membership homeowners associations.”

Among the encumbrances are extensive and legally complex “governing documents” such as restrictive covenants, corporate bylaws and rules and regulations.



## Housing Choice

And since homeowner associations are run by small numbers of unit owners who serve on a volunteer basis (versus a municipal government with relatively large numbers of voters and potential elected officials), it is much more critical that each owner participate in governing the affairs of the association and electing governing boards. However, many consumers do not take the initiative or simply don't have the time to diligently fulfill these requirements.

One factor that has driven the rapid growth of common interest development housing is local land use policies that favor common interest developments over traditional residential subdivisions. Accordingly, CHC will support grassroots efforts at the local government level to implement residential development policies that provide for an adequate stock of homes in traditional subdivisions in order to increase consumer choice.

In addition, CHC will push for reforms in residential real estate marketing practices. All too often, housing in master planned communities, condominiums and town homes are sold as a "carefree living" in which amenities are emphasized with little mention of the serious risks and obligations of homeowners association membership. "Homebuilders and real estate agents are doing a disservice to consumers by not telling the whole story in their advertisements and property listings," said Johnson, "homeowners associations are not for every homebuyer,

## Housing Choice

and consumers deserve a clear choice while considering any home purchase”.

Kathy Johnson

Founder, Consumers for Housing Choice

Feb 2001

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“With equivalents to the power to tax, to legislate, to enforce the rules and to provide community services, the Common Interest Homeowners’ Association closely resembles a local government.”

...Common Interest Communities,  
Barton and Silverman

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“But you're right in that a lot of local municipalities are mandating associations ... And so this is a way for the local government to collect the taxes, but at the same time distance themselves from their constituents, because every time you go to them there is this hands off approach, "Oh, by the way, go deal with it with your homeowners association. That's private. We don't want to get involved.”

... Prof. McKenzie on *On The Commons*

# Housing Choice

### III. Civil Liberties and the Statutes

#### A BILL OF RIGHTS for HOMEOWNERS IN RESIDENTIAL COMMUNITY ASSNS

Lois Pratt, Ph.D. and Samuel Pratt, Ph.D.

“A bill of rights is what the people are entitled to against every government on earth, general or particular, and what no just government should refuse.”

. . . Thomas Jefferson, 1787

This is an exploration of the fundamental and the particular rights that accrue to homeowners in residential community associations. This is not a legal document. It is a document based on the traditions of American democracy as they apply to the RCA form of housing.

#### DISCUSSED HERE ARE A HOMEOWNER’S RIGHTS –

- To Property Rights
- To a Proper Governance Structure
- To Proper Administration
- To Participate Fully
- To Accountability

## Civil Liberties

- To Information
- To Rights As a Neighbor
- To Constitutional Rights

### THE SEARCH TO IMPROVE LIVING IN RESIDENTIAL COMMUNITY ASSOCIATIONS

The central problem of community associations is how to create and maintain a home environment that enthralls owners that their housing needs are met in a superior way by living in a CA. Good management of a small corporation is relatively simple compared to the task of creating and sustaining an enthusiastic community of homeowners. A major part of this difficult enterprise is the balancing of individual rights and collective rights. The individual rights arise from the fact that community associations belong to the homeowners and they have a right to private control of their homes. The collective rights arise from the fact that each must respect the others and that joint action is required to ensure this.

Attendance at conferences and working groups has revealed there is a national search for ways to improve the current situation. The search goes on in legislatures, in Congress, in industry organizations like CAI, in community associations, in the press – and now on the Internet. An underlying theme of this search is how to get

the proper balance of individual rights and collective purpose.

These efforts are vital to ensuring that RCA-style living remains an attractive and superior form of housing to a large public. Homeowners organized in associations is a recent housing style. It has wonderful potentials. It needs major revisions to ensure that it is not a short-term style – like so many other experiments in housing.

An important step toward strengthening RCAs is to codify the individual and the collective rights of homeowners. Some of the rights to be discussed are already in law, others are in the process of being put into law, and others are emerging as proposals for discussion. This should not be considered a static listing of rights. There is the constant need to improve, to adapt to basic social changes, to absorb into an association the advanced thinking of professionals, and to respond to legal changes.

### RIGHTS ARE DEEP ROOTED

One of the foundations and finest achievements of our country's form of governance is a system of rights of persons that are enforced dispassionately and equally for all persons. These rights cannot be signed away by individuals or denied to them arbitrarily by those in power. The most basic are those codified in the

Constitution and in law. These broadly accepted rights are extended and formalized within organizations of all types. There is no place in our society where certain fundamental rights do not apply – in a corporation, a prison, a street corner, the White House, or a residential community association.

### HOMEOWNERS MUST DEFEND RIGHTS

Americans believe deeply in these individual rights, in the Constitution and laws that protect their rights, and in the importance of these rights to their welfare. Rights need to be tended to and asserted or they will be violated, eroded, or cease to exist. They must be constantly reaffirmed in ceremonies, in daily practice, and when necessary, in the courts.

In community associations, it falls ultimately to homeowners themselves to define and affirm the rights, protect them, and see that they are enforced. Other groups with interests that may diverge from those of unit owners, such as managing agents and professionals in the housing industry, are actively pursuing their particular interests in the operation of RCAs through their professional associations, through lobbying legislators, and through the courts.

While the topic of “Homeowner Rights and Responsibilities” is frequently presented for discussion –

in books, articles, and conferences on RCA management and operations, in state laws, in association by-laws, and in board minutes – the focus of attention consistently turns to the obligations of homeowners, and scant attention is given to homeowners' rights. To date we have found no document that presents a thorough treatment of homeowner rights – such as has been provided for tenants, workers, hospital patients, disabled persons, consumers, children, investors, and others.

### A PARTNERSHIP WITH HOMEOWNERS

It is opportune now to advance the formal discussion and codification of homeowner rights, and of the place of homeowners in what must be a partnership of four principal groups: homeowners, boards, professionals in the housing industry, and the public interest as expressed in government. Associations nationwide are entering a third stage of development of governance. In the first stage the sponsors were the dominant influence. In the second stage many boards became entrenched power centers and professionals in the RCA industry developed strong partnerships with the boards, replacing the power formerly exercised by sponsors.

A third stage is beginning, in which homeowners are becoming increasingly knowledgeable and are seeking a greater role in the partnership and greater recognition of their rights. Legislatures in the major RCA states have



responded by specifying in law the rights of homeowners, such as their rights to access to information, open meetings, availability of fair dispute resolution procedures, and appropriate enforcement of rules. Current disclosure of corrupt practices by some property management firms, as reported extensively in the New York Times, is stimulating homeowners to pay more attention to the operation of their property and how the operation of their association impacts on their rights, finances, and lifestyle.

The thrust of these developments is to highlight and to mandate that the purpose of the four partners is the welfare and happiness of the homeowners. Each of the four groups in the partnership has a stake in developing and maintaining a successful RCA housing system. Each group has a particular and important function to carry out. Ideally, an improved partnership will be forged among these four groups, with homeowners assuming the role of full-fledged partners.

### **SOURCES FROM WHICH HOMEOWNERS DERIVE THEIR RIGHTS**

Homeowners derive rights from five principal sources. First, the most fundamental rights are derived from the Constitution. The Bill of Rights (the first ten amendments to the United States Constitution) guarantees rights such as freedom of speech, freedom of religion, due process of

law, and freedom from governmental search and seizure. Court decisions have reinforced and extended these rights.

Rights are also stated in many federal and state laws and court decisions. Most particularly, these include the various residential community association laws, which regulate the creation and operation of RCAs, as well as the regulations issued by state agencies to implement and enforce the laws.

The official governing documents of each association – Master Deed, Bylaws, Covenants – enunciate rights and responsibilities for the particular association. In addition, associations generally develop Rules and Regulations governing use of the property. State RCA laws take precedence over an association’s governing documents.

Another source is professional and business associations, such as the Community Associations Institute and the American Institute of Certified Public Accountants, which have developed recommended principles and procedures by which community associations should operate.

Finally, social codes have evolved to protect people from abusive and unfair treatment, and to guide how they should relate to others. These include informal, though well established, standards governing relations between people in a community setting, such as civility, fairness,

decency, honesty, courtesy, and respect for privacy. Particular social codes have developed for community associations, based on the legal and social structure of this form of housing. The residential community association form presumes equality, rights to full participation, easy access to information, democratic governance, and formally approved procedures to assure members' rights will not be violated.

**“A special respect for individual liberty in the home has long been part of our culture and our law.”**

. . . Supreme Court Justice  
John Paul Stevens, 1994

The intent of condominium law in New Jersey is stated in this way: “The association shall exercise its powers and discharge its functions in a manner that protects and furthers the health, safety and general welfare of the residents of the community.” A board of directors is generally established and is given powers to advance this purpose, and while the board may seek to facilitate its work, it may not do so at the expense of compromising this fundamental obligation.

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

**Book review: “Neighborhood Politics: Residential Community Associations, Robert Jay Dilger, NYU Press**

Reviewed by Fred Pilot

There’s an entire chapter devoted to the topic of “RCAs and Civic Value.” Here’s a passage I know you’ll appreciate:

”For example, most of those who advocate the formation of RCAs assume that RCAs follow accepted norms of decision making that incorporate all the rights and privileges embodied in the U.S. Constitution, including the rights of free speech and assembly guaranteed in the First Amendment and the rights of due process and equal protection under the law found in the Fourteenth Amendment. However, RCAs often employ decision making processes that are far more closed and autocratic than those used by local government and mandated for all governments in the United States by the U.S. Constitution.” (p. 136)

I think a major problem with the CID governance model is that while ideologically based on the small town

unitary democracy concept (defined by Dilger as rooted in a high degree of common interest among citizens, a shared desire to reach consensus, importance placed on face to face negotiation and an emphasis on the respect of the rights of other electors), it doesn't employ New England town hall style direct democracy. Rather, CIDs use the republican form of government in which citizens are represented by elected representatives (directors) as used in larger, adversarial (vs. unified) democracies such as state and national government.

Another problem is the breakdown of a culture of democracy in CIDs. In other words, it's not enough to simply have a democratic system of governance; attitudes must be democratic as well. Like faith, democratic values must be constantly reaffirmed.

As you know, Gregory S. Alexander discovered just how easily this delicate culture of democracy can break down (and feed apathy, which further erodes democracy) in HOAs in a study of a few dozen HOAs in the Phoenix area circa 1990. It's detailed in Alexander's chapter "Conditions of 'Voice:' Disappointment and Democracy in Homeowner Associations" in the 1994 anthology "Common Interest Communities."

Apr 2001

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## Court Cases & Incidents Constitutionality of HOA statutes

### A. Cases on HOA's right to fine homeowners

(Cases are based on material taken from *On The Commons* with Shu Bartholomew and Frank Short :

As an example of state legislature's failure to comply with its state constitution, allow me to cite two cases, one in Virginia and one in Rhode Island. Both deal with the unconstitutional surrender of governmental prerogatives to HOAs with respect to the imposition of fines by HOAs.

Unit Owners Assoc v, Gillman 223 VA 752 (1982), whereby the Virginia Supreme Court held that the power to fine is a governmental power. James Foley v. Osborne Court Condominium et al C.A. No. 96-360 Superior Court of Rhode Island Newport (1999) where the R.I. Supreme Court asked the lower court to determine if fining represents an unconstitutional delegation of judicial or police power to the association. **The lower court gave this decision because the statute allowed associations to act as a tribunal exercising judicial power since the association had the right to enforce its orders by depriving a violator of property by foreclosure. Therefore, the statute was**

**unconstitutional delegation of governmental powers.**  
(724 A.2d 436, 1999 R.I. LEXIS 55).

Now for the great quotes. Here's what the Supremes [Supreme Court of Virginia] had to say about this.. **“The imposition of a fine is a governmental power. The sovereign cannot be preempted of this power, and the power cannot be delegated or exercised other than in accordance with the provisions of the Constitution of the United States and of Virginia. Neither can a fine be imposed disguised as an assessment.”**

The Supremes were in top form that day.. Not only did they have a great handle on the Constitution but they also demonstrated that they fully understood the mentality of many HOA BODs when they went on to say, **“The mischief that could be wrought if it were Constitutionally permissible for a condominium association to levy fines on and exact penalties of unit owners”**.

## **B. Courts are Neither Independent nor Impartial**

[Background on suit filed in Tucson, AZ.

The HOA defense used ARS 10-3304 as a defense and the plaintiff's attorney responded with a question of the statute interfering with the provisions of a private contract]

The Plaintiff wrote:

Simply put: The defense (and the judge) are interpreting 10-3304 as barring me from bringing ANY claim against the assn without 10% of the members joining the suit. You know that you can hardly get 10% to show up at an annual meeting, let alone stick their necks and join a lawsuit if they can only avoid it.

My claims are about violations of CC\$Rs, Bylaws (which are incorporated in the CC\$Rs, therefore are part of the contract) and statutes, in holding and exercising illegal elections, which produced an illegal board, which is purporting to be the representative of the association – but I am claiming that it is not! [a board is a body that has been elected according to the procedure prescribed, not any bunch of people who were elected thru a custom-made procedure.]

The defense and the judge are attempting to bar me from bringing these claims. It's not about the actions of the board but rather about it not being the board at all.

**Comments by the Editor:**

In a civil case brought by one of our own, the HOA, defense argued that it could not be sued for the validity of its actions by an individual homeowner, citing ARS 10-3304. ARS 10-3304 requires 10% or 50+ members to join in the action, which applies to any nonprofit



membership corporation. The case deals with specific actions by the HOA and **this one deals with violations of the governing documents.**

I believed that this statute, and several others, violate the Arizona Constitution, Article II, 13, and Article IV, Part 2, 19, which say, in effect, that the legislature cannot pass any special laws for any one class of individuals or organizations.

However, Mika's highly capable and astute attorney took the defense's argument that. Since the CC&Rs constituted a contract between the HOA and the homeowner (upheld by the Arizona Supreme Court), ARS 10-3304 was an interference by the government, the legislature, into a private contract and was, therefore, unconstitutional.

On the other side of the coin, what happens if there is no provision in the CC &Rs? **In other words, if nothing is said about access to records or open meetings or fiduciary responsibilities, only then can state law be applied?? And if there is no provision for fiduciary responsibilities in the CC&RS, and generally there is none, does that mean that the attorney general or county prosecutor can now act on complaints?? I think so!**

The US Constitution, as well as the constitutions of most other states, prohibits any government from interfering

with the provisions of a private contract. The defense attorney, from the insurance company, left not too happy.

**Judge's Ruling (bold font represents the plaintiff's comments)**

Arizona superior Court, Pima County  
Judge: Hon. Lina Rodriguez

InterPro, LLC; Mika Sadai – Plaintiffs  
Casas Adobes Casas Homeowners Association; Haven  
Community Management – Defendants

Date: October 5, 2001

**MINUTE ENTRY**

As a preliminary matter, the court concludes that except for Plaintiff's last breach of contract claim (i.e. that the Defendant illegally issued violation notices and fines to Plaintiffs specifically for presumed violations of its guidelines), each and every one of the other allegations, including the last allegations as to notices and fines applying to homeowners other than Plaintiffs, are claims which clearly challenge the validity of the corporate actions herein pursuant to A.R.S. §10-3304.

The court finds that Defendants' analysis is correct that A.R.S. §10-3304 applies to all non-profit corporations including homeowners associations, thus it would apply to govern actions as against the homeowners' association herein.

The court finds that A.R.S. §10-3304 is procedural only and not substantive, thus it has retroactive application.

**The Judge is dead wrong. If the following Court's interpretation of 10-3304 is correct, then it is a new statute that takes away a substantive right to enforce the provision of a contract, and thus it cannot be applied retroactively.**

Moreover, reading of Plaintiffs' breach of contract claims clearly demonstrate that these are the types of claims which fall squarely within the provisions and legislative intent of A.R.S. §10-3304. Even Plaintiff recognizes that the legislative purpose of A.R.S. §10-3304 appears to be to prevent "rogue" association members from interfering with the day-to-day operation of a non-profit corporation and disabling it by obtaining injunctions against corporate actions on the ground that the corporation has no power to take particular action. Clearly, Plaintiffs in their lengthy list of claims for breach of contract likewise seek to enjoin and disable the corporation's actions herein with regard to its elections of officers, meetings, employment of counsel, filing of claims, manner in which meetings are called, manner in which meetings are conducted, hiring of a

management agency, etc., asserting in every instance that the Defendant corporation homeowners' association had no power to take the particular actions delineated in the itemized claims for breach of contract and seeking injunctive relief.

**That's not so. My claim is mainly for a declaratory judgment, in addition to injunction. She denies me the right for a declaratory judgment because it might lead to an injunction, which she claims the statutes disallows.**

The legislative purpose in requiring at least 10% or more of the voting power in order to challenge the validity of the association's actions is logical and applicable to the Plaintiffs' claims herein. That is, Plaintiff is challenging the validity of a number of actions taken by the association herein, to include its elections of the board formation of an architectural committee, notice and manner of conducting meetings, and seeks to nullify board actions.

**I am challenging first and foremost the LEGALITY of the actions, If the actions are in violation of the Governing Docs and the statutes, shouldn't they be nullified?**

Clearly, if the Plaintiff prevails on any of these claims, it will have a profound effect on the remaining homeowners – most of whom do not wish to have these changes imposed on them.

**The Judge has no knowledge about the wish of "most" of the remaining homeowners.**

Thus, the statute is not onerous. It simply requires that before Plaintiff may make these challenges seeking to reverse the elections that have already taken place

**The special elections were allowed to be held under the condition that the court would then review their propriety, legality and validity**

and seeking to change certain actions by the corporation, that Plaintiff must have at least 10% of the homeowners join with her in filing these breach of contract claims challenging the Association's actions herein. Thus, one avoids the concern pointed out by Plaintiffs themselves, i.e. an action by a rogue disgruntled homeowner seeking to impose his or her will upon the remaining homeowners. It further avoids the great expense imposed upon the Association in defending this types of claims brought by a single disgruntled homeowner.

Further, the legislature provides an opportunity to homeowners to amend their Articles of Incorporation, if they so choose, to reduce or even eliminate the statute's 10% procedural requirement.....

Accordingly, it is ordered denying Plaintiff's Motion to Reconsider this Court's January 29, 2001 ruling.

**We did not file a Motion for Reconsideration. Actually it was a Motion for Clarification. Makes a big difference.**

The Court affirms its ruling granting Defendants' Motion for Summary Judgment with regard to Plaintiffs' claims for breach of contract as itemized and set forth on the attached Statement of Claims for Breach of Contract, except for Plaintiffs' specific and personal claim that the Association issued a violation notice and fine to Plaintiffs which is in violation of its own guidelines which challenges the legality of the Association's actions. To the degree said claims challenge the power of the Association to act in imposing fines against other homeowners or upon Plaintiffs, said claims are dismissed.

**She left me the right to challenge a violation notice and fine, but how can I challenge it if the main challenges are (1) that it was done by an illegitimate board, and (2) that my Association has no authority (=power) to impose fines? This is in addition to the nature of the alleged "violation(s)", that were not in violation of the CC&Rs but of the illegal board's and illegal ACC's interpretation and expansion of the "restrictions". Of course this judge will not allow me to challenge any of these even as a defense, as I am facing foreclosure.**

Thus, as to Plaintiffs' breach of contract allegation that the Defendant issued a violation notice and fine to

Plaintiffs for violation of its guidelines, the Court finds that this is not a challenge to the Association's power. This is not an action challenging the legality of the Association's actions and is specific to the Plaintiffs herein and affects only the Plaintiffs. That is, if Plaintiffs prevail on this claim that the Association illegally fined the Plaintiffs' specific property, it does not directly affect the rights of any of the other homeowners.

**The Judge is re-writing the law. ARS 10-3304 does not distinguish between challenging actions which affect me and only me, or me as a member of the association. She cannot make such interpretation (but she does!).**

Accordingly, the Court denies Defendants' Motion for Partial Summary Judgment as to Plaintiffs' breach of contract claim that the Association illegally issued violation notices and fines to Plaintiffs herein for alleged violations of its guidelines.

**None of our arguments re the unconstitutionality of the statute (denial of my constitutional right to enforce the provisions of my contract and my right to claim a breach of contract) or, alternatively, declaring the contract illusory and void, is addressed in this ruling. As if she didn't want to deal with it and chose to ignore these issues.**

**Yes, it will be appealed, and if necessary will go to the state Supreme Court and Federal Supreme Court**

**(against the state of AZ for enacting a law that violates U.S. constitution).**

**[Editor's comments on Ruling]**

Second paragraph – Judge affirms ARS 10-3304 applies to homeowners associations. Says nothing about illusory contracts and their unenforceability since only one party in a contract can sue –the HOA. Grounds for an appeal???

Third paragraph – The fall of the judge in total. “ARS 10-3304 is procedural only and not substantive”. In short, she is saying, big deal! She assumes that all other homeowners don't mind, so we go with the majority. The good of the state (HOA) predominates – majority rules even if it tramples on the rights of the minority. She supports laws that favor one group or person over another. Grounds for an appeal??

Fourth & fifth paragraphs – **Here she's clearly backing her impression of what is good for society – HOAs are good; homeowner civil rights and the enforcement of HOA contract provisions in favor of the homeowner is bad, very bad, and against the public good (It's good to uphold statutes in favor of the HOA). The**



judge lost her impartiality and has made the court no longer an independent check on the tyranny of the legislature. That's how I read her remarks.

It's a sad commentary of justice. I should have sent her my quotes from Madison on the purpose of independent courts in a democracy.

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### C. Example of the lack of support from state governments

[A Florida case in which a homeowner sought to obtain HOA minutes as permitted by Florida law]

By Jan Bergemann, President CCFJ, INC.

In a Court of Law – Small Claims – the case would have been opened and closed in five minutes. Penalty: \$ 500.00 in favor of petitioner – as written in the [FLORIDA STATUTES](#) – together with a reward for reasonable fees! In my opinion, instead of going by the book, the arbitrator tried to find all kind of excuses for this obvious non-compliance and even tried to defend it. If you read the Statutes back and forward, the facts are clear. The minutes of board meetings have to be kept in writing for seven years. A copy of the minutes has to be handed to the unit-owner 5 working days after demand in writing. Non-compliance carries a penalty of \$ 50 a day, maximum \$500.00. There is absolutely no paragraph in

the Statutes stating that a written copy of minutes can be substituted by listening to a tape.

Not only has the unit-owner been denied his rights as stated in the Florida Statutes, he is now going to be asked to pay the above amount for denying him rights granted to him by the Florida Legislature.

It is my understanding that the Florida Legislature passed these Statutes to protect owners against abusive boards. Records, as cited in the Statutes, are supposed to be open and should be easily accessible by the unit-owners, so association business can be looked into.

Owners do have the right to see where their money is going!

If this ruling by the DBPR arbitrator stands, any condo- and homeowners-association will use this excuse in the future:

**Sorry, the records are not available in the moment, seem to be lost !**

The refusal of DBPR to respond to letters regarding this issue, make it very clear to me that serving the citizen is not on their PRIORITY LIST !

Recently our National Leaders and Legislators have complained – see Election Disaster – that courts and judges are making their own laws and are ruling not

according to the existing law! Here we have a case where a DBPR arbitrator is doing exactly the same. The ruling is definitely not according to the Statutes. But in this case the DBPR is a government department under the direct regulation of our Legislators.

So, what does it take for our legislators to take the necessary steps to protect the citizens from abuse by their own departments? WE are not dealing with an independent Court in this case!

It is the obligation of our Governor and ALL Legislators to step in and see that their own rules are obeyed by their own departments. If they are unwilling to see to the enforcement of their own rules huge damage will be done towards the protection of the citizens.

### **It is about time for our Legislators to protect their Constituents!**

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#### D. The Power of an HOA: Foreclose a \$150,000 home for \$5,000

Excerpts from: “After widow’s loss, Senate approves foreclosure limits”, By ERIC BERGER, Houston Chronicle, May 10, 2001

The bill, filed a week ago by Sen. Jon Lindsay, R-Houston, would allow homeowners to recover the equity in their home if it was auctioned for less than its market

value, as was the case with 82-year-old Wenonah Blevins.

Blevins was evicted last month for not paying dues of \$814.50. Her case prompted legislators to reconsider restricting homeowners associations' powers, an issue that has died in past sessions. The associations, which have a powerful lobby, enjoy considerable sway in cities that, like Houston, lack zoning regulations.

"It's just not right for someone to be able to have substantial equity in their home to then lose it over a small amount of debt," Lindsay said.

Under the proposed law, which would be retroactive to Jan. 1, Blevins would receive nearly \$145,000 from the Champions Community Improvement Association because she had paid off the \$150,000 home, and it was auctioned for \$5,000. Advocates for homeowners associations said the bill was a knee-jerk reaction to Blevins' plight.

"I'm pretty shocked," said Margey Meyer, president of Prime Site Inc., a Houston community association management firm. "What happened to Ms. Blevins is so emotional that the Legislature is forgetting what would happen if homeowners associations would not be able to foreclose." Meyer and others said that, without the ability to foreclose, homeowners associations will go bankrupt because they would not have an effective tool to collect assessments.

Lindsay does not believe his bill strips the associations of their ability to foreclose. He had filed three bills, two of which barred foreclosure altogether but were later dropped. The bill passed by the Senate on Wednesday would establish a minimum value, usually the appraised value minus liens and back taxes, for which an association could auction a property.

If a property were auctioned for less than the minimum value, the original owner could sue the homeowners' association for the difference, as well as legal fees. If a property were sold above the minimum value, any profit left over after payment of the sale expenses and late assessments would have to be paid to the original owner.

[Commentary]

The foreclosure came about as a result of Ms. Blevins paying just \$800.00 of the \$814.50 owed. The HOA did not cash the check nor did it return the check or advise Ms. Blevins of the error. They simply filed the foreclosure because they had to power to do so.

Ms. Blevins lost her home!

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E. Fair Debt Collections Procedures Act

[Prepared by **Wendy Laubach**"]

The following cases may be of use to homeowners seeking to defend themselves from unfair practices used in connection with the collection of HOA dues. This is a preliminary summary of cases provided to me by a third party. I have not attempted to conduct independent research to determine what other cases have been decided on this subject, nor have I yet checked to see whether any of these cases has been reversed, questioned, or modified. Please consider this a beginning point of research.

Thies v. Wyman, 969 F. Supp. 604 (S.D. Calf. 1997): The HOA was obligated by covenant to improve and maintain common areas within the development. When it failed to do so, the homeowners withheld dues for two months. In August 1996, they resumed payment. In September 1996, they also paid the dues previously withheld, together with a late fee (\$176). The HOA's law firm notified them by letter that they owed \$186 plus legal fees of \$30, and threatened to record a lien against their home. In October 1996, the homeowners paid that month's dues plus a late charge. That same month, the HOA's law firm returned the September 1996 check for \$176 on the ground that it was not payment in full. For the next five months, the homeowners continued to send checks for the amount due, less attorneys' fees, and the HOA law firm continued to return them. The HOA then obtained a default judgment against the homeowners in state court for \$1,314.88.

In response, the homeowners sued the HOA in federal court under the Fair Debt Collection Practices Act, 15 U.S.C. section 1691 et seq. ("FDCPA"), seeking damages and attorneys' fees. The HOA sought to dismiss on the ground that HOA dues are not "consumer debt" arising out of a "transaction" under the FDCPA. Held: in the Ninth Circuit, FDCPA "debt" is not limited to credit extensions. (The court acknowledged possibly contrary authority in *Zimmerman v. H.B.O. Affiliate Group*, 834 F.2d 1153 (3d Cir. 1987) (tort liability to pay for pirated cable signal is not consumer debt).) Also held: because the services provided by the HOA in exchange for dues are primarily for personal, family, or household purposes, the HOA dues constitute "consumer debt."

*Newman v. Boehm, Pearlstein & Bright, Ltd.*, 119 F.3d 477 (7th Cir. 1997) (past-due condominium fees are a debt under the FDCPA because assessments used to improve or maintain commonly-owned areas qualify as personal, family, or household uses and confer a direct benefit on residents). Community Associations Institute ("CAI") filed an unsuccessful amicus curiae brief via counsel from Chicago, Denver, and Braintree, Massachusetts, arguing that the FDCPA should not be applied to HOA's.

In 1996, homeowner and condominium owners filed two separate FDPCA actions in the Northern District of Illinois against two law firms representing two HOA's.

The suit complained of technical violations in connection with the collection of HOA assessments in the amount of between \$400 and \$500 each, including the following: (1) the HOA's failed to include in their collection letters the "validation notice" required by section 1692g of the FDCPA, (2) the letters did not expressly disclose that the law firms were attempting to collect a debt and that any information obtained would be used for that purpose, as required by section 1692e(11), and (3) one of the law firms falsely implied that legal proceedings on the alleged debt had already been initiated.

Davis Lake Community Association, Inc. v. Feldmann, 530 S.E.2d 865 (N.C. Ct. App. 2000): Homeowners fell behind in four consecutive quarterly assessments in the amount of approximately \$200. When they attempted to tender a check for the full amount, it was returned on the ground that it did not include payment for legal fees. The HOA then filed suit in state court to collection the \$200 plus almost \$2,400 in legal fees. The homeowners countersued under the FDCPA and a similar North Carolina statute, and sought to join the HOA's counsel as additional parties. The court ruled that attorneys engaged in debt collection on behalf of their clients are exempt from the state statute. Creditors engaged in collecting their own debts are exempt from the federal statute.

However, the state statute applies to creditors engaged in collecting their own debts. The homeowners therefore were allowed to proceed with their claims that the HOA



deceived them by intentionally misrepresenting the amount of money needed to satisfy their outstanding obligation, since under North Carolina law attorneys' fees are limited to 15% of the outstanding debt.

The court held that HOA dues are "consumer debt" for the purpose of the statute, and that representing that the homeowners owed more than 15% of the debt in legal fees was a deceptive act. The court also held that one of the HOA's regular, daily activities was collecting dues and assessments, and the unfair acts were directly connected with these dues-collecting activities; consequently, the debt-collection practices were business activities in or affecting commerce, as required by the statute.

Caron v. Maxwell, 48 F. Supp. 2d 932 (D. Ariz. 1999): A homeowner sued under the FDCPA, alleging that the HOA's lawyer was a debt collector who (1) falsely represented that he would be entitled to collect legal fees under the terms of a judgment obtained by the HOA, (2) threatened to take action that cannot legally be taken, and (3) sent a letter stating that if the homeowner did not respond with ten days, the HOA would exhaust all of its legal remedies against her, including a Sheriff's execution sale of her personal or real property.

The homeowner also sought to hold the HOA vicariously liable for the lawyer's actions, and included state-law causes of action for intentional infliction of emotional

distress. The HOA argued that HOA dues were not "debt" under the FDCPA, because the dues are more like tax obligations that collectively benefit the whole community. Following the reasoning of Newman, Ladick, and Thies, the court rejected this argument.

The court also followed Thies in holding that no extension of credit is required. The court rejected the HOA's argument that no "transaction" occurred because the homeowner acquired the home as a gift from her parents. The court also noted that the client of an attorney working as a debt collector is liable for his lawyer's violations only if both the attorney and the client are debt collectors. The court held open the possibility that the HOA could be sued under FDCPA if it were found to be a debt collector or to have acted in concert with the lawyer.

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"All the Constitutional protections you are accustomed to in America no longer exist in an HOA."

... Shu Bartholomew

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## Denial of Homeowner Civil Rights Used to Obtain HOA Compliance

The denial of homeowner civil rights is the prevalent and effective method used to sustain and nourish the patently un-American common ownership properties – homeowners associations, common interest developments -- that have grown so rapidly across this country. It is estimated that are some 50 million Americans living in 205,000 HOAs/CIDs. This form of property or home ownership is supported by mortgage lenders and city and town governments at the expense of the rights and civil liberties of homeowners under a legal interpretation that the CC&Rs constitute a private, adhesion contract between the buyer and the HOA/CID. This prohibits, as homeowners have been told, state interference into the private affairs of an HOA/CID and allows for the denial of the homeowner's civil liberties.

This outrageous state of affairs, here within the United States of America, bastion of democracy and people's rights, has come about, in part, by providing partial information and the omission of important facts about HOA/CID to homebuyers, that negatively reflects life in an HOA/CID. Such as, the fact that there are very limited state laws to protect homeowners, the non-enforcement of state laws and the non-existence of

penalties against HOAs/CIDs when its directors violate state law or the HOA/CID governing documents.

The facts and evidence are out there, available for all to see, and have been for as early as 1982. There are numerous academic research studies, publications and papers concerning the private government aspect of HOAs/CIDs, questions of US constitutionality of certain powers allowed by these entities, court cases in several states, and these facts are even found in the Community Association Institute's (CAI) own Research Foundation studies and reports. Some of these studies show many community relations problems resulting from boards of directors overstepping their responsibilities and the fact that homeowners were not aware of what they agreed to allow HOA/CID boards to do.

Adding to further insult, the courts have held buyers to a binding adhesion contract – one that one party, the buyer, simply accepts and cannot negotiate – that, unknowing to the buyer, gives away his civil rights. Yet, supporters of

HOAs/CIDs point to the democratic nature of these entities, simply because there is a voting mechanism to elect directors. Well, Cuba and China have elected representatives, but I can't imagine anyone calling them democratic. How can there be a democracy, as practiced here in this country for over 225 years, when the citizen-homeowner is bound to a contract he didn't have a hand in drafting, was not told the full details that he was, in fact, entering into a contractual arrangement whereby he agreed to surrender his guaranteed civil liberties?

Supporters of these undemocratic nonprofit corporations have argued that,

- 1) It's the buyer's fault for not reading some 100+ pages of legal documents,
- 2) Homeowners can always move if they don't like the restrictions, arrogantly saying, "HOA/CID living is not for everyone",
- 3) The homeowner can vote to remove the board and change policy, and
- 4) HOAs/CID maintain property values.

In answer,

- 1) A) Are these supporters adopting a "buyer beware" attitude when speaking about the advantages and niceties of living in an HOA/CID? B) Or is this deliberate misrepresentation, because these required documents do not warn buyers about the severely limited recourse available to them in event of problems with the HOA/CID?

- 2) A) More and more communities are mandating only common ownership properties for new homes. B) Why should a homeowner move when he did no wrong? And,
- 3) A) How can anyone base an activity or obligation on another fully knowing that it's not a commonly accepted behavior of society? Like, active participation in your government or in managing your HOA/CID? All the while knowing of the high approval requirements to change anything. For example, normal political voting is based on the percent of those voting, not a percent of all eligible voters as is commonly contained in the governing documents? There is no independent vote counting or "agency" to insure the integrity of the voting process – the "board machine" controls everything. B) Here again they go mixing governmental functioning with private contractual obligations. Why must third parties be included to renegotiate a contract between the HOA/CID and the homeowner? Because that's what was agreed to? Because that's what the Bylaws say? You know, it's the same private contractual "fact" used to keep the government from intervening, now being applied om the HOAs favor. It's the same contractual obligations hidden from the buyer until he tries to find recourse for his difficulties and is then thrown out against the buyer.

- 4) A) The true factors affecting real estate property values have to do with market factors, and the economy, of which location is most important. B) There need not be an HOA/CID to enforce CC&R restrictions regarding property values, because, by law, each homeowner can sue to enforce these restrictions. C) There are many well kept communities without an HOA/CID and the unnecessary intrusion of “outsiders” into one’s home.

In a democracy there is no written, legally bound contract between the government and the citizen that makes third parties, other members of the HOA/CID, a part of this adhesion contract. This is a pervasion of democratic principles and is very important when you realize that the supporters are making use of democratic principles when it suits their objectives while denying democratic principles when it does not suit their interests. They refer to “private contract” to allow HOAs/CIDs to deny civil liberties and prevent government regulation and oversight, and refer to democratic government when speaking of a homeowner’s voice in the operation of the HOA/CID. The entire concept and legal structure of common ownership properties is a mess of corporate law and political governance concepts, all slanted in favor of the HOA/CID and against the rights of citizens. In a democracy there is the Bill of Rights, there is a separation of powers between executive, legislative and

judicial branches. None of which exists in a HOA/CID to protect homeowners.

How is this all maintained? Much to the pleasure of the special interest parties, the mortgage lenders, the HOA management firms, the HOA attorneys, the cities and counties, and the legislators, only a small number speak up, justifying the argument that there is only a small disgruntled group of malcontents seeking to make things bad for the rest of the HOAs/CIDs.

Why are there not more people coming forward to complain? There are several reasons.

- 1) Some people accept the rules and regulations as a “given” and are more concerned about stability, order and property values. But then,
- 2) Some people, at some later time after buying into an HOA-controlled property, take offense or object to some of the procedures, decisions or activities of the board of directors. When they complain or object they find out that there is very little that can be done legally, without the expenditure of a large amount of money in legal fees just to get the board to follow the governing documents. They accept the reality of these conditions.
- 3) Some of the people in (2) above become outspoken and try to point out these problems to other HOA/CID members and find out that they become scorned by neighbors and are the object of



arbitrary fines and penalties with hefty attorney's fees attached. A technique that is designed to intimidate the outspoken and justifiable homeowner, into compliance.

In the case of (2) and (3) above, there is always the real threat of foreclosure on their house for failure to pay these fines and penalties, with interest attached, resulting simply because they objected to the HOA's actions. Some people will argue that this power of the HOA/CID to foreclose because of fines, and sell a homeowner's property that will benefit a third party, is an unreasonable seizure of property and a violation of the 4<sup>th</sup> Amendment. Others feel it is an unconstitutional delegation of government powers to a private organization, as courts in two states have ruled.

If one considers all the factors presented above with the power of the HOA/CID to foreclose, even by means of a non-judicial process in some states, **then it is an inescapable conclusion that these factors represent a "legalized extortion" of homeowners not to speak up, to obey the HOA/CID board of directors and to pay their assessments without complaint.** In short, pay up or else! Not to do so brings the real threat of fines and foreclosure. While supporters may argue that this does not happen in the majority of common ownership properties, the threat is always there, just waiting for an incident or a new board to make use of it against some

outspoken member, or for personal reasons. The threat is always there and amounts to legalized extortion. And while they can get away with it, it is unjust, unfair and makes homeowners second-class citizens! Minorities, women, the handicapped and gays have more rights than these 50 million Americans!

If one considers all the factors presented above, the inescapable conclusion is that the HOA/CID concept or product is defective and that marketplace forces have been tampered with in order to force the acceptance of HOAs/CIDs. If homebuyers knew the full truth, would they so readily accept this form of home ownership? If the facts were readily publicly available to buyers, would there still be governmental support for these undemocratic organizations? The inescapable conclusion is that this concept is so flawed and so many have worked to distort it and hide its serious defects, that the only effective means of correcting the problem is to abolish them, turning all common areas over to governmental agencies, as has been done in the past, and turning over recreational facilities to a separate organization that has no authority over the buyer's property. Sunset the HOA/CID laws. And, the government can encourage existing HOA/CID homeowners to throw out the CC&Rs and turn the ownership of the common areas and facilities as said in the preceding sentence. And it must be done now!

George K. Staropoli

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The Tyranny of the Majority

Reading Ch 15, *Unlimited Power of the Majority in the United States, and its Consequences*, of "**Democracy in America**" (circa 1835), towards the end:

**"Governments usually perish from ... tyranny ... If ever the free institutions of America are destroyed, that event may be attributed to the omnipotence of the majority, which may ... urge the minorities to desperation ..."**

[James Madison in Federalist #51 is quoted]

**"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".**

[And Thomas Jefferson is quoted]

**"The tyranny of the legislature is really the danger most to be feared ..."**

Continuing to look into the "tyranny of the majority issue", I found the "*Origins of the Bill of Rights*", Prof. L.W. Levy, 1999. Excerpts –

**[quoting Madison]**

"All power ... is subject to abuse and should be guarded against by constitutionally securing the 'great rights of mankind' ... To limit the powers of government, thus preventing legislative as well as executive abuse, and ... preventing abuses of power by 'the body of the people', operating by the majority against the minority".

**"It [the Bill of Rights] serves to secure the minority against the usurpation of the tyranny of the majority"**

"Jefferson believed that an independent court could **withstand oppressive majority impulses by holding unconstitutional any acts violating the bill of rights.**"

**[quoting Madison]**

"Independent tribunals of justice will consider themselves in a particular manner the guardians of those rights; they will be an impenetrable bulwark against every assumption of power in the legislative or executive".

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“But it's **"the manufacture of consent"**. So, since the problem now the industry and others are realizing is that a lot of people are not consenting to be governed this way. So now the new idea is well we'll manufacture that

consent, we will educate them. And I assume the next step is that as benevolent way of enforcing the rules, if you violate the rules maybe they'll just send you off to a re-education center. Is that too far fetched? You know what you need here is you pay your fine and then we'll send you off and have you re-educated. Part of your fine is 3 education sessions.”

... Prof. McKenzie on *On The Commons*

## IV. State Government Response to Homeowners

### Arizona

#### Statement to the first hearing of the Homeowners Association Study Committee Of the Arizona State Legislature, Aug 14, 2000

My name is George Staropoli. I'm a homeowner speaking for myself, although I maintain an internet email service called "HOA Network". I am not here to gripe.

There is no vehicle, no avenue, no means of effective redress of grievances when it comes to a homeowner making legitimate claims that an HOA board has failed to conduct themselves as required by state law:

- **To act in good faith,**
- **As a prudent person would in a similar situation.**
- **The board has a fiduciary duty to its members.**

The homeowner needs an effective mechanism for the redress of grievances. It is for this reason that this committee exists. If there were no homeowner complaints we wouldn't be here today. The association managers didn't complain; the association directors didn't complain; the lawyers didn't complain.

## State Government Support

As I look over the non-legislator members I see the non-complainers, the groups representing the status quo are present. They are representatives of their industry. I have no personal comments to make against any member of the committee.

Yet, I see an attorney who has been president of an association trade group chapter, Community Associations Institute, Inc, and is currently the Chair of their Legislative Action Committee for the Central Arizona Chapter.

CAI started as an educational non-profit firm in 1973, Today, it claims 16,500 members and states that there are some 205,000 homeowner associations in the country. That means, after some 27 years, CAI has only about 8%, at most, of the associations as members. It further states that some 17.8% of member dues are used for lobbying purposes in representing this 8% of homeowner associations. Its own brochures state that they speak for the industry. Maybe so, but they do not speak for the homeowners.

I also see a representative of a homeowners association on the committee. There is no minimum requisite knowledge required for association board members to govern the citizens of the State of Arizona. There are no licensing requirements for either board members or management personnel / firms to protect the citizens of Arizona.

And then there is the developer. The structure of the homeowners association is designed to protect the property values **for the developer** while the project proceeds to completion. When the developer leaves, and turns the association over to homeowner members to serve on the board, the structure remains the same. **It does not convert to an American form of government** with its inherent civil liberties and other protections provided under the laws of the land.

I posed the following question to the association directors and management firm subscribers on my internet network:

**Do you feel that giving back civil liberties to the citizens of Arizona who live in your association would harm the association's property values?**

There was no response from the 8 or so subscribers identified as management or association director subscribers. Why? Because there is no valid YES answer. America grew in just 225 years from a rag-tag collection of colonies to the greatest and richest nation in history with the Bill of Rights in place. There is no YES answer.



So the makeup of this committee reflects the reality of the homeowners associations. The moneyed, powerful organizations, including their attorneys, are here to be judges of them selves. The two homeowner representatives, representing the reasons for this committee's existence, must once again do battle with the same elements as found in dealing with homeowners associations. And with the same expectations of results.

**Let me make a few points about the role attorneys for homeowner associations.** They are very influential, because they do not have to worry about the State Bar's enforcement of Ethics Rule 1.13, dealing with "Organization as Client", which is not addressed by your committee's mission.

Lawyers, we are told, represent the association and not any one party. Yet, if a member complains to the attorney about violations of the governing documents by the board, you will most likely meet with, "I don't represent you since you are in conflict with the association". Under the rule, however, the attorney is required to advise the board accordingly that its acts are illegal and if the acts don't cease the attorney is to resign. The attorney has no fear of complying with or being sanctioned by the rule and in realty, then, the attorney represents the board.

There is no appeal of the State Bar's lack of enforcement of this rule to the Chief Justice. I am told by the Chief

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Justice's office that the Chief Justice does not get involved and that I can sue the State Bar if I wish. Once again a citizen's only real alternative is begin an expensive legal suit at his expense, while the wrongfully acting board can use homeowner dues to oppose the homeowner.

It is unconscionable that the board is allowed to use homeowner's funds while opposing the homeowner, and that the homeowner must dig into his own pocket for expensive legal fees in order to seek justice. **Something is seriously wrong here!**

**I believe that this committee will come to the appropriate decisions necessary to alleviate the plight of homeowners living in homeowner associations.**

Thank you for listening.

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A commentary on success of the HOA Interim Study  
Committee

January 2, 2001

State Senate  
1700 West Washington  
Phoenix, AZ 85007

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Dear Senator:

Let me first wish you a very successful year for the upcoming legislative session.

I am a 16-year resident of Arizona living in a small homeowners association in Scottsdale. You are undoubtedly aware of the recent media attention to problems in these associations as well as the results of the HOA Study Committee just ending this past December. I have been an active participant for homeowner rights and HOA reforms, producing several articles for the web site, presenting papers to and speaking before the HOA Study Committee, and being quoted in several nationwide publications. I maintain internet email sites, <http://starman.com/HOA> and <http://pvtgov.org>, and an email list service, HOA Network, with an nationwide membership. I've started a membership, non-profit organization, Citizens Against Private Government HOAs, working to bring important and full information about living in an association to the attention of the public, the media and Arizona legislators.

Let me say that the Study committee did not do the job it intended to do – it failed to protect homeowner's rights and did not examine at all the practices of the special interest groups, the management firms, that had representatives sitting on the committee. It is my strong conviction, as well as that of others who have been

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seeking homeowner rights nationwide, that these special interest groups with the inclusion of the associations and attorneys working in this area that have deliberately mislead the legislature, the media, the public and the buyer of an HOA-controlled property. The question comes to: Can the homeowners association maintain property values, as it is charged by virtue of the CC&Rs attached to the development, and not deny its homeowner members the basic civil liberties and rights that are guaranteed to all citizens of this state and this country?

Senator Smith, at the committee hearings and in the press said, “I don’t want to hear any more horror stories” from citizens speaking before the HOA Study Committee. The committee has received thousands of letters and emails as Senator Freestone stated at the first hearing. No, we are not a few “malcontented and disgruntled homeowners” as stated publicly by the leading trade group, CAI, in the media, in the Arizona School of Real Estate’s monthly publication and in their own monthly publication.

I have asked at the committee hearings, on the national CAI email list, and in my articles,

“Do you feel that giving back civil liberties to the citizens of Arizona who live in your association would harm the association’s property values?”

I have stated before the committee that I have not heard CAI say,

“We agree that homeowners have been denied their civil rights and we will work with you for their restoration ... We will join you in helping stamp out those boards that violate state laws and the governing documents ...”

Yet, you, the legislators and the public, are still being told by the special interest groups that there is always a discontent minority and we should not upset things for the 95% of the associations doing things right. Well, it's this arbitrary and unverified 5% that need the protection of the laws of the land to stop abuses, oppression, intimidation, loss of home and possible financial ruin as a result of HOA boards of directors failing to follow state law and their obligations under the associations governing documents. Why? Because the enforcement of the CC&Rs falls into the hands of a non-profit corporation called, essentially, the homeowners association. **The HOA is a private corporation and not a civil government and thereby allows the boards of directors to disregard the rights of its homeowners and prevents the state from taking actions against the unlawful acts of these boards.**

Yet, you, the legislators and the public, are still being told by the special interest groups that the homeowner signed an agreement which is a private contract and outside the protection of the civil liberties we all have come to expect and are guaranteed by the Bill of Rights. **No mention is made, by the special interest groups, of the fact that the average homeowner does not understand that he surrendered his civil liberties when he bought his home.** No mention is made that the average homeowner cannot fully comprehend the 8 page home purchase contract, nor the 100+ pages of the governing documents he is supposed to receive, nor that he was not given a 5 or 10-day “escape” provision to cancel his contract if he was not satisfied with the documents he read.

There are those who argue that this is wrong, that this is un-American and violates the American system of government and principals and values of justice for all and fair play. Studies regarding these problems with HOAs have been conducted by several university researchers: Evan McKenzie, Stephen E. Barton and Carol J. Silverman, to name a few. There was even a study conducted in 1992 in Arizona regarding the problems with homeowners associations. There are those who argue that it is now time for the legislators to seek out the truth, the full story, regarding the private government aspect of homeowners associations and take steps to remedy this unjust and unequal application of the laws against homeowners living in associations.

I am seeking effective legislative reform to bring justice to homeowners and hold the HOA boards of directors accountable as we currently hold our civil government accountable. Yet, you, the legislators and the public, are still being told by the special interest groups that

- if you hold HOAs accountable,
- if you seek to have only knowledgeable and informed persons, through training requirements, be able to hold a position of authority in an HOA,
- if you require the licensing HOA management firms as property managers are required to be licensed

**all of this will cause homeowners not to volunteer to serve on the HOA boards and will thereby result in the failure of the association.** The implication here is that property values will erode because an association is the only method to ensure property values. This is the same false conclusion that the courts have ruled on: to allow an association not to enforce the payment of assessments through foreclosures on homes would cause serious harm to the association.

Do not fall for these arguments seeking to generate false fears. **What we have here is the special treatment of a person, the HOA, by the government so it can't fail.**

**What we have here is the special treatment of a person, the HOA, permitting it to govern citizens while denying them the rights guaranteed to all citizens under the Bill of Rights – due process and the equal protection under the law.**

What do we have here?

- The Arizona legislature passing laws in violation of the Arizona Constitution that forbids enacting laws favoring any one individual or person.
- The creation of an un-American system of government, the private HOA-controlled property government, where the foremost purpose of the government is not the protection of the freedom and liberties of its citizens, but the subversion of these basic American principles to the “state” goal of maintaining property values.

I have therefore, not being at all satisfied with the performance of the HOA Study Committee, prepared my own proposals for HOA reform and the restoration of homeowner rights. I am not seeking anything that is not the right of any citizen. I am not seeking to destroy homeowners associations, but to seek justice for homeowners. I have taken pains to make as little changes as possible to existing statutes, relying on existing laws and their modification for application to the problems



with homeowners associations. Included with this letter is my draft proposal for a legislative bill to be introduced at this legislative session.

I urge all legislators to sponsor and support these proposed legislative reforms.

George K. Staropoli

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### HOAS are Big Business

It has been just about a year since ex-Senator Tom Freestone was able to get the legislature to create the HOA Interim Study Committee that met from August to December of 2000. The mission of the committee included *“To (1) review the effectiveness of current homeowner association laws in ensuring the rights of homeowners are protected; (3) examine the role of management companies hired by homeowner associations.”*

I feel the committee had failed to effectively to meet items (1) and (3) relating to protecting the rights of homeowners and investigating the practices of management companies, respectively. As for item (3), the committee never called any of the management

companies to answer for the charges made against them by the homeowners and therefore, could not come to any unbiased conclusion.

Pat Haruff, HOA committee member and homeowner representative, writes, “The most frustrating part of the legislative process is that ‘Joe Citizen’ is really NOT a ‘part’ of the process ... In the final analysis the ONLY persons who have ready access and plenty of contact with YOUR representative are the Lobbyists for the many Special Interests.”

To place these issues in proper context let me say that the intrinsic legal structure of the HOA is defective and that the problems with HOAs are not the grumbling of a “disgruntled minority”. It’s a nationwide problem and Arizona had an opportunity to do the right thing and failed. Shu Bartholomew, host and producer of *On The Commons*, uses the slogan “*You are now leaving the American Zone*” to call attention to the private government nature of these nonprofit corporations, with their denials of the civil liberties that Americans are entitled to. There have been Supreme Court cases in other states that decided that certain acts by HOAs are “an unconstitutional delegation of government powers”. Yet, homeowners are still being held to a so-called private contract arrangement between HOA and the homeowner that is arguably voidable for 2 reasons: it denies homeowners their civil liberties and there has not been a true “meeting of the minds” with a full disclosure of what living in an HOA really means.

What the legislators and the public are **not** being told by the special interest management firms, lead by the leading trade group, CAI, that, as Ms Bartholomew states, *“Property values and the quality of their lives are subject to the whims of their neighbors and the honesty or lack thereof of management”*. As Rick Happ from North Carolina Property Rights says, *“Even a well directed HOA is "one election away" from tyranny ... The HOA problem is a national problem that needs to be addressed on a Federal level.”*

“Why”, I ask, “have the Arizona legislators failed to see these basic violations of the American way of government and fair-play?” **Because HOAs are big business!** CAI, the special interest lobbying trade group, vigorously attacked homeowners seeking to call attention to these problems in the HOA committee, in the legislature and in the media. And the legislators sat silent and wouldn’t even remove this impediment to the redress of grievances from the HOA committee. Cities and towns get infrastructure paid for by developers rather than having to raise taxes to pay for expansion, creating these private governments that denial civil liberties. This is the extent that special interests have spread their myths about HOAs, permitting government officials at all levels to look the other way. **HOAs are big business!**

George K. Staropoli

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## California

[excerpts from a presentation to the California Legislative Reform Committee, Feb 2, 2001.

The California Law Revision Commission was created in 1953 as the permanent successor to the Code Commission and given responsibility for the continuing substantive review of California statutory and decisional law. The Commission studies the law in order to discover defects and anachronisms and recommends legislation to make needed reforms]

Distinguished members of the CLRC:

Thank you for allowing me, an investor, to have input into proposed changes to common interest development (CID) law. I am a shareholder, of sorts. But the "share" I own, is my home — and the CID, being contemplated, is my neighborhood.

III. Horror Stories/ Abusive HOAs (a symptom)/ Neighborhood Cleansing/ Dissidence Suppression (Gulag)

Horror stories are closely associated with HOAs. When incorporated, these "fictitious" or "legal persons" are abusive to the real ones in HOAs. Yet the attorney general claims he doesn't have the money to enforce the corporations code? How much money do y'all think the average homeowner has to enforce the law in the courts?

"Board confrontation usually ends in a power struggle..."

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[http://realitytimes.com/rtnews/rtcpages/20001018\\_hoasilverlining.htm](http://realitytimes.com/rtnews/rtcpages/20001018_hoasilverlining.htm)

"Homeowners wish to just end the confrontation, whatever it may be, and just live in peace."

<http://propertyrightstexas.com/HTMLArticles/toliveinpeace.htm>

"'Hobby Board members' that have their own agendas, can cause the biggest problems for the majority of communities."

<http://groups.yahoo.com/group/CAISLA/message/150>

Why?

In many board confrontation cases, neighborhood cleansing

<http://propertyrightstexas.com/News/news3.htm> is the result. In common interest developments, you find homeowners — whose board confrontation led to a power struggle — selling their homes and moving.

In Texas, "HVCA's directors existing unaccountable, have acted intentionally and recklessly causing the Solcichs to move from the subdivision."

[http://www.ahrc.com/HOAorg/Lawsuits/Steve\\_Tx1.html](http://www.ahrc.com/HOAorg/Lawsuits/Steve_Tx1.html)

Targeted homeowners are incurring thousands and thousands of dollars of transaction costs in selling their mini-fiefdom shares (their HOA homes) and moving, but

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— compared with the opportunity costs these people have forsaken, the transaction costs of moving pale in comparison.

Board members are "the ultimate untouchables" [http://www.ahrc.com/HOAorg/Media/ma\\_Reg091200\\_Bob.html](http://www.ahrc.com/HOAorg/Media/ma_Reg091200_Bob.html) and have insufficient reason to ever stop harassing neighbors they don't like. Neither HOAs, nor property managers, are regulated or accountable to any higher authority, save a prohibitively expensive court system — and that's the way they like it. The homeowners, don't!

Consequently, "community associations still suffer from conflict.

"<http://www.caionline.org/news/detail.cfm?PRNumber=65111798>

"Petty back-fence arguments can escalate into fines, liens and lawsuits. And frustrated homeowners — who didn't realize ... are screaming for attention.

"<http://www.kiplinger.com/magazine/archives/2000/September/managing/hoa2.htm>

And because of the way HOAs suppress innocent dissenters, homeowners are beginning to call them "gulags".

## A. Civil, Constitutional, Human, and Property Rights Violations

## 1. Nonjudicial Foreclosure

Homebuyers are not informed that they are entering into contractual arrangements, when they buy homes in CIDs, and are signing away their rights to due process and equal protection. Homebuyers shouldn't even have to do this!

Using homebuyers' homes as collateral to assure the viability of a corporation run by amateurs is unreasonable.

<http://loan.yahoo.com/m/ten.sm.html#over>

## B. Racketeer Influenced and Corrupt Organizations/ CAI/ HOAs/ State Actors

### 1. Treason

Legislators enacted the laws that are causing the trouble I'm describing. They allowed Caring Attitude Impostors to push laws — and kill homeowner-friendly legislation — and the legislators took money from them via the Consumer Attorneys of California. Legislators have failed to deal with the homeowner's plight, even though they are aware of it, while Caring Attitude Impersonators grow rich off of loopholes that I believe were deliberately left in CID law. Ask the Corrupt, Apathetic and Indifferent CAI lobbyist if enforcement of CID law

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should be taken out of the courts, where the lawyers make their money. Go ahead! Ask him!

Turning your back on 7 million serfs living in CIDs, and taking money for it, is treason

## 2. Cliques, New Gangster In Town, and the Good Ol' Boys and Girls Network

<http://fcam.tripod.com/articles/617HomeownersClicks.html>

[http://www.ahrc.com/HOAorg/News/keyreports/kr\\_gangster.html](http://www.ahrc.com/HOAorg/News/keyreports/kr_gangster.html)

<http://groups.yahoo.com/group/prf/message/83>

### a) Collusion

Collusion is a problem. Less than one percent of an association can entrench itself and the HOA's vendors, via collusion. Board tyrants with domineering personalities can almost always get their way. What volunteer would want to oppose one of these vindictive bullies? What makes it worth it? The board meets one a month, maybe — often with a property manager — so they all have an incentive to get along.

The system inspires collusion. Cliques that form thusly don't have the same incentive to get along with the other homeowners.



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Sometimes, the collusion gets out of hand. Embezzlement is common in HOAs.

### b) Organization as Client

I believe the California Rules of Professional Conduct – State Bar of California state, "In representing an organization, a member shall conform his or her representation to the concept that the client is the organization itself, acting through its highest authorized officer, employee, body, or constituent overseeing the particular engagement.

In other words the association supposed to be the client acting through the board of directors. This is fantasy! Vendors know what side the bread is buttered on and rogue multi-billion-dollar insurers back delinquent HOA cliques up.

You can't tell an HOA property manager, lawyer, gardener, or pool man that the association is his or her client. The board picks the vendors, so — as far as the vendors are concerned — the board members are their clients. No one else.

<http://groups.yahoo.com/group/hoanet/message/2212>

### 3. Selective Enforcement of Governing Documents

"There is no vehicle, no avenue, no means of effective

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redress of grievances when it comes to a homeowner making legitimate claims that an HOA board has failed to conduct themselves as required by state law:

To act in good faith,As a prudent person would in a similar situation.

"<http://starman.com/HOA/statement.htm>

### 4. Targeting Homeowners

Homeowners are targeted with the multi-million dollar resources of HOAs, if they dare to question the operation of their HOA — or even question the inconsistent enforcement of the CC&Rs that can be used to harass them. Sometimes a homeowner is targeted just because a rogue board member doesn't like the homeowner.

### 5. Self-dealing

Board members "work for nothing but get compensated in other ways."

<http://loan.yahoo.com/m/ten.sm.html#compensate>

### 6. "Frame and Blame"

"Frame and blame" is the board member's motto.

These people are very gifted in smearing people to destroy them to protect their territory," claims Willow Dean Vance, of the now-defunct American Homeowners

Association. "They like their perks. The homeowner is just a little old lamb to be slaughtered."

Unaccountable homeowners association BODs and their vendors create victims that are in active opposition to this de facto government and Caring Attitude Impostors label them as "disgruntled malcontents" to discredit them and keep them from getting anything changed that might cost HOA vendors money.

"The industry has audaciously laid the blame at the feet of its very customers. 'You should have read the documents;' 'You should have gotten more involved or tried to get on the board;' etc. etc."

How arrogant to blame the victims! How callous.

7. Intentional Infliction of Emotional Distress/ Targeting "Disgruntled Troublemakers"/ Ruling by Fear/ Hostile Housing Environment HOA cliques with criminal mentalities target homeowners that make trouble for them and intentionally inflict emotional distress on them. "Homeowners wish to just end the confrontation, whatever it may be, and just live in peace. There is fulfillment in being left alone no matter what's the price. Conceding to gangster board whims is the way out. As it happens, these frequent circumstances build a totalitarian Gangster visibility throughout each community." <http://propertyrightstexas.com/HTMLarticles/toliveinpeace.htm>

Sometimes BODs that rule by fear go overboard and actually create hostile housing environments for the "troublemakers".

<http://www.leginfo.ca.gov/cgi-bin/displaycode?section=gov&group=12001-13000&file=12955-12956.1>

<http://www.leginfo.ca.gov/cgi-bin/displaycode?section=gov&group=12001-13000&file=12980-12989.3>

#### **IV. Reform vs. Abolition**

A. Do we want to build common interest developments?

As Evan McKenzie notes in Privatopia, ‘the rise of CID housing is a unique, ad hoc form of privatization carrying with it significant social and policy considerations that never have been adequately considered by government or academics

We should be asking the legitimate public policy question of whether we should continue down the road of privatizing local government, or not!

**B. Can CIDs be "fixed"?**

Before we decide if we want to try to reform them, we must determine if they are fixable. Are you familiar with

the expression, "Start with excrement? End with excrement."

## 1. Inherent, Systemic, Pathetic Flaws

The HOA system of privatized governments is flawed and should be eradicated.

a) Signing Contracts that Deprive Citizens of Constitutional Rights. This is un-American.

### (1) Contracts of Adhesion

As more and more CIDs are built in California, relative to the amount of total housing being built, consumers like me find themselves without any choice!

If I wanted my daughter to attend California's best high school, I had to enter into the infamous "contractual arrangement". It's unconscionable that my wife and I had to sign away our Constitutional rights, or move into an apartment, to get our daughter into California's best high school. In areas with nothing but HOAs, in my opinion, the "contractual arrangements" are adhesion contracts.

b) HOAs: Corporations? Governments? Both? Neither?

The CID industry has muddied the waters.

(1) Associations have the statutory power to adopt rules, allege a violation by a member, and levy fines.

This ignores a VA Supreme Court decision that found fines to be a sovereign power which cannot be delegated and that opined that fining by associations violated both the US and VA Constitutions. — Unit Owners Ass'n of BuildAmerica-1 v. Gillman, 292 S.E.2d 378, 384 (Va. 1982)

(2) Unfair Debt Collection Practices

The CAI argues that the Fair Debt Collection Practices Act should "be amended so that: the definition of debt does not include fees, assessments or other charges due or alleged to be due a ... community association;

"The term 'transaction' is added to the Act and defined to ... ensure that assessments of community associations are not within the purview of the Act"

<http://www.caionline.org/govt/advoc/fed/debtsum.cfm>

Without getting into the question of whether or not the homeowners want their HOA vendors to be allowed to engage in unfair debt collection practices, I'd like y'all to consider something else.

When homeowners ask the government to enforce its

own laws — the CID industry argues that government shouldn't meddle with private contracts.

And the CID industry makes campaign contributions.  
<http://www.caionline.org/govt/caipac.cfm>

### c) Separation of Powers/ Checks and Balances

Ramona Ripston was the Executive Director of the American Civil Liberties Union Foundation of Southern California, one of the largest ACLU affiliates in the nation. She wrote, "The historical reality is that the people who wrote the Constitution and the Bill of Rights recognized that one of the most important objectives of any American government would have to be limiting the ability of a majority to impose tyranny on all."

<http://www.pbs.org/wnet/federalist/opinion-prop.html>  
<http://starman.com/HOA/majority.htm>

For seven million Californians, their government has become that which the United States was formed to get away from — a tyranny.

But this time, it's worse. It's on the home front.

"What is government itself", asked James Madison, in The Federalist # 51, "but the greatest of reflections on human nature?"

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. In framing a government which is to be administered by men over men, the great difficulty lies in this: You must first enable the government to control the governed; and in the next place, oblige it to control itself."

So he argued, successfully, that "the structure of the government must furnish the proper checks and balances between the different departments", to "oblige it to control itself."

<http://www.pbs.org/wnet/federalist/paper51.html>

Corporations have no checks or balances. They are run by boards of dictators — I mean, directors — that are the executive, legislative, and judicial branches all rolled into one. As long as HOAs are classified as "corporations", they will have no checks or balances. As long as our legislators fail to institute any form of government oversight, something the Industry is opposed to, the boards of directors will continue to be unaccountable. These "corporations" aren't causing problems as fictitious persons. It is the people on the BOARDS that are. Not all boards, but enough to make it worth the time for those legislators of ours — that are not afraid of losing Homeowner Control Industry campaign contributions — to do something about it!

Homeowners associations have no limitations on the ability of a majority — or tiny minority — to impose



tyranny on all, yet seven million Californians live in them.

There is a lot of frustration with this form of government.

#### d) Due Process

Forcing homeowners to look to the superior and appellate courts for due process — except in the case of non-judicial foreclosure, in which the homeowner gets no due process — is a fundamental flaw in the HOA system of governance.

Often, HOA boards just serve as judge, jury, and executioner.

#### e) Double Taxation/ Tax Discrimination

According to author Evan McKenzie "Sooner or later, [CID] owners will realize that local and state governments are balancing their budgets on the backs of CID residents. That could open up a full public policy debate over the role of CIDs that should have happened 20 years ago."

<http://www.uchastings.edu/plri/96-97tex/cidhome.htm>

That debate, should start, now.

#### f) Dependence on Member Participation

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The system depends on member participation, and the members aren't interested.  
<http://starman.com/HOA/alexander.htm>

## V. Food for Thought

Now, before you call me "disgruntled" — or try to paint me as part of a "gripe show" — I just ask that you answer two questions first:

Are these things to be "disgruntled" about? Are these legitimate "gripes"?

This is what the Davis–Stirling CID Act wrought. Should we now go back to the CID industry for another law (UCIOA)? How stupid is that??

Thank you for the opportunity to provide you with input.

Sincerely,  
Robert Lewin

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Florida

9-29-2001

Honorable Governor,  
Dear Senators Cowin and Geller,

First of all: thank you, Governor, for your statement regarding flying the American flag in homeowners' associations, issued 9 -16 -2001. It definitely has been applauded all over the nation and is still mentioned in the media. Thank you so much!

Senators, you have proposed bills regarding these issues - SB 148 and SB 150. Please add provisions which allow any homeowner to fly the flag, according to the federal rules and as long as the American flag is displayed in a respectful and honorable manner, on their private property.

Senator Cowin's bill includes the mention of providing a penalty. Please make sure that the General Attorney's office is funded for this purpose, unlike other similar provisions, like in Chapter 498/021.022 where III. Degree felonies are not prosecuted for lack of funds, much to the disadvantage of Florida homeowners.

But even all announcements and bill-proposals doesn't stop the industry from making new cases against homeowners. Please see newest case from Tampa below! The industry is openly displaying total disregard for homeowners' rights and as long as you, our elected officials, are unwilling to provide the necessary oversight and enforcement, the industry will be unwilling to obey by the rules.

In an official statement the CAI (Community Association Institute - the industries trade organization) suggested to the many associations they influence to limit these

modifications to their rules for six month before getting back to the old system. Violation-notices, fines and law-suits! It shows clearly that their initial statement is just to appease public opinion. Will flying "Old Glory" be limited to 6 month? Is there a time-limit to display patriotism?

You may have heard or read that Senators in AZ are pushing for a Reform Task Force for Mandated Properties, the same our organization is pushing for in Florida, in connection with the flag-issue. The reaction among CAI executives showed the clear disregard the industry has for the common homeowner, your constituents. Here are some of the comments of CAI executives about creating a task force from very recent e-mails: "letting a legislator loose on this subject, backed by the testimony of the disgruntled homeowners" was only topped by a Florida CAI official who stated : "We had exactly the same problem in Florida in 1996 and CAI/FLA did a lousy job of combating it. However, four years later the damage has been repaired."

With other words: the industry is considering the work of Florida legislators in 95/96 "DAMAGE"!

Senator Cowin has first hand experience with unhappy - the industry calls them "disgruntled" - homeowners. Her district has many examples for abuses of homeowners living in associations. The list of complaints is nearly endless and is very often not limited to civil law. Since

recent town hall-meetings the problems have even increased.

As long as homeowners living in mandated properties are treated as step-children of society here in Florida, the abuses by the industry will continue. These constituents need the support of the government and the protection necessary. Many of these are retirees and veterans who live on a limited budget and can't afford to fight the deep-pocket industry in lengthy court-battles.

Please help many of your constituents in need and support the Proposed Act : Mandated Property Reform Task Force

Your help will be greatly appreciated. If you have any further questions, please feel free to contact me at any time.

With best regards

Jan Bergemann

President

Cyber Citizens For Justice, Inc.

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New Jersey

Well, those long-awaited HOA reform bills have finally been introduced in the NJ Assembly.

The bills are being met with strong, even virulent, opposition from the NJ CAI. In fact, the group has hired

3 or 4 of the largest lobbying groups in the state to fight it.

Each bill starts with the following:

"The Legislature finds and declares:

The corporate model that has been applied to homeowners associations has proven inadequate in some respects for the governance of residential communities, a fact recognized by the Assembly Task Force to Study Homeowners Associations in its 1998 report;

By authorizing homeowners associations in certain planned real estate developments to exercise the power to levy fines on owners residing in the community and to impose liens in order to collect those fines, the Legislature, in effect, delegated governmental powers to private entities. Governmental powers, however, must be exercised in a way that comports with constitutional standards of fundamental fairness and due process, while promoting democratic participation and safeguarding the investment of owners in their properties. ...

Accordingly, the Legislature finds it in the public interest that:

1. homeowners associations be held to standards of due process, open governance and fundamental fairness, similar to those to which governmental bodies are held;

2. a fair and efficient system for resolving disputes between homeowners and associations be implemented; and,
3. associations should discharge their obligation to protect the health, safety and welfare of homeowners subject to the oversight of the Department of Community Affairs."

Anyway, the bills do the following:

**A3085: Prohibits a homeowners association from recording a lien to enforce collection of a fine imposed by the association** until the association receives authorization to record the lien by review of a professional mediator or arbitrator arranged through the Department of Community Affairs. The bill also creates a 3-tiered ADR process.

**A3086: Creates a new chapter of law respecting homeowners associations. Requires associations to register with the state Department of Community Affairs and pay a yearly registration fee.** (The fee will be used in part to pay for training of mediators for the above-mentioned ADR process). The bill also empowers the DCA commissioner with empowerment of the statutes respecting associations, allowing the commissioner to fine an association of member, or remove a board member who flagrantly violates the statute. (A side note: NJ CAI hates that one. They read it

as the fine being imposed on the entire association, rather than the board of trustees. Perhaps a bit of language fine-tuning is needed here).

**The bill also "requires the commissioner to develop a disclosure booklet,** which shall be made available at cost to the general public, to associations and to homeowners, to serve as a general guide to community associations. The booklet is to be distributed by the association to each homeowner free of charge; it shall be the duty of each selling homeowner to provide a copy of the booklet to a purchaser of the unit at or before the time of the signing of the sales contract."

**The bill also creates the Office of the Ombudsman for Homeowners and Associations.** "Headed by the Ombudsman, who shall be a person qualified by experience in the areas of planned real estate developments and dispute resolution, the office will develop, in conjunction with the Office of Dispute resolution and in conjunction with companion legislation, a pool and list of volunteers throughout the State who have been trained in dispute resolution and establish procedures and a system of training for such volunteers."

A3089: Opens all meetings, save those deemed confidential, to all unit owners.

A3090: Establishes "standards of fairness, due process and accountability for homeowners associations concerning meetings, access to records and audits."



## State Government Support

Associations must give at least 48 hours noticed, in writing, of the time, date and place of HOA meetings. The board must also post time, place and date of all meetings for the next year. An association would be required to provide residents with copies of financial records within 7 days of such a request, save those records that would infringe on a homeowners privacy.

That's the bills in a nutshell. Like I said, the NJ CAI ( and I assume the national CAI) is going apoplectic over these things. One CAI lawyer I spoke with today called the "set up costs" the "Bateman tax." These bills need grassroots support to pass. The CAI is going to exert tremendous pressure to defeat these things, much as they did 2 years ago to beat the UCIOA.

Bill

Dec 15, 2000

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## Oregon

Oregon [two emails in Mar and May 2001]

You asked about the consumer protection disclosures that are in the bill I have proposed in the Oregon Legislature. The disclosures were not something that Dr. Pratt provided, but consumer protection disclosures that were Oregon law prior to 1999. I've tried to condense them

down in this post, but it is still longer than I would have liked. I'm sorry if my post to Dianne gave the impression the consumer protection disclosures were provided by Dr. Pratt.

In 1999 CAI affiliated lawyers, property management companies and insurance companies, working under the name of “Condominium Working Group” introduced and had passed SB 1206 that contained sweeping changes in Oregon planned community and condominium law. SB 1206 repealed all the consumer protection disclosure laws. In listening to archived testimony this group gave to the senate judiciary committee they frankly stated one of the reasons for SB 1206 was to “get rid of the consumer protection aspect - disclosure” of the old laws. They said, “developers do not want to work under the present bill.” meaning laws prior to 1999.

The laws repealed in 1999, that I replaced in my bill and which the representative was so interested in, mandated the following:

[May emails]

Did CAI take an oppose position on your bill? If so, what was the basis of CAI's opposition?

Yes, they took an opposition position. To understand it, I will give you some background on what they used.

## State Government Support

1. When I bought into this development (May 1998) each village had their own CC&R's, etc. Unknown to us there was a movement afoot to bring all villages under one set of governing documents--a master association. This was accomplished one year after we moved in. Also in 1999 the Oregon legislature passed SB 1206 which changed everything and gave sweeping powers to the BOD.
2. At the initial legislative hearing in February , one of the facts I brought out was that what I bought was not what I was now living under and related briefly the consolidation of the community villages and legislation of 1999 had added statutory provisions which had they been in effect I would never have considered a home in an HOA. This background testimony was given in order to evidence the fact that although one reads and understands the governing documents when they buy into an HOA, those documents are constantly morphing--whether through BOD changes or state statutes--and this is something no home buyer understands.

I wanted legislation that the home buyer would have up front knowledge that what they bought today was not what they could be living under tomorrow and that alone presented a financial risk to the home buyer that many may not be prepared to face.

3. The CAI at the later work session produced the old (original) documents for my village and proceeded to tell the committee I was not living in an HOA under statutory law and, what a shame, I did not know what I was living under. Therefore, my testimony was not credible and they were the experts who should be listened to. They had been coming to the legislature for 25 years. They alone knew what was best in homeowner association legislation.
4. I countered that the documents being presenting were no longer valid and I had the current governing documents and produced them in order to show the committee what was current. The session ended without moving to do anything with my bill as the amendments were not ready.
5. My lawyer (who was not at that particular hearing) then wrote a letter to all members of the committee and included the pertinent documents which clearly show that I do live in an HOA under state statutory laws. My lawyer said this was a "red herring" issue.
6. Their bill was heard one week later by the House Judiciary Committee on Civil Law and again they brought out the "she does not live in an HOA under statutory law" routine and HB 3912 will not affect her at all. This is, of course, not true. In my testimony before the Judiciary committee, I told them if HB 3912 was passed, then they should include legislation

opening the Consumer Complaint Department under the AG's office to accept complaints from homeowners against the HOA. Then they would *know* what was happening and how the laws were affecting homeowners. They would have facts and figures.

CAI immediately came forward with dozens of reasons why this could not possibly work. The hearing ended with a work session to be scheduled. In a meeting that afternoon with the Chair of the House Business and Consumer Affairs committee, he said they would meet with the HB 3912 (CAI) proponents and attempt to work to get some of my provisions into HB 3912. I have inquired as to the outcome of such a meeting, but no response. So, my bill, is dead in the committee.

Their open strategy was to attempt to discredit me by producing old documents and saying I did not understand what I was living under. I then had to move to prove this was not the case and that shifted the focus onto my credibility and away from the facts of HOA legislation beneficial to the homeowner. I had hired a lawyer and a consultant so I was not working totally without assistance.

What behind the scenes maneuvering went on, I have no idea, but one can only guess. The lingering in

## State Government Support

legislative counsel of my bill's amendments will always raise questions with me.

Harriett

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Texas

reviewed by Wendy Laubach

[A caution -- this is not actually a very good law. It's slightly better than nothing. But the redemption rights are unlikely to help any homeowners, particularly since the HOA is expressly allowed to tag on any post-foreclosure fines it likes as a condition of exercising the redemption. The HOA also gets to tack on so many kinds of costs and legal fees that it's going to amount to little more than extortion. The right of "hearing" is so vague that we can be sure it will be abused. The right of "notice" contains an exception for -- of all things -- foreclosure suits. The right to examine "records" will mean nothing as long as the HOA keeps all its important records in the hands of its law firm.

This law was sponsored by Sen. Carona, owner of several HOA management companies.]

Senate Bill 507, relating to residential subdivisions that require membership in a property owners' association.

Author: Sen. John Carona

Sponsor: Dutton

Effective Date: 1-1-2002

Adds Chapter 209 to the Texas Property Code

This bill creates the Texas Residential Property Owners Protection Act, which applies to all residential subdivisions requiring membership in an HOA that may impose mandatory assessments. The bill establishes a limited right of redemption after foreclosure, implements a notice and hearing process to resolve disputes, and establishes limits on attorney's fees.

(1) the HOA must record a management certificate providing subdivision recording data and the name and mailing address of the HOA. Officers, directors, employees, and agents of the HOA are personally liable for willful or grossly negligent delay in recording the certificate.

(2) HOA records, including financial records, must be available for review by an owner in accordance with the Texas Non-profit Corp. Act. All attorney files are exempted from this requirement, whether or not they are within the traditional "privileged" category for attorney documents.

(3) In most cases, the HOA must give an owner notice of its intent to suspend use of a common area, to charge for property damage, to levy fines for violations, or to file suit other than to collect assessments or foreclose on a lien. The owner is entitled to a reasonable time to cure and may request a "hearing" within 30 days. "Hearing" is not defined but refers to a procedure conducted by the HOA, not a hearing in a real court.

## State Government Support

(4) An HOA may collect attorney's fees and collection costs only after written notice that the fees will be charged, giving the homeowner a date certain on which the costs must be paid.

(5) The homeowner cannot be charged for legal fees incurred before the conclusion of the "hearing" requested by the homeowner.

(6) If the HOA is authorized to conduct nonjudicial foreclosures, the legal fees will be limited to the greater of \$2,500, or 1/3 of the actual costs and assessments being foreclosed over.

(7) An HOA may not foreclose on an assessment lien consisting solely of fines or legal fees.

(8) Within 30 days after a foreclosure, the HOA must give the homeowner written notice of the owner's right of redemption, and within 30 days thereafter, the HOA must record an affidavit stating the date of the notice and other specified information.

(9) The HOA or the purchaser at foreclosure must commence a forcible entry and detainer (i.e. eviction) suit to recover possession of the property.

(10) The homeowner may redeem the property within 180 days after the date of notice of the sale.



(11) The purchaser at foreclosure must not transfer ownership to a new owner during the redemption period.

(12) A redeeming homeowner must pay the full amount owing to the HOA at foreclosure (without regard to which amounts were actually foreclosed on), any excess price bid at foreclosure over and above the debts being foreclosed on, plus interest, and the HOA's foreclosure and reconveyance costs, including "reasonable" legal fees, plus any additional fees, dues, etc. assessed by the HOA after the foreclosure date, plus various other transactional costs.

(13) Upon the written request of the homeowner within the redemption period, the period will be extended to 10 days after the HOA provides written notice of the total required redemption payments to be made as claimed by the HOA.

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*"Residents in CIDS commonly fail to understand the difference between a regime based formally on rights, such as American civil governments, and the CID regime, which is based on restrictions. This often leads to people becoming angry at board meetings and claiming that their "rights" have been violated -- rights that they wrongly believe they have in a CID."*

*. . . Privatopia*

"It may be that government can help here through licensing, certification, public complaint, and continuing professional educational requirements."

... Community First, CAI

## V. Sample Full Disclosure Document for HOA Home Buyers

(Note: This information has been taken from the Common Interest Project web site and has been edited for presentation purposes and ease of reading. HOA, PUD, CID, RCA, etc all refer to a common interest owned property).

CICP's model marketing disclosures – information housing consumers should (but likely don't) receive from builders or real estate agents or read in their ads and/or sales literature.

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### A. Planned Community Developments

1. (Name of development).
2. PURCHASING RESIDENTIAL PROPERTY IN THIS TYPE OF DEVELOPMENT INCLUDES A COMPLEX BUNDLE OF RIGHTS AND OBLIGATIONS THAT DIFFERS SUBSTANTIALLY FROM RESIDENTIAL PROPERTY LOCATED IN TRADITIONAL SINGLE FAMILY HOME SUBDIVISIONS.
3. The use of residential property in this development is governed by deed restrictions known as Covenants, Conditions & Restrictions (CC&Rs) which are binding upon and

enforceable by each and every property owner in the development.

B. PUD Government as a Non-Profit Corporation

4. While (name of development) is subject to the jurisdiction of municipal and/or county authorities, it is primarily governed by a non-profit mutual benefit membership corporation known as a homeowners association, of which every unit owner is a voting member.
5. The powers, obligations and rights of this corporation and its members are set forth in the [appropriate state statutes].
6. In addition, various provisions of the Davis-Stirling Act delineate additional powers, duties and rights and obligations of the homeowners association and its members.

C. Enforcement of State Laws

7. THERE IS NO STATE OVERSIGHT AGENCY EMPOWERED TO ENFORCE THE DAVIS-STIRLING COMMON INTEREST DEVELOPMENT ACT; VIOLATIONS OF THE ACT MUST BE ENFORCED IN A COURT OF COMPETENT JURISDICTION AT THE EXPENSE OF THE PARTY SEEKING ENFORCEMENT. THE

CORPORATIONS CODE IS ENFORCED AT THE DISCRETION OF THE STATE ATTORNEY GENERAL'S OFFICE. SINCE ENFORCEMENT BY THAT OFFICE IS DISCRETIONARY, YOU MAY BE REQUIRED TO RETAIN AN ATTORNEY AT YOUR OWN EXPENSE TO REMEDY CORPORATIONS CODE VIOLATIONS BY THE HOMEOWNERS ASSOCIATION. IN ADDITION, DISPUTES OVER THE INTERPRETATION AND APPLICATION OF THE CC&Rs MAY BE REQUIRED TO BE RESOLVED THROUGH ALTERNATIVE DISPUTE RESOLUTION RATHER THAN COURT LITIGATION.

D. Self-Governing

8. As a common interest community, (name of development) is intended to be self-governing and therefore requires a significantly greater commitment of time and effort by property owners than a traditional single family home subdivision.
9. As a property owner in (name of development), you will be required to elect a board of directors of the homeowners association from among other homeowners in the community and may be requested to serve on the board

and/or its advisory and architectural control committees.

10. While serving as a director of (name of development), you will be required to act as a fiduciary for and in the best interests of all property owners in managing the business and legal affairs of the homeowners association.

E. Enforcement of CC&Rs

11. The homeowners association is empowered to enforce the CC&Rs and may also promulgate rules based on the CC&Rs governing matters such as paint color of your home, modifications to its exterior, fences, landscaping, placement of trash cans and stored items, parking of vehicles, and keeping of pets.

12. If the association has adopted a published schedule of fines for violations of these rules, you may be assessed fines if you are found in violation by the governing board.

F PUD Assessments

13. As a homeowner in this community, you will be required to pay regular (and possibly additional special and emergency) assessments to the association to fund expenses related to

the repair, maintenance and preservation of common area property such as roads, clubroom and other buildings, recreational facilities, and open space areas as well as administrative expenses for management, legal and accounting services.

14.THERE ARE NO PROPERTY TAX OFFSETS CURRENTLY AVAILABLE FOR PAYMENT OF THESE ASSESSMENTS, NOR ARE THEY DEDUCTIBLE FOR INCOME TAX PURPOSES IF THE PROPERTY IS TO BE HELD AS YOUR PRIMARY RESIDENCE.

15.FAILURE TO PAY THESE ASSESSMENTS COULD RESULT IN A LIEN PLACED UPON YOUR PROPERTY AND POSSIBLE SALE BY THE HOMEOWNERS ASSOCIATION IN A NON-JUDICIAL FORECLOSURE PROCEEDING; CONSULT THE ASSOCIATION'S COLLECTION POLICY FOR FURTHER DETAILS.

## VI. Community Associations Institute, Inc on Homeowner' Rights

[CAI publishes numerous research reports by means of its Research Foundation As well as in the Journal of Community Association Law].

### A. A review of CAI Research Report on NonProfit Corporations--

Reviewed by G. K. Staropoli

The Community Associations Institute, holding its national conference in Tucson this week, has released its latest issue of its Journal of Community Associations Law, vol. 4, number 1. It's titled: "Using State Nonprofit Corporation Laws as an Effective Tool for Community Association Governance".

In this report, the author makes the following statements echoing the grievances and issues HOA activists have been bringing forward in the media and before the legislatures of many states, including this past session of the Arizona Legislature:

\* "and it may come as a surprise to some that the balance of power in the private universe favors governors and weakens the authority of the governed residents", a definite un-American and against public policy condition.

\* "CC&Rs are to be enforced by the court unless a challenged restriction is found to violate public policy". [We need to ask, is the denial of civil liberties against public policy?]



\* The nonprofit corporation laws present HOAs as "essentially a 'top down' oligarchical structure", meaning undemocratic.

\* "Individuals who purchase homes in planned communities do so failing to appreciate the nature and extent of the association's regulatory authority over small details of their lives ... Perhaps the rudest awakening for first-time purchasers ... is the rather limited role that is contemplated for association members under state nonprofit corporation laws."

[Enough said for the argument that buyers are fully informed, under existing disclosure requirements, and are well aware of what they are getting into when they buy a HOA-controlled home].

\* "Another concept of corporate governance which finds no equal in laws pertaining to public elections is the requirement that a stated percentage of the members appear ... in order to take valid action".

It's time for the media and legislators to standup and correct the record in regard to HOAs.

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B. Second CAI report appearing in their Journal of Community Association Law deals with Gated Communities.

Reviewed by G. K. Staropoli

[I will just provide some interesting quotes] ----

"Residents of gated communities live in private worlds with special town-like features."

"Because these gated communities consider themselves independent and incorporated towns, they have their own private government ... the association has its own set of rigid rules of conduct which sometimes appear to conflict with our basic constitutional rights".

The author asks, "**Does the [association] security guard have the right to require the public utility inspector to open his toolbox for an inspection? ...** The bottom line is that the gated communities rely on private police forces ... **therefore the 4th amendment search and seizure issues don't apply**".

"A harmful result of class division [between gated communities and the greater community] is a diminished sense of civic responsibility, **where the member only perceives his or her responsibility and obligations to the private community**". [I think I heard someone talk about "city-states" within the municipality].

[An interesting point of view is made regarding the use of public funds and resources:]

"When a developer builds a new community on barren public land and then demands that the municipality declare the surrounding streets to be private. **This practice has the effect of excluding non-members, and raises issues of due process and equal protection.**"

### HOAs as state agencies –

The author cites a court case that held that, "where an organization is quasi-public, **its power to exclude must be reasonably and lawfully exercised in furtherance of the public welfare**".

"Gated communities functioning as state actors [an arm of the government] could be brought into courts of law for violating nonmembers' constitutional rights". [And in my humble non-lawyer opinion, they can also be brought to court for violations of any constitutional right].

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## C. HOAs as a Government

Reviewed by G. K. Staropoli

A CAI article in Common Ground (Nov-Dec 2000) that lends itself to why HOAs are better than municipal governments. Of course, it's a superficial treatment of the democracy issues, but **does state that residents do percieve the HOA as a govenment.**

"There is however, more than duplication of service issues that the large-scale manager needs to consider. While most of our associations are private corporations, there is an inherent “democracy” component to be considered in managing a communal society — city or homeowner association. **Specifically, the board of directors is, for better or for worse, viewed by the association’s residents as a defacto city council, and, accordingly, residents expect to be heard at board meetings. My association’s frequent town meetings, daily member (citizen) input, and staff responsiveness to complaints, is reminiscent of city management. So, how do we address the similarities? Very carefully, it would seem, since state civil and corporate codes differ significantly, not to mention statutes specifically related to municipalities.**"

## VII. Prof Evan McKenzie Speaks Out

[Prof. McKenzie is a Associate Professor of Political Science at the University of Illinois at Chicago and author of the widely quoted book, *Privatopia: Homeowners Associations and The Rise of Residential Private Government*. He has studied the common interest development industry since 1994, writing and speaking about important issues that affect our community. Included here are excerpts from his appearance on a live talk Internet radio show, *On The Commons*, on Sep 20, 2001]

### Foreclosures

If you live in a place that has this type of government and you have to pay for certain things, then obviously people have to pay their assessments. But what has happened here unfortunately is that Boards are just contracting out to these lawyers, collections lawyers basically, the ability to make all the decisions about how to do that. That's the problem. And it's one thing to say we need to collect our assessments. Yes you do. But the Board has other responsibilities, and if the Board makes the decision about how to collect the assessments, which is what they should be doing, then the Board will balance that with their other needs such as maintaining some sense of community and cohesion in the entire development and not just nailing people to the wall and driving them out of their community and engaging in what I would call "sharp practices".

I mean, a sane Board of Directors would not want to do that. But what they're doing is because as volunteers they

don't want the responsibility, I assume in most cases, they just contract the whole thing out to a law firm, and the law firm as you know will say, "Well, that's okay, we won't charge you anything for this. We're going to collect all our fees from the people who didn't pay, or the people who broke the rules. We'll collect all our fees from them."

**“And then they really go after them. And then people lose their homes not because of the assessments -- that's the whole justification for this is the Association needs the assessment. But you can try to pay the assessments and you'll still have a lien on your house because you have to pay the attorney's fees first. So it becomes really a matter of attorney's fees.”**

### Private Contracts & the CC&Rs

“And basically it's a take it or leave it contract, drawn up by somebody who has all the power and imposed on the person who doesn't have any power. And that makes a mockery of the whole logic of contract law. Because contract law, the only reason contracts are binding again is because you agreed to it. This is government by contract. **Government by restrictive covenant. And that has got to be a public policy issue.**

“This whole logic of contract goes out the window when it's above governance. At some point we have to think about meaningful consent in the governmental arena. We have to talk about consent within the meaning of

constitutionalism. In other words what I'm saying is it should not be possible for a person to be held to a contract that violates their basic Constitutional rights.

“Judges should stand up and say "We will not enforce these things, they are against fundamental public policies, they are unconstitutional, and we are not going to allow big institutions to take away individual's constitutional liberties by contract. We're just not gonna allow it to happen." That's what needs to take place. And if the judges won't do it, the legislators need to do it.

### HOA service providers

“But increasingly it becomes a matter of the survival of the attorneys and the other professionals who make their living off these associations. And you know, I think you **know I've been very critical of the industry over the years because they have not policed themselves and they have bitterly resisted letting any local government police these professionals.**

“And you have to have one or the other. And I really feel that the industry has to either accept...they either have to have very meaningful self-regulation which would be subject to some kind of scrutiny from outside so we can see what they're doing, or there has to be State regulation of these professionals. And personally I think that's the only way to go. I think this has to be a government

responsibility to make sure that these professionals are not gouging people.”

## Civil Rights

“Well, you know, this is one of the most -- to me -- one of the most outrageous examples of what's wrong with homeowner association's governance. This whole question of flags and also political signs ... it's insane because these signs and flags could not possibly be viewed as damaging to property values. That is a completely insane idea. And of course there's no ... it's ludicrous to even...there's no conceivable rationale for it.

“But it just underlines the deeper problem that **these associations are operating outside the framework of the United States Constitutional and the Bill of Rights**. And it's not just the flag. I mean, this needs to be highlighted. It's not just that we need an exception for the flag, we need to understand that the exception here is **we've got millions of people who are having their basic Constitutional rights stripped away from them on the flimsiest most bogus of excuses** by people who just can't stand to look around the neighborhood and see that one house looks different from another because one has a flag and the other one doesn't.



## APPENDIX A. Biography

### **George K. Staropoli**

Mr. Staropoli has been active as a homeowners rights proponent for the past year; is a member of 4 HOA internet email lists; and has appeared twice on a live talk radio HOA advocacy show, *On The Commons*, heard internationally over the internet. He appeared before the Arizona HOA Study Committee in August 2000 and at a Special Hearing on HOAs held by Nevada state senators O'Connell and Schneider; and has been active in communicating HOA advocacy issues to the Arizona Legislators, including the submission on Sept 7, 2000 of his "*Homeowner's Declaration of Independence from Homeowner Association Governments*" to the committee.

The Arizona Capitol Times has printed Mr. Staropoli's Commentaries: "*Reforms Would Not Destroy Homeowners Associations*" and "*Homeowners Associations Are Big Business: So Government Officials Look Other way*". Many of Mr. Staropoli's papers and articles can be found on his web sites, <http://starman.com/HOA> and <http://pvtgov.org>.

Mr. Staropoli has served on the board of an 800 member HOA and as its Treasurer and has been a board member of the Valley Citizens League, a Phoenix based civics organization. He is president of the non-profit Citizens Against Private Government HOAs and a member of CAI for over a year.

## APPENDIX. B

### Citizens Against Private Government HOAs, Inc

#### Mission

To inform the public (a) of the private government nature of HOAs and their governing bodies, the homeowners association; (b) of the restrictions on homeowners' civil liberties and; (c) of the lack of effective enforcement of state laws and the governing documents under the “private contract” interpretation of HOAs.

To seek changes to existing state and federal statutes to (a) restore democratic principles of government to existing homeowners associations and (b) replace the “private contract” view of CC&Rs with a declaration that HOAs are civil governments subject to the laws of the land.

To define, create and promote the acceptance and adoption of an alternative form of common interest government that would (a) allow for the protection of property values and (b) provide for financial and tax savings for municipalities, and

To foster and promote grassroots lobbying efforts for the above goals.

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## APPENDIX C. RESOURCES

Email lists and web sites

American Homeowners Resource Center

<http://ahrc.com/hoaorg/horgindex.html>

Citizens Against Private Government HOAs, Inc

<http://pvtgov.org>

[pvtgov@cs.com](mailto:pvtgov@cs.com)

Cyber Citizens For Justice, Inc

<http://www.ccfj.net>

Consumers for Housing Choice

<http://www.consumersforhousingchoice.org>

**HOA Network**

<http://starman.com/HOA>

[hoanet-subscribe@yahoogroups.com](mailto:hoanet-subscribe@yahoogroups.com)

Homeowners Associations: Dream or Nightmare

<http://www.homeownerassoc.com>

On The Commons - live radio talk on the Internet (email for current HOA schedule) [onthecommons@cox.rr.com](mailto:onthecommons@cox.rr.com)

<http://www.onthecommons.com>

Appendix

*Privatopia: Homeowner Associations and the Rise of  
Private Government*

Dr. Evan McKenzie

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## George K. Staropoli is the Founder of Citizens Against Private Government HOAs, Inc

Mr. Staropoli is an Arizona resident who has been active as a homeowners rights advocate since April 2000, appearing several times on a live talk radio HOA advocacy show, *On The Commons*, heard internationally over the internet. He also appeared before the Arizona HOA Study Committee and a Nevada Legislative committee in Sept 2000; and has been active in submitting homeowner rights issues to the legislators, the media and the public.

This *Buyer's Guide* is a collection of the papers, articles and emails from Mr. Staropoli and from other advocates across the country – Florida, Virginia, Oregon, California, Texas, Delaware. It presents homeowner positions in regard to foreclosure, fines, civil liberties, private government HOAs, the failure of state legislatures to provide for a meaningful redress of grievances, and the adversarial role played by Community Associations Institute, Inc (CAI), a lobbying, national business trade group.

**Citizens Against Private Government HOAs, Inc (CAPGH)** is 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.