

Citizens Against Private Government HOAs, Inc
5419 E. Piping Rock Road, Scottsdale, AZ 85254-2952
602-228-2891 / 602-996-3007
pvtgov@cs.com <http://pvtgov.org>

The Role of the FHA in Planned Communities

March 2003

Thanks to Arizona's CAI lobbyists who tried to find a device to prohibit the removal of HOA foreclosures, I am investigating the role of the Feds and the FHA/HUD requirements for mortgage insurance. The requirements to notify the lender (regarding CC&R modifications) and the 20 - 30 year minimum life of the HOA (can't dissolve for a minimum period) always rubbed me wrong.

So, here's my first look into this topic, taken from Evan McKenzie's historical record on homeowners associations, *Privatopia: Homeowners Associations and the Rise of Residential Private Government* and Robert J. Dilger's *Neighborhood Politics: Residential Community Associations in American Governance*.

In the 1960s, the overwhelming public interest served by promoting and encouraging HOAs was to reduce the land development costs, since land was becoming scarce, so they said. This resulted in smaller lots on the same acreage, as compared to the traditional suburban detached home, so a higher home density could be achieved.

Higher density was needed since so much land had to be set aside in this given development acreage for common areas; and to keep the equivalent same number of units in the development. In other words, lower development costs with the same or increased sales prices on the same number of units, providing the developers with improved profits.

The FHA steps in with guidelines for obtaining mortgage insurance; that is, protect FHA from the development turning into a blighted area with the loss of value to the lender.

The FHA manual required:

- an automatic-membership nonprofit homes association with the power to enforce protective covenants running with the land
- an association charge on each lot to assure sufficient funds and to provide adequate safeguards against undesirable high charges
-
- give the homeowner voting rights

In 1963, Byron Hanke, later to help form CAI in 1973, influenced FHA to insure a PUD in California that was incapable of getting insurance. The above manual was instrumental in getting mortgage insurance for the developer. Hanke then used this manual to sell PUDs to America. He found his mission in life that didn't include consideration of democratic systems of governance.

However, academics were not too pleased with developments and criticism that homes associations looked like private governments emerged. Stanley Scott argued, p 93,

"The FHA-ULI [Urban Land Institute, a private organization created as The Real Estate Foundation] policy would bring about excessive control of thousands of inhabitants by private associations manipulated by developers [...] All in the interest of manipulating property values.

"He points out that the twin devices of restrictive covenants and homeowner associations 'favor the interests of the developer and lender in almost every way' and anticipates that 'uniform and national application of such policies [...] could be most unfortunate'."

Forty years later and the problems are here with us. And in 1973 CAI was formed to deal with problems with HOAs.

Dilger echos this role of the Feds with,

"The RCA's CC&Rs [...] are written to conform to guidelines issued by lenders such as FHA, VHA, FHLMC and Fannie Mae [...] Lenders are particularly interested in assuring that the RCA has sufficient funds to maintain the common properties ... As a result they generally require very specific assurances in the CC&Rs that the RCA has the authority to collect reasonable assessments [...] that RCAs have in place procedures to deal with delinquent assessmants"

What we have here is a question of good public policy. Is it good public policy to promote the private interests of the real estate industry and to impose restrictions that cause the loss of our constitutional rights, the denial of the equal protection of the laws, and the loss of our freedoms and liberties as citizens living in America have the right to expect?

I think not, since there are alternative means to achieve these goals without homeowners being treated as second class citizens. Where does it say in the Constitution that it's the government's obligation to provide this form of housing?

The Lender's PUD Rider to your Deed

Have you ever read your PUD Rider to your deed, those that have such a document now becoming standard here in Arizona? Do other states have this rider, too? Another hidden business purpose over the rights of homeowners.

Check Item "E", that also puts restrictions on your property rights, and those of the HOA since the board members are also bound by this rider.

E. Lender's Prior Consent.

Borrower shall not, except after notice to Lender and with Lender's prior written consent, either partition or subdivide the Property or consent to:

- (i) the abandonment or termination of the PUD, except for abandonment or termination required by law in the case of substantial destruction by fire or other casualty or in the case of taking by condemnation or eminent domain;
- (ii) any amendment to any provision of the "Constituent Documents" if the provision is for the express benefit of Lender; [?? benefit of Lender? Suppose it hurts the lender then it's OK??]
- (iii) (iii) termination of professional management and assumption of self-management of the Owners Association, or; [kick backs from special interests involved here?]
- (iv) (iv) any action which would have the effect of rendering the public liability insurance coverage maintained by the Owners Association unacceptable to Lender.
- (v) Item (ii) seems to require that the Lender's written agreement be obtained for almost any change to the CC&Rs and bylaws. How many persons are in breach of contract with their lender for this reason?

Item (iii) seems to say that professional management is preferred over self-management without specifying any level of qualifications or expertise of the so-called management firm. Maybe if they were licensed by the state this would have some meaning.

Did you know that you had your lender as part of the "team" that you are answerable to? I believe all these provisions can be thrown out in court as against the public interest, as an example of a lack of due process because the homeowner is surrendering rights for what consideration? A loan? The lenders would have to show cause for this requirement, othewrwise NO FEDERAL INSURANCE. (AHA!)

This is another example of legislative powers surrendered to private organizations and of government agencies stepping outside their legal authority. What expertise does the lender or HUD have in requiring a management company, or in not allowing for the termination of the PUD? What is their justification for these requirements and are they in the best public interest, or just cooperation with the developers?

FHA, beginnings and policy (from Stabile's, Community Associations, a book funded by CAI and ULI)

FDR created FHA in 1934 to help out home buying during the depression. It's function was to insure mortgage loans and make housing more available to many more people than would otherwise obtain housing. The reason is that the lenders would take a bigger risk knowing that any default would be covered by one of several FHA insurance programs. It was a successful use of government powers to help its citizens and "to promote the general welfare".

As part of its procedures to insure mortgages, FHA established in 1938 a land planning division that worked with developers. Stabile writes,

"Critics of the FHA insist that the real estate industry captured it early in its existence and used it to foster a particular approach to land use planning. Marc Weiss, for example,

argues that land developers and politicians designed the FHA to aid a particular form of private housing construction, the planned subdivision. Through its underwriting standards, the FHA indirectly set a national zoning policy that large scale developers had long wanted. It [FHA] set conditions under which it would insure a mortgage."

In 1959, community associations were just starting to show themselves. The FHA, under Andre Faure and Byron Hanke [later to form CAI] authorship, addressed community association CC&Rs with a manual that included,

"In developments where adequate public maintenance of park areas, streets or other facilities is not available, it is advisable to establish a property owners' maintenance organization with adequate powers [...] to assess the benefiting property owners at a reasonable rate and to collect such assessments. Establishment of a property owners' association is also advisable to provide an effective means of obtaining adherence to protective covenants".

The question is: Should this goal of more housing be allowed to deny homeowners their equal protection of the laws and the loss of civil liberties, several of which were only reaffirmed through US Supreme Court cases. The depression ended in 1941.

The FHA set the pattern for developers, CAI, real estate agents and state governments to ignore our guarantees of justice, our fundamental freedoms and the Bill of Rights.

FHA and ULI cooperate to promote HOAs

In my first post on this topic I wrote about the publication by the FHA of a manual, co-authored by Byron Hanke. Some background is necessary to understand this effort to promote HOAs. The following is according to Stabile in *Community Associations*.

In 1962 Hanke left his position at FHA and went to work for ULI [formerly the Real Estate Foundation] along with FHA funds for a study on HOAs. The first publication, *Planned Unit Developments with Homes Association (1963)*, from this study was a 64 page brochure that promoted HOAs and was a hit with the developers and **local government agencies** [my emphasis]. It focused on the niceties of planned developments with all those amenities and design layouts and landscaping.

It also set out the requirements for qualifying for FHA insurance. Stabile writes, "The FHA brochure further set **legal** [my emphasis] absolutes for a CA to qualify for FHA insurance". It required "an automatic-membership nonprofit homes association" and assessment charges to take care of the common area maintenance. This was just the start by FHA and ULI to promote HOAs.

In 1966 a much more thorough publication of some 422 pages, *The Homes Association Handbook*, known as TB50, was released. "Its intent "was to serve as a guide to the development and conservation of residential neighborhoods with common open space facilities privately owned and maintained by property-owners associations". It presented findings and conclusions from a study that included, "**Difficulties occurred with**

'boards that did not represent the whole community' or that degenerated into extremes of 'dictatorial leadership' or 'overly permissive leadership' [and this was 1966].

This publication became the bible for developers, offering solutions to problems uncovered by their study. Stabile states, "**They [HOAs] exhibit a combination traits in keeping with their being a consumer product sold by a profit-seeking firm, a legal device, a corporation reliant on both coercive powers and voluntary cooperation**"

After producing TB50, Hanke returned to the FHA where he continued to promote "the new land-use intensity as applied to CAs".

Yet, we still had the critics "**of this collaborative effort [finding] this an unhealthy alliance between government and business to promote CAs to unwary consumers. As evidence they cite mounting complaints about CAs that accompanied their rapid growth**".

CAI comes to the rescue

With the continued problems facing attempts by FHA, ULI and NAHB (National Association of Home Builders] to mass market the planned community approach to profits, land-use intensity and affordable housing, another organization was needed to help run these mandatory associations. Enter CAI in 1973.

Stabile writes,

"Negative reports of these problems began appearing in the press, and advocates for CAs worried that bad publicity would halt this innovative approach to housing. Because of complaints [...] Congress had planned federal legislation. **The CAI opposed the legislation that would bring about federal regulation, arguing that state legislation would be more effective.**"

As part of its early efforts, CAI produced brochures that spoke of protecting the investment and enhance the value of the property and the "swift, judicious enforcement of master regulations", because "an important thing to remember about a community association is that it is a business". It had initial success, but by the late 1980s problems once again were cropping up.

In a retreat of CAI members to go over these problems in 1989, respondents said,

-- "CAI [prior to becoming a trade group in 1992 it was an educational organization] is a professional organization and not a consumer group; that it was never intended to be a consumer group."

- "CAI [was viewed] as a consumer organization teaching consumers how to sue builders"
- -- membership was only 1% of the total market of HOAs
- In 1992 with problems still facing CAI as a utopian organization representing 5 different groups, CAI was falling apart. It became a trade

group dominated by attorneys and management firms and a strong lobbying organization.

Stabile writes, " **Critics of the CAI charge that it has become a trade organization and cite its lobbying activity as one example of why a trade association approach is not beneficial for CA members.**"

My comments:

1. FHA's initial involvement was with providing mortgage insurance to help families buy homes.
2. It quickly became entangled with land use planning and heavily promoted the planned community subdivision approach for developers.
3. In order to make this concept work, the use of highly restrictive CC&Rs and homeowner associations with mandatory membership and compulsory fees was required, using the mortgage insurance argument.
4. FHA set the pattern for the onerous CC&R restrictions and undemocratic associations whose goal was to enforce the restrictions and thereby maintain property values, protecting their security interest. The corporate form of governance was necessary because they could not count on democratic processes protecting their security interests.
5. No where was there any significant concern for the political and governmental aspects of these private organizations, and the loss of fundamental freedoms. HOAs were a business, a very good business to the special interests.
6. While deliberately keeping the public in the dark, unwary home buyers sold their rights for pretty landscaping and misleading images of carefree and resort living.
7. CAI was created to help educate homeowners and board members, but has failed in this 30 year undertaking because of the very nature of the HOA -- it is defective and contrary to fundamental American principles and values.