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## Getting the Feds involved in HOA reforms

As apparent from the Illinois Supreme Court opinion[1] favoring HOAs, the Feds need to get involved. However, the Feds, like state attorney generals, have no specific authority to get involved – HOA/condo states are state laws, except for those federal laws like the American Disabilities Act and Fair Housing.

There are no outcries, no demonstrations, no rallies, no national media coverage, and no national HOA reform organization. There is only Community Associations Institute! Why would a Congressman, the US Attorney General or a state legislator get involved in HOA reforms?

A broader approach is necessary in order to wake up the Feds, and that can come about by an appellate or US Supreme Court case decision on 1) violations of a homeowner's constitutional rights, or 2) a violation of the 14th Amendment's equal protection clause brought under federal law § 42 U.S.C. 1983, Civil action for deprivation of rights. This approach would be similar to the whistle blower law suits of Erin Brockovich or Jeffrey Wigand (tobacco nicotine is addictive).

### Constitutional Rights

CAI and Prof. McKenzie have argued that homeowners living in an HOA do not have any constitutional rights, because they voluntarily waived or surrendered those rights under the CC&Rs private contract. (This holding of a voluntary waiver is subject to challenge, but is not discussed here. See HOA Common Sense, No. 4: Consent to be governed).

Now, it may come as a surprise to many, but our constitutional rights have been subject to a number of Supreme Court decisions. Under the landmark Footnote Four and Footnote Four Plus decisions, your constitutional rights amount to 1) the first 10 amendments[2], 2) privacy as implied from the first amendment[3], and 3) specific Court selected[4] 'fundamental rights' derived from the

9th Amendment's holding that the unenumerated rights of the Constitution belong to the people. (Like HOA reform legislation, it's on a case by case basis).

State courts have upheld free speech rights and flag flying rights as a free speech right. Legislation is presumed constitutional unless challenged in court, where the challenger must make a strong showing that the statute violates the constitution. (Forget about the legislative Rules Committee that is merely a show-piece committee).

There are three main levels of tests of constitutionality that must be passed, referred to as "judicial scrutiny," ranging from the state showing an absolute necessity ("strict") to a general government interest ("rational"). *Equal protection* challenges must succeed in showing that the statute is applied selectively to a class of people, not just a few persons. The definition of the class can be challenged as invalid.

For example: Are all homeowners in HOAs a valid class of homeowners who are treated all alike and therefore represent a valid classification? Or is separating HOA homeowners from all homeowners, HOA or not, a valid classification? What is the government interest in HOA statutes to warrant the denial of the equal protection of the laws? What is the compelling and necessary justification for these HOA statutes? Does this interest create state actors?

**Waiver or surrender of constitutional and other rights**

It is well established legal doctrine that the waiver of constitutional rights must be voluntary and explicitly stated.

> [T]he common-law contract principle that a contract will be enforced unless the interest promoted by its enforcement is outweighed by the public policy harms resulting from enforcement. . . . The contractual waiver of a constitutional right must be a knowing waiver, must be voluntarily given, and must not undermine the relevant public interest in order to be enforceable.
>
> Even under the unconstitutional conditions doctrine, the condition that a person give up his constitutional rights is balanced against the government's interest in promoting the efficiency of public services.

(*Lake James Community v. Burke County*, No. 97-1815 (4th Cir. 1998)).

Nowhere in the HOA governing documents will you find such an explicit waiver of rights. What you see is various covenants that say what the homeowner cannot do, such as free speech prohibitions, ex post facto amendments, due process agreements, etc., but no explicit "I hereby understand and voluntarily waive my rights regarding . . . ."

## Equal protection of the laws (14th Amendment)

For our purpose here, I consider the 14th Amendment's prohibition against actions by a state that "*deprive any person of life, liberty or property without due process of law*" and "*deny to any person . . . the equal protection of the laws*". (The other applicable prohibition found in this amendment is to not "*abridge the privileges and immunities of citizens of the United States.*")

42 USC 1983[5] provides a remedy for deprivation of constitutional rights when that deprivation takes place "*under color of any statute, ordinance, regulation, custom, or usage*" of a State. To succeed on a 42 U.S.C. § 1983 claim, a plaintiff must show that the violative conduct *"was committed by a person acting under the color of state law*" and that the "*conduct deprived a person of rights, privileges, or immunities secured by the Constitution or laws of the United States."*

> The general rule in equal protection analysis is that state action [court enforcement, for example] is presumed to be valid and will be sustained if the classification drawn by the state is rationally related to a legitimate state interest. . . . Rational-basis review requires a two-step process. First, one must identify "a legitimate governmental interest" . . . . Second, one must determine whether a "rational basis exists to believe that the legislation would further the [government interest]."

(*City of Mayfield Hgts v. Woodhawk Club*, No. 98-4163 (6th Cir. 2000)).

The definition of "acting under the color of state law" requires that the defendant have exercised power *"possessed by virtue of state law and made possible only because the wrongdoer is clothed with then authority of state law*." In other words, the homeowner must sue because he was "deprived of rights *secured by the United States Constitution or federal statutes"* in a prior court proceeding and have lost.

> Section 1983 of the Civil Rights Act provides a way individuals can sue to redress violations of federally protected rights, like the First Amendment rights and the Due Process Clause and the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution.[6]

## Getting the Feds involved

As a very good analogy, in my view, let's look at 1954 *Brown v. Bd. of Education* decided by the US Supreme Court. *Brown* was a landmark civil rights case that overturned 58 years of the "separate but equal" doctrine of the 1896 *Plessy v. Ferguson* Supreme Court decision. Plessy was an "equal protection" violation of the 14th Amendment regarding segregation. *Brown* was a consolidation of 5 class action cases supported by a national nonprofit organization.

This comparison is noteworthy because in Brown the Supreme Court broke its own precedent. Addressing the "separate but equal" doctrine in education and using research studies, the Court held that, *"Whatever may have been the extent of psychological knowledge at the time of Plessy v. Ferguson, this finding is amply supported by modern authority and any language to the contrary in Plessy v. Ferguson is rejected."*

In *Spanish Court* however, while the appellate court broke with bad precedent, the IL Supreme Court defended its opinion, recognizing precedent. "*The appellate court acknowledged that its holding placed Illinois in the small minority of jurisdictions*" (¶ 7). It did not look at the broader political and social aspects of HOA-Land as *Brown* looked at the changes in society over some 50 years.

The current incarnation of HOAs began in 1964, some 50 years ago, with *The Homes Association Handbook*.[7] HOA reforms have another 8 years to go before we can hope to equal the *Brown* decision.

**References**

[1] See IL Supreme Court holds HOAs "are a creature of statute," and not contractual.

[2] *US v. Carolene*, 304 Us 144 (1938) (Footnote Four. The 9th and 10th amendments are questionable).

[3] *Griswold v. Connecticut*, 381 US 479 (1965).

[4] *Planned Parenthood v. Casey*, 505 US 833 (1992). (Footnote Four Plus).

[5] 42 U.S.C. § 1983 provides:

> Every person who under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, Suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

[6] Enforcement Act of 1871 (third act), *Wikipedia* (April 9, 2014).

[7] See Analysis of The Homes Association Handbook.