VIII. The Case Against State Protection of HOAs

A. The Issue of Private Property vs. the Bill of Rights

In this argument I use "HOA" to refer to the private governmental body of the planned community real estate "package" of open space, homes, amenities and rules and regulations. This very same accumulation of benefits has been, and continues to be governed, by democratic forms of government consistent with the US Constitution and Bill of Rights in what we know of as towns, cities, villages and communities.

As can be seen from the preceding materials, the heart of the problem with the legal concept of homeowner associations lies in 1) the adoption and predominance of private property and contractual rights over the constitutional protections of the Bill of Rights, and 2) in the view that HOAs are private governments since the association, by anyone's logic, is a state actor. Defenders of HOAs hide behind the private property restriction in the US Constitution, and state governments, the legislatures, the attorneys general, the protective agencies such as the real estate departments, have all adopted a hands-off policy in deference to this private property argument over the Bill of Rights.

What does the Constitution say about contracts? Just a small part of Art I, Section 1.10, which reads, "No state shall … pass any … law impairing the obligation of contracts". (As a secondary consideration, Section 8.1 reads, "Congress shall have the power to regulate commerce …"). Forrest McDonald, writing in ***Novus Ordo Seclorum***, states that Rufus King of Massachusetts added this contract clause late in the convention. He adopted wording from the Northwest Ordinance of 1787, adopted by the Continental Congress, which reads in part, "That no law ought ever be to be made … that shall, in any manner whatever, interfere with or affect private contracts or engagements, *bona fide*, and without fraud, previously formed". Interesting to note the words, "bona fide" and "without fraud" were part of the original statement, but omitted because it was felt that the words were "redundant".

McDonald provides a discussion of the issues surrounding this contract clause, which can be summarized as to a concern for prior taxes, debts and loans made under the Continental Congress -- "redemption of old continental bills of credit", "making public debts as 'valid' under the constitution". James Madison wrote in **Federalist 44**, "The sober people of America are weary of the fluctuating policy which has directed public councils ... [the] sudden changes and legislative interferences …" [special interest influences in today's language].

The following sections of this chapter contain the findings of the courts, and opinions of political scientists regarding the relative influences of these two issues on what constitutes unconscionable acts by the state, in view of the principles underlying the America system of government, and what constitutes good public policy. The argument is made that state governments are violating the 14th Amendment and its protections of due process and the equal protection of the laws for all persons. The reader should weigh the contract clause in the constitution against the Bill of Rights.

B. Constitutional Rights and Restrictive Covenants

The very first court case, as far as I can tell, relating to private governments was the 1946 **Marsh v. Alabama** ruling relating to free speech versus the private property rights of a company town. A religious group, non-residents, had entered the company town to preach their religion. The Supreme Court ruled in favor of the 1st and 14th amendment protections over the single clause in Art 1, section 1.10, and protecting contractual obligations.

Some excerpts:

> "The State urges in effect that the corporation's right to control the inhabitants of Chickasaw [the town] is coextensive with the right of a homeowner to regulate the conduct of his guests We can not accept that contention. Ownership does not always mean absolute dominion The more an owner, for his advantage, opens up his property for use by the public in general, the more do his rights become circumscribed by the statutory and constitutional rights of those who use it.
>
> "The managers appointed by the corporation cannot curtail the liberty of press and religion of these people consistently with the purposes of the Constitutional guarantees, and a state statute, as the one here involved, which enforces such action by criminally punishing those who attempt to distribute religious literature clearly violates the First and Fourteenth Amendments to the Constitution.
>
> "There is no more reason for depriving these people of the liberties guaranteed by the First and Fourteenth Amendments than there is for curtailing these freedoms with respect to any other citizen. To view the circumstance that the property rights to the premises where the deprivation of liberty, here involved, took place, were held by others than the public, is not sufficient to justify the State's permitting a corporation to govern a community of citizens so as to restrict their fundamental liberties and the enforcement of such restraint by the application of a State statute."

In 1971 the New Jersey Superior Court (**State of New Jesey v. Kolcz**) ruled that constitutional rights cannot be denied by a New Jersey **planned retirement community association**, Rossmoor Community. The issue was one of a trespass complaint filed against persons seeking to distribute municipal campaign information to members of the community. An excerpt from the opinion,

> “Using the same reasoning as the Supreme Court, this court believes … that the present case involves defendants who were not engaged in commercial activity. It appears that persons endeavoring to disseminate political or religious information are protected by the Constitution, but those wishing to canvass an area for business purposes must yield to other considerations. The Supreme Court in *Breard* states that freedom of speech is not an absolute right, but must be adjusted to the rights of others. That right must yield whenever the attempt to exercise it is solely for the purpose of commercial profit.
>
> “This court believes that decisions relating to municipalities are equally applicable to Rossmoor, since it is in many essential regards a self-sufficient community. These

> officers may believe that it is their duty to protect the Rossmoor residents from annoying or obnoxious sales methods, but the court cannot allow the corporation to decide to bar what it knows to be a bona fide political endeavor."

In short, the courts have upheld constitutional rights over company towns and private communities. What about the affect of legislation or statutes depriving citizens of their rights in a private community?

C. Governmental Powers of Homeowners Associations

Several political scientists have argued that the homeowners association possesses governmental powers, making these association quasi-governments or private governments denying homeowners their civil rights by virtue of the private contract view of CC&Rs.

Professor Evan McKenzie writes in ***Privatopia: Homeowner Associations and the Rise of Private Government,*** 1994,

> "CIDs [HOAs/POAs/RCAs] currently engage in many activities that would be prohibited if they were viewed by the courts as the equivalent to local governments … 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".

Professor Robert J. Dilger writes in ***Neighborhood Politics: Residential Community Associations in American Governance***, 1992,

> "For example, most of those who advocate the formation of RCAs **assume** [emphasis added] that RCAs follow accepted norms of decision making that incorporate all the rights and privileges embodied in the US Constitution, including the right 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 **and mandated for all governments in the United States by the U.S. Constitution**" [emphasis added].

Barton & Silverman, editors of ***Common Interest Communities: Private Governments and the Public Interest,*** 1994, add, "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".

In the Foley case, mentioned earlier, the issue of unconstitutional delegation of governmental powers was raised before the courts. In his complaint, "plaintiff argued that the power to impose fines was restricted to the government" and raised questions as to constitutional issues, the first, whether the process used by the committee was "fundamentally unfair," and the second and third, addressing the claim of unconstitutional delegation of judicial power or police powers to private entities." The SC asked the Rhode Island Superior Court to rule on these claims.

In a similar case in Virginia, 1982, the Virginia Supreme Court ruled,

> "The accepted definition of "fine" is to impose a pecuniary punishment or mulct, to sentence a person convicted of an offense to pay a penalty in money, a pecuniary punishment imposed by lawful tribunal upon person convicted of crime or misdemeanor, a pecuniary penalty. **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 Constitutions of the United States and of Virginia. Neither can a fine be imposed disguised as an assessment.
>
> "The court held that "the Act [Virginia Condominium Law] did not grant the condominium association the power to impose fines to secure compliance with its bylaws, rules, and regulations. The statute permitting foreclosure by a condominium association due to nonpayment of fees and assessments was an unconstitutional delegation of judicial or police power"

D. The Question of Unconscionable Adhesion Contracts, Contract Validity and Good Public Policy

In all of the above discussion within this Chapter VIII, we took for granted the validity of the CC&R contract. However, there's a legitimate question as to the validity of the CC&Rs as an adhesion contract and in view of questionable marketing tactics; namely misrepresentation due to the failure to provide full information concerning the surrender of the buyer's rights upon signing the purchase contract only.

A very good opinion on the use of adhesion contracts is given in Pardee vs. Rodriquez, CA App Aug 2002, (for a detailed presentation see Part 3, Chapter VII above) that relates to "hidden clauses" that involve the surrender of a buyer's right to trial by jury. This instance involves a purchase and build out of a home. The court said,

> "Generally speaking, there are two judicially imposed limitations on the enforcement of adhesion contracts or provisions thereof. The first is that such a contract or provision which does not fall within the reasonable expectations of the weaker or 'adhering' party will not be enforced against him. The second — a principle of equity applicable to all contracts generally — is that a contract or provision, even if consistent with the reasonable expectations of the parties, will be denied enforcement if, considered in its context, it is unduly oppressive or "unconscionable**.** Subsequent cases have referred to both the 'reasonable expectations' and the 'oppressive' limitations as being aspects of unconscionability.
>
> "And the agreements in their entirety were contrary to the public policy against compelling homeowners to submit construction defect claims to alternative dispute resolution."

In the Foley case cited earlier, we have, "Such restrictions are very much in the nature of covenants running with the land, and they will not be invalidated absent a showing that they are wholly

arbitrary in their application, in violation of public policy, or that they abrogate some fundamental constitutional right."

The actions by the state with respect to the unquestioned use and widespread acceptance of these questionable marketing procedures as well as the unconscionable application of the adhesion contract with respect to the purchase of one's home falls squarely within the general scope of violations of the 14th amendment.

E. Supreme Court Tests for "State Actor" Designation

"State action may be found when private individuals or groups are endowed with governmental powers or functions because they in turn become state agencies or instrumentality's.

"The fact that property is private is not sufficient to justify the State's permitting a corporation to govern a community of citizens so as to restrict their fundamental liberties."

So said the 9th Court of Appeals in **Lee v. Katz, 2002**

Additionally, the US SC found in, **Brentwood Academy v. Tennessee Secondary School, 1999**:

> "We have, for example, held that a challenged activity may be state action when it results from the State's exercise of "coercive power," when the State provides "significant encouragement, either overt or covert," or when a private actor operates as a "willful participant in joint activity with the State or its agents,
>
> "We have treated a nominally private entity as a state actor when it is controlled by an "agency of the State," when it has been delegated a public function by the State ... we have found a private organization's acts to constitute state action only when the organization performed a public function; was created, coerced, or encouraged by the government."

With state legislatures creating statutes that:

1. interfere with the HOA private contract,
2. act to deny homeowners living in HOAs their Constitutional rights,
3. are strongly biased to provide benefits to the HOA, giving it powers and rights that are unique and singular to the HOA as compared to other nonprofit corporations,

then we have a definite case of "coercive power" and "significant encouragement, either overt or covert", by the legislature. Furthermore, no one disputes the fact that HOAs possess public functions, although they are not a government, a political entity, by law.

F. State Government Protection of Homeowner Associations

The Supreme Court, **Shelley vs., Kraemer, 1948**, considered several cases in regard to violations of civil liberties (minority person's rights to purchase real estate) and the application of the 14th Amendment to restrictive covenants, referencing other cases. The question of the applicability of the 14th Amendment is directly linked to acts by the state and not acts by private parties. In other words, by entering into a private agreement, either party may violate the constitutional provisions on civil liberties.

The Justices wrote, "Here the particular patterns of discrimination and the areas in which the restrictions are to operate, are determined, in the first instance, by the terms of agreements among private individuals. Participation of the State consists in the enforcement of the restrictions so defined … But here there was more. These are cases in which the purposes of the agreements were secured only by judicial enforcement by state courts of the restrictive terms of the agreements." The question became one of, To what degree does the actions the state or state agency deprive citizens of the equal protection of the law?

The Justices cite the **Virginia vs. Rives case, 1880**, and the **Trust & Savings v, Hill case, 1930**, writing,

> "The Court observed: 'A State acts by its legislative, its executive, or its judicial authorities. It can act in no other way…. This Court pointed out that the Amendment makes void 'state action of every kind' which is inconsistent with the guaranties therein contained, and extends to manifestations of 'state authority in the shape of laws, customs, or judicial or executive proceedings.' Language to like effect is employed no less than eighteen times during the course of that opinion.
>
> "The federal guaranty of due process extends to state action through its judicial as well as through its legislative, executive, or administrative branch of government.'

In short, the state courts or any agency, such as the real estate department, or the attorney general are bound to uphold the 14th Amendment's equal protection of the law and its due process prohibitions.

Getting to the heart of the matter of state enforcement of restrictive covenants, the Justices state,

> "We are called upon to consider whether enforcement by state courts of the restrictive agreements in these cases may be deemed to be the acts of those States…. We have no doubt that there has been state action in these cases in the full and complete sense of the phrase. The undisputed facts disclose that petitioners were willing purchasers of properties upon which they desired to establish homes. The owners of the properties were willing sellers; and contracts of sale were accordingly consummated. **It is clear that but for the active intervention of the state courts, supported by the full panoply of state power, petitioners would have been free to occupy the properties in question without restraint."** [emphasis added]

> "We hold that in granting judicial enforcement of the restrictive agreements in these cases, the States have denied petitioners the equal protection of the laws and that, therefore, the action of the state courts cannot stand.
>
> "The Constitution confers upon no individual the right to demand action by the State which results in the denial of equal protection of the laws to other individuals. And it would appear beyond question that the power of the State to create and enforce property interests must be exercised within the boundaries defined by the Fourteenth Amendment."

These private governments that have been created, maintained and protected by the state governments much in the same way the United Nations has setup, maintained and protected countries as UN Protectorates. It has been my argument, supported by other homeowner rights advocates, that the HOA model or concept is a defective product that required the real estate special interests to resort to various legal arguments and self-serving statutes in order to make these governments accepted to the public, much like these UN Protectorates could not stand on their own without the support of others.

In the Arizona Appeals Court, (2 CA-CV 2001-0198), an opinion was given that bears directly on the issue of the delegation of legislative powers. The court said, "The legislative authority of the State shall be vested in the Legislature . . . **. it is a well established theory that a legislature may not delegate its authority to private persons over whom the legislature has no supervision or control**.

"The legislature cannot abdicate its functions or subject citizens and their interests to any but lawful public agencies, and a delegation of any sovereign power of government to private citizens cannot be sustained nor their assumption of it justified."

George K. Staropoli
Citizens Against Private Government HOAs
http://pvtgov.org
pvtgov@cs.com

March 2003