January 27, 2011

By George K. Staropoli
george@pvgov.org

Restoring Constitutional Laws and Removing Legislative Sanctions of Invalid HOA Acts: Arizona SB 1148 & SB 1170

There are two Arizona bills dealing with substantive, constitutional HOA reforms: SB 1170, the issue of who controls public streets, and SB 1148, the restoration of due process protections for homeowners by means of an independent tribunal adjudication of HOA disputes. Legislators need to understand the constitutional aspects of these bills and, by the failure of the Legislature to act, the sanctioning of HOA actions that are invalid, unconstitutional, or against public policy. "Sanctioning," as used in the courts, is the statutory permission to act in a manner that the legislature does not deem illegal. The chief example of this sanctioning is the use of the word "may" in the statutes. While not a compulsory order by the Legislature, it is nevertheless a statement that any such acts are not illegal. A second common example of sanctioning, the error of omission, is the refusal to enact statutes to declare certain acts as illegal.

The crux of the opposition to these bills, with their "equal application of the laws" issue, has been the popular cry of protecting individual rights, specifically in regard to "freedom of contract" and "no government interference." The more elegant opposition can be stated by a quote from the Dec. of Indep.: "*governments are instituted among men, deriving their <u>just powers</u> from the consent of the governed.*" The opposition would have legislators believe that this is the end all of the Constitution. They believe that the HOA constructive notice "contract" is sacrosanct, untouchable, and there is no need for a "Truth in HOAs" law similar to other consumer protection laws, like truth in lending and truth in advertising. However, the special consideration given to the HOA industry by pro-HOA, no homeowner protections legislation, and the unconscionable adhesion contract nature of the CC&Rs — with its implicit and non-existent surrender of the homeowner's rights, freedoms, privileges and immunities — can easily be seen as a violation of The Arizona Constitution :

1. **Article II. Declaration of Rights**

   (a) Section 2. All political power is inherent in the people, and governments derive their just powers from the consent of the governed, and <u>are established to protect and maintain individual rights.</u>

   (b) Section 4. <u>No person shall be deprived of life, liberty, or property without due process of law.</u>

(c) Section 13. No law shall be enacted granting to any citizen, class of citizens, or corporation other than municipal, privileges or immunities which, upon the same terms, shall not equally belong to all citizens or corporations.

(d) Section 32. The provisions of this Constitution are mandatory, unless by express words they are declared to be otherwise.

2. Article XIII. Municipal Corporations

(a) Section 6. No grant, extension, or renewal of any franchise or other use of the streets, alleys, or other public grounds, or ways, of any municipality shall divest the state or any of its subdivisions of its or their control and regulation of such use and enjoyment; nor shall the power to regulate charges for public services be surrendered; and no exclusive franchise shall ever be granted.

The safe-guarding of one's individual rights, as required by Art. II, Section 2 of the Arizona Constitution, in a complex society with competing and opposing assertions of individual rights is accomplished under the state's police powers, as stated in its constitution itself, the statutes, and the administrative code. The complete reading of the partial Decl. of Indep. assertion above reveals the omitted opening phrase, *"That to secure these rights governments are instituted . . . ."* A clear reference to restrictions and limits that define "just powers." The legitimacy of a government, under political philosophies of a democracy, lies in its just and fair laws. There are no absolutes!

The Arizona Legislature has continually avoided any explicit constitutional delegation of legislative powers to homeowners associations under a misplaced emphasis on an inviolate, sacrosanct HOA contract, which has been explicitly stated from time to time by legislators in various committees over the years. HOAs have been implicitly permitted to function as de facto, but unrecognized private HOA political governments, under the false argument that HOA governing documents are sacrosanct, thereby allowing persons to write any private contract to create a political government, circumventing constitutional protections. While laws exist to regulate HOAs, they do so in the areas of an intertwinement into the operations of the HOA, and with a specific denial of homeowner constitutional protections. These laws create unconstitutional special laws and an unconstitutional classification of citizens:

1. "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." (Emmett McLoughlin Realty v. Pima County, 58 P.3d 39 (Ariz. App. Div. 2, 2002), ¶ 7). See also *Eubank v. Richmond*, 226 U.S. 137 (1912) and *Eastlake v. Forest City Entr., Inc*., 426 U.S. 668 (1976) (where private parties were denied the right to set zoning ordinances).

2. "The Legislature may not surrender its legislative authority to a body wherein the public interest is subjected to the interests of a group which may be antagonistic to the public interest." (*Salt Lake City v. Int'l Assn of Firefighters*, 563 P.2d 786, Utah 1977).

3. "The general form of the delegation doctrine is that delegations with standards will not be questioned in the courts, while open-ended delegations about basic social choices will be." (*Administrative Law*, Ammon and Mayton, eds., 2nd ed., Westgroup 2001).

With respect to SB 1148, it is a mockery of the law and an insult to the good people of Arizona for the Legislature to sanction the the HOA "after an opportunity to be heard" requirement, by statute, as meeting the constitutional criteria for a fair and just due process of law. Madison warns (The Federalist Papers, #10) that "*The smaller the society . . . the more easily will they [the members] concert and execute their plans of oppression* [against the other members]," and therefore heightened protection of homeowner rights is needed, not an abdication of those protections as we see with HOA governance. SB 1148, and its precursor, HB 2824 (2006) takes away the mockery of justice by the private HOA's adjudication of disputes, and gives it to the independent OAH tribunal with all its constitutional protections. The California appellate court ruling in Pinnacle, emphasis added, presents opinions with respect to opposition arguments of genuine consent, a valid consent, or a waiver or surrender one's right to constitutional due process protections under the "take it or leave it" CC&Rs.

> We conclude that an arbitration provision in a declaration of covenants, conditions and restrictions (CC&R's) recorded by the developer of the condominium project, which may not be changed by the association without the written consent of the developer, did not constitute an "agreement" sufficient to waive the constitutional right to jury trial for construction defect claims brought by the homeowners association. Additionally, assuming the homeowners association is bound by a jury waiver provision contained in purchase and sale agreements signed by the individual condominium owners, we conclude that the jury waiver provision in the purchase and sale agreements is not enforceable because it is unconscionable. (*Pinnacle Museum Tower Assn v. Pinnacle Market Development, LLC*, D055422, Cal. App. 4 Dist., July 30, 2010).

With respect to SB 1170, it is a bill that simply restates the law, much like HB 2774 (2010) that restated the law that government officials cannot be compelled to respond to statute constitutionality challenges. SB 1170 is a reminder that private entity HOA CC&R covenants running with the land (servitudes), bylaws, or rules and regulations that assume the authority of local government are not only invalid in accordance with legal doctrine, but are specifically held to be invalid under the Restatement of Servitudes (2000), Sec. 3.1:

> **Validity of Servitudes: General Rule.**
> A servitude . . . is valid unless it is illegal or unconstitutional or violates public policy.
>
> Servitudes that are invalid because they violate public policy include, but are not limited to:
> (1) a servitude that is arbitrary, spiteful, or capricious;
> (2) a servitude that unreasonably burdens a fundamental constitutional right;

The Arizona Legislature cannot continue to reject their obligations and duties under the Arizona Constitution by continuing to favor the private entity HOA legal scheme, or to sanction illegal or unconstitutional laws or acts contrary to public policy. Arizona legislators cannot in all conscience continue to resort to the indefensible arguments 1) that HOA contracts are the voice of the people in the general interest of society, and not in the interest of a small faction of the citizenry, and 2) that HOA contracts are sacrosanct and inviolate.

Both SB 1148 and SB 1170 must be put into law to restore Arizona under the rule of law and not under the rule of man.