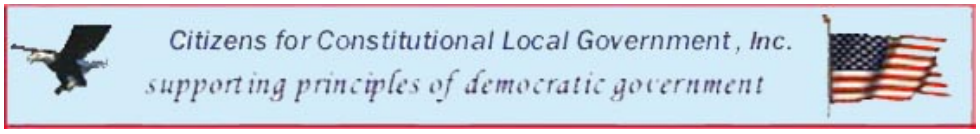

Homeowner associations: Ex post facto amendments, consent to be governed, and contracts to avoid the Constitution

By George k. Staropoli
October 23, 2007

Can we enter into a private contract to avoid the application of constitutional protections? It seems that this question has already been answered many times with a resounding YES when it comes to HOAs! Restating the question:

> **Can individuals contract to establish a governing body that controls and regulates the people within a territory, and avoid adherence to the US Constitution, by means of a contract that is contrary to and ignores the state municipality laws?**

The Constitution prohibits the "interference into contractual obligations"[1], and CAI and other pro-HOA supporters emphatically point to the contractual, private nature of the CC&Rs as justification to avoid constitutional protections for homeowners. However, while the state may under its police powers regulate contracts for the health, safety and general welfare of its citizens, the 14th Amendment and its requirements for due process and equal application of the laws applies only to public entities. HOAs are not public entities and have not been declared, at least not yet, state actors and subject to the 14th Amendment.

In order to restore constitutional protections to homeowners living in homeowner associations, the effects of its legal status, both in regard to existing state laws and the court application of the law to HOAs, must be examined. The failure to apply the protections of the Bill of Rights, in particular, the unequal application of the law and gross failures in due process protections, become quite evident even from a cursory analysis.

How has this state of affairs come to be? The HOA legal basis for the exclusion from the application of the 14th Amendment is the use of CC&Rs, the interpretation of CC&Rs as binding contracts -- but not contracts of adhesion -- and the equitable servitudes doctrine of "constructive notice". This legal basis to sidestep the Constitution raises serious questions regarding the unconstitutional surrender of fundamental rights.

There is the question of the genuine consent to be governed by HOAs. Does the posting of the Declaration of CC&Rs at the county clerk's office, known as "constructive notice" under the equitable servitude laws reflect genuine consent? Does constructive notice with its absence of explicit consent and full awareness satisfy the requirements for the surrender of constitutional

[1] "No state shall . . . pass any law impairing the obligations of contracts" (US Const., Art I, Sec. 10).

rights and freedoms? What due process level of judicial review[2] does "constructive notice" satisfy? Surely an explicit consent is necessary since the HOA is not a public entity. Yet the courts support constructive notice as legitimately binding the homeowner's consent to the surrender of his fundamental rights.

The question of genuine consent is raised in another area. Does an adhesion contract[3] reflect genuine consent by the "people", the homebuyers who enter into HOA-land?[4] What due process level of judicial review does an adhesion contract satisfy? Is the homeowner agreeing to the CC&Rs with full knowledge and without the stress of no other equal housing is available, especially when the municipality mandates only HOA housing? Yet the courts support the adhesion contract nature of CC&RS as legitimately binding the homeowner's consent to the surrender of his fundamental rights.

Supporters of HOAs point to the general consent doctrine **as applied to public governments:** if a person lives in the political jurisdiction, then he is assumed to have consented to be governed. (Pro-HOA supporters apply this same rationale with regard to adhesion contract criticism: no one forced him to buy in HOA-land). If people buy into HOA-land, then, it is argued, they consent to be governed as if the HOA were indeed a public entity and not subject to the restrictions of contract laws. Yet, HOA governance is not public governance, but contractual private governance. The contract cannot be avoided by such inappropriate application of general public entity functions and privileges, especially without the concomitant application of those laws and principles established to protect the people from the abuse of public government: the US Constitution, the Bill of Rights, and respective state constitutions and laws that are subservient to the federal laws. They do not exist in HOA-land constitutions.

The current day legal permissiveness to allow individuals to create, market, sell and contractually bind homeowners under governing regimes that escape state laws governing public governance is appalling. Our courts are saying that it is OK to create a principality, a city-state, independent of the laws to which public governments must obey. The effect of this permissiveness to grant special status to private governments above and beyond what our laws

---

[2] Strictly speaking, judicial review is "The power of the Supreme Court to determine the constitutionality, and, therefore, the validity of the acts of the other branches of government " (*Constitutional Law*, p. 1). This judicial review passes on to state courts in their review of legislation. In general, for the purposes of planned communities and laws creating unequal protections of the laws, there are two broad tests. The first is the classification of homeowners in or not in HOAs must show a "necessary or narrowly tailored [classification] to promote a compelling or overriding government interest" (p. 423). The second test, if a fundamental right is not involved, the legislation will be given deference if "the classification is rationally related to a legitimate end of government (p.423). No state has been challenged in court to justify its planned community statutes, nor have questions of appropriate tests of constitutionality been raised.

[3] "A standard form contract prepared by one party, to be signed by the party in a weaker position, usually a consumer, who has little choice about the terms." (Black's Law Dictionary).

[4] The court stated, "arbitration clauses in each of the Purchase Agreements . . . which are adhesion contracts . . . are unenforceable clauses because [they are] contrary to the reasonable expectations of the [purchasers] and under the circumstances are unconscionable". *Harrington v. Pulte Home Corp*., CA-CV 04-0576 (Ariz. App. Div.1 2005). "Procedural or process unconscionability is concerned with 'unfair surprise,' fine print clauses, mistakes or ignorance of important facts or other things that mean bargaining did not proceed as it should. Substantive unconscionability is an unjust or 'one-sided' contract. *Maxwell v. Fidelity Financial Services, Inc.*, 907 P.2d 51 (Ariz. 1995) (sale of solar heater under unconscionable contract). See *Pardee Construction v. Rodriquez,* Cal App 4th D039273 (2002) (adhesion contract; construction defects).

require of public governments. President Lincoln emphatically said NO, and held the union together! It appears that anything goes today.

Does it really matter? Many feel that it doesn't matter -- the people are free to do as they please. A striking example of the deviation from the laws of the land by HOA regimes, and the adverse effects on homeowners, can be found in the relatively uncontested constitutional restrictions on ex post facto laws[5]. Allowing such laws flies in the face of our beliefs in justice and fairness. To make an action or event that occurred in the past, legal at the time of occurrence, to become illegal and, as such, to place inequitable burdens and damages upon law abiding people is contrary to American values, beliefs and system of jurisprudence. Yet, this is a fairly frequent occurrence in HOA-land. Courts are permitting such amendments, without requiring a justification by the HOA for the retroactive amendment, that deny individual liberties for the benefit of the community. Many of these amendments constitute a "taking" of private property. (The HOA-land private government, its "constitution - the declaration of CC&Rs - provides for "laws" - the covenants - and ex post facto amendments to these covenants have been upheld as binding on all homeowners). This borders on placing socialist principles far above and beyond constitutional concerns and protections of individual rights and freedoms.

What is the current legal status of CC&R amendments? In general, with respect to valid CC&Rs and amendments, the courts have ruled:

1. La Eperanza (case ref. 4): When the HOA board filed a modified a duly approved amendment without another homeowner vote, the court ruled, *"[The amendment] was 'null and void' as an attempt to amend the declaration without meeting percentage approval requirement."* (Cited in Vales, case ref. 9).

2. In Wilson (case ref. 11), the Court stated,

> *"But, generally, to impose a restriction on a lot owner's use of the lot, the restriction must appear in the recorded declarations. See Shamrock v. Wagon [case ref 8]. If the recorded declaration does not contain or at least provide for later adoption of a particular restriction or requirement, that restriction or requirement is invalid."*
>
> *Consequently,* ***absent a specific authorization in the Declaration*** [emphasis added], *neither the Board nor a majority of the owners in Playa de Serrano has authority to restrict occupancy in the subdivision to persons fifty-five years of age or older*

And the court cites the Restatement Third, Property (Servitudes), § 6.7(3),

> ***Absent specific authorization in the declaration*** [emphasis added], *the common-interest community does not have the power to adopt rules, other than those [designed to protect*

[5] "No. . . ex post facto law shall be passed" (US Const., Art I, Sec. 9, applying to the federal government; "No state shall . . . pass any ex post facto law" (Art I, Sec. 10, applying to states). The use of retroactive HOA amendments is analogous to ex post facto laws and criminal penalties. The Supreme Court was not happy with attempts to evade the application of ex post facto laws aimed to punish innocent persons, and prohibited the "fashioning of a civil statute out of what is basically a criminal measure". (Constitutional Law, p. 463, footnote 73).

the common property], that restrict the use or occupancy of, or behavior within, individually owned lots or units.

3. In Evergreen (case ref 16), the Colorado Supreme Court ruled, *"[D]eclarations that allow for "change" or "modification" to covenants by majority vote [are] expansive enough to allow addition of covenant requiring membership in homeowners' association"*. And in Shamrock (case ref. 8),

> "For the reasons that follow, we hold that mandatory membership in a new homeowners' association can only be imposed on owners of lots within an existing subdivision by recording deed restrictions to that effect."

4. In the 2006 Armstrong (case ref. 18), the North Carolina Supreme Court held that unspecific, broad amendments were invalid,

> Because we determine that the amendment to the declaration *sub judice*, which authorizes broad assessments "for the general purposes of promoting the safety, welfare, recreation, health, common benefit, and enjoyment of the residents of Lots in The Ledges as may be more specifically authorized from time to time by the Board," is unreasonable,

5. In Nahrstedt (case ref. 12), the California court spoke of public policy and the enforcement of covenants,

> *Indeed, giving deference to use restrictions contained in a condominium project's originating documents protects the general expectations of condominium owners* ***"that restrictions in place at the time they purchase their units will be enforceable."*** [emphasis added] . . . *Ellickson, Cities and Homeowners' Associations (1982) 130 U.Pa. L.Rev. 1519, 1526-1527 [stating that association members "unanimously consent to the provisions in the association's original documents" and courts therefore should not scrutinize such documents for "reasonableness."].)* ***This in turn encourages the development of shared ownership housing*** [emphasis added] *--generally a less costly alternative to single-dwelling ownership--by attracting buyers who prefer a stable, planned environment. It also protects buyers who have paid a premium for condominium units in reliance on a particular restrictive scheme.*

With the above background on the validity of CC&Rs, there remains the question of the validity of CC&R amendments (as Nahrstedt touches upon, but avoids), their application to all non-consenting members, and the argument that there must be only one controlling CC&R document. The Nahrstedt opinion appears to place the original CC&Rs as a binding contract, to be enforced forever. This is the heart of the ex post facto amendment fallacy that is contrary to our values of fairness and legality, and resorts to a strict contractual nature of HOA-land governance. In short, what was illegal for our governments to do is acceptable within HOA

governments, in spite of the issues raised earlier of legitimate consent to surrender fundamental and civil rights.

6. In the subsequent 2004 Villa de las Palmas opinion (case ref. 15), the question of subsequent amendments to the "binding" CC&Rs is addressed by the California court, which seems to be doing an about face.

> *We conclude that under the plain and unambiguous language of [the California Davis-StirlingAct], **use restrictions in amended declarations recorded subsequent to a challenging homeowner's purchase of a condominium unit are binding on that homeowne**r, are enforceable via injunctive relief under section 1354, subdivision (a), and are entitled to the same judicial deference given use restrictions recorded prior to the homeowner's purchase.* [the amended CC&Rs prevail] [emphasis added]

> ***To allow a declaration to be amended but limit its applicability to subsequent purchasers would make little sense*** [emphasis added]**.** *A requirement for upholding covenants and restrictions in common interest developments is that they be uniformly applied and burden or benefit all interests evenly. (See, e.g., Nahrstedt, supra, 8 Cal.4th at p. 368 [restrictions must be "uniformly enforced"]; Rest.3d Property, Servitudes, § 6.10, com. f, p. 200.) This requirement would be severely undermined if only one segment of the condominium development were bound by the restriction. It would also, in effect, delay the benefit of the restriction or the amelioration of the harm addressed by the restriction until every current homeowner opposed to the restriction sold his or her interest.* ***This would undermine the stability of the community, rather than promote stability as covenants and restrictions are intended to do.*** [emphasis added].

The court attempts to justify its rationale with,

> *One reason for this is because amendment provisions are designed to "prevent a small number of holdouts from blocking changes regarded by the majority to be necessary to adapt to changing circumstances and thereby permit the community to retain its vitality over time." (Rest.3d Property, Servitudes, § 6.10, com. a, p. 196.)* ***Subjecting owners to use restrictions in amended declarations promotes stability within common interest developments.*** [emphasis added].

And what about enforceable binding contracts? The important question here was avoided: did the homebuyer agree with the court presumption that his overriding factor in buying into HOA-land was to uphold all original CC&Rs, so as not to "undermine the stability of the community" as cited in Nahrstedt (5) above? Or did the homeowner believe that he was buying his home, his very own private property? It is well established that upholding the laws in existence at the time of the act or incident seems to be working and acceptable in the public domain, where grandfather clauses serve to protect the harmony of the society as a result of subsequent amendments to the laws. Why is there is separate law for HOAs that is contrary to our legal system?

Given the above court pronouncements relating to explicitly worded and stated powers and the reasonableness of covenants, the supposition by the courts that this concern for the general welfare was, and is, the overriding factor in the purchase of a home in HOA-land. In effect, this presumption by the courts makes the CC&R binding contract a meaningless piece of paper, subject to change without the homeowner's explicit consent to the specific provisions of the amendment in question. Are the CC&Rs a binding contract or a vague piece of paper subject to the acts of third parties, the other members of the HOA?

It is quite clear that our judicial and political system of government frowns on ex post facto laws. Yet, why are they permitted within HOA-land? Are ex post facto amendments reasonable? Are they contrary to good public policy?

The court, in order to legitimize the ex post facto amendment, had to proclaim that there was genuine consent to any and all amendments, under an assumed understanding and agreement by the homebuyer that the communal benefit requires only one "constitution". And that the homeowner had further agreed, therefore, to the surrender of his contractual rights as contained in the CC&Rs that were in effect at the time of his purchase. And further, that the homeowner does not believe that individual rights and freedoms are the basis of our society. These are very broad presumptions not supported by any real evidence.

It appears that the courts have placed themselves in an untenable position in its attempt to maintain the HOA legal and social system, and realize that the HOA legal structure is defective and contrary to American principles of government, justice and fairness. The legal basis supporting the contractual, private HOA government regimes must be challenged in the courts. And, We the People must do it.

<u>Case Law references</u>

Federal

1. *Cleburne v. Cleburne Living Center* 473 US 432 (1984) (requirement to show reasons for restricting liberties).
2. *Holden v Hardy* 169 US 392 (1898) (property rights subject to public good)
3. *Lochner v. New York* 198 US 45 (1905) (police power & general welfare; right to contract is fundamental).

State

4. *La Esparanza Town Home Association, Inc. v. Title Security Agency of Arizona*, 689 P.2d 178 (Ariz. App. 1984) (covenants must apply equally to all members).
5. *Harrington v. Pulte Home Corp.,* CA-CV 04-0576 (Ariz. App. Div.1 2005) (adhesion arbitration contract).
6. *Riley v. Stoves*, 526 P.2d 747 (Ariz. App. Div. 2 1974)(covenants; equal protection; reasonableness; state action).
7. *Maxwell v. Fidelity Financial Services, Inc.*, 907 P.2d 51 (Ariz. 1995) (sale of solar heater under unconscionable contract).
8. *Shamrock v. Wagon Wheel Park Homeowners Ass'n*, 206 Ariz. 42, ¶ 14, 75 P.3d 132, 135 (App. 2003).

9. *Vales v. Kings Hill*, CA-CV 04-0816 (Ariz. App. Div. 1 2006) (validity of amendments).
10. *Westwood Homeowners v. Tenhoff* 745 P 2d. 976 (Ariz. App. Div. 1 1987) (covenants against public policy; group homes).
11. *Wilson v. Playa de Serrano*, CA-CV 2005-0072 (Ariz. App. Div. 2 2005) (restricting fundamental property rights requires specific notice of possible restrictions).

12. *Nahrstedt v. Lakeside Village Condominium Association* 878 P.2d 1275 (1994) 8 Cal.4th 361 (covenants & public policy; arbitrary; reasonable).
13. *Pardee Construction v. Rodriquez* Cal App 4th D039273 (2002) (adhesion contract; construction defects).
14. *Rancho Santa Fe v. Dolan-King* (2004) D040637/D041486 Cal App (restrictions for good of community).
15. *Villa de Las Palmas v. Terifaj* CA SC S109123 (2004) (amended restrictions are binding on all)

16. *Everygreen Highlands Association v. West*, 73 P.3d 1 (Colo. 2003) (amendment to require mandatory HOA).
17. Maatta et al v. Dead River MI App No. 248848 (2004) (amending CC&Rs without unanimous consent).
18. *Armstrong v. Ledges Homeowners Ass'n, Inc.*, 633 S.E.2d 78 (N.C. 2006) (affirmative covenants; reasonable amendments; too broad a purpose not reasonable).
19. *Bryan v. MBC Partners* 541 SE 2d 124 (2000) (HO may waive constitutional rights; signs)
20. *Covered Bridge Condo Assn. V. Chambliss*, 705 S.W.2d 211 (Tex. App. 14th Dist. 1985) (reasonable covenants are not unconstitutional; age restrictions).

Secondary Authority

1. *Black's Law Dictionary*, (West Group, 7th ed. 1999).
2. *Constitutional Law*, Novak & Rotunda (West Group, 2000).

George K. Staropoli is the President and Founder of Citizens for Constitutional Local Government, Inc. He is not an attorney. For more information, see http://pvtgov.org and http://pvtgov.wordpress.com.