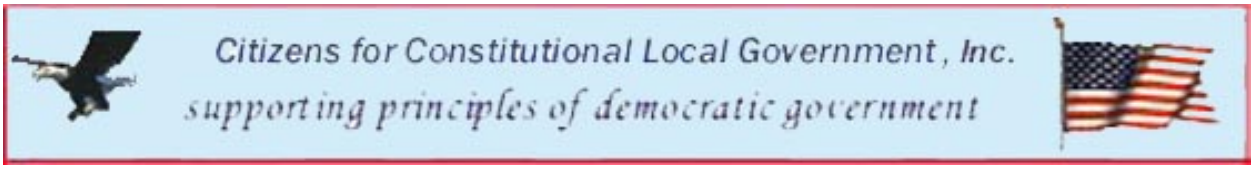

Homeowners Associations:

Covenants as Private Contractual Agreements to Succeed from Constitutional Local Government

May 2008

George K. Staropoli

Can the people contract to form a private government to bypass the Constitution?

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May 26, 2008

By: George K. Staropoli

Summary
In the *Goldwater Institute Daily* email release of May 22, 2008, author Nick Dranias specifically opposes Arizona HOA reform bill SB1162 on the basis of contractual interference, stating, *"If freedom of contract means anything in this state, it means that we shouldn't all suffer together when the state overreaches in deciding what's best for us*". Yet the bill seeks to apply existing contract law to HOAs. In response to a request for assistance from the Institute for Justice in 2002,

> "You are of course correct that members of homeowner associations have fewer rights than others-but only because they exercised essential rights in the first place, namely freedom of contract and voluntary association. To the extent that individuals entered into such contracts without full disclosure or appreciation of the consequences, that is a matter of contract law, not constitutional law."

And in *Cain v. Horne* (Arizona school vouchers),

> To be sure, even the system of free markets recognizes some limitations upon the principle of consent in ordinary contracts between private individuals. Duress, force, misrepresentation, undue influence, and incompetence may be used to set aside contracts that otherwise meet the normal requirements of offer, acceptance, consideration, and consent.

My argument, to make my position clear, is not against "freedom to contract", but the "freedom from contract", as imposed by statutes that ignore the bona fide consent to be governed by the homeowners. It is against the special laws and the granting of special immunities and privileges that the state has either explicitly granted to homeowners associations, or has refused to protect the public from unforeseen and unwanted consequences, such as the loss of rights and privileges enjoyed by those not living in HOAs.

SB1162 must be made into law in order to level the litigation playing field, and to protect private property rights in support of "equal justice under the law", including homeowners living in HOAs.

Goldwater Institute believes that homebuyers freely consent to be governed by authoritarian regimes known as HOAs

In the *Goldwater Institute Daily* email release of May 22, 2008[1], author Nick Dranias specifically opposes Arizona HOA reform bill SB1162 on the basis of contractual interference, stating, *"If freedom of contract means anything in this state, it means that we shouldn't all suffer together when the state overreaches in deciding what's best for us*". Yet the bill seeks to apply existing contract law to HOAs. Is Goldwater saying that private contracts supersede all other considerations, like the equal application of the law? Dranias argues that, *"Because the relationship between homeowner associations and their members is a voluntary contract, any law that overrides that relationship violates this principle"* without establishing any basis to support the claim of a fully informed and explicit voluntary consent to be governed.

In a dogmatic defense of preferred principles, Dranias elevates the disjointed clause in Art. I, section 10 of the Constitution above and beyond the other fundamental rights, especially those enumerated in the Preamble that defines the purpose and intent of the Constitution: *"to establish justice, insure domestic tranquility . . . promote the general welfare, and to secure the blessings of liberty . . . ."* In fact, the contract clause does not even mention the words "interference" or "private" ("No state shall . . . pass any . . . law impairing the obligation of contracts . . . .") These words are found in the earlier Northwest Treaty Ordinance of 1787 (adopted on July 13th while the Constitution was finalized on September 17th of 1787), which explicitly stated certain reasonable assumptions that are ignored in any qualification of the sanctification of contracts in the Goldwater email release. The Northwest Treaty states (emphasis added),

> "Art 2nd. . . . And in the just preservation of rights and property, it is understood and declared, that no law ought ever be made . . . that shall, in any manner whatever, interfere or affect private contracts or engagements, bona fide, and without fraud, previously formed."

Notice that the simple words "bona fide" and "without fraud" always go unmentioned by the public interest firms proclaiming the sanctity of contracts. And this is precisely the argument being made not only by this writer and other advocates, but also by other recognized constitutional scholars and attorneys. (See the paragraph on a national debate below).

In response to a request for assistance from the Institute for Justice in 2002, it's VP at the time, now the Director of the Goldwater Center for Constitutional Law, Clint Bolick, replied,

> If people decide to form a voluntary community - to use your term, a private government -they should have wide latitude to establish governing rules (emphasis added).
>
> You are of course correct that members of homeowner associations have fewer rights than others-but only because they exercised essential rights in the first place, namely freedom of contract and voluntary association. To the extent that individuals entered into such contracts without full disclosure or appreciation of the consequences, that is a matter of contract law, not constitutional law.

And, in regard to this "wide latitude", what level of due process notice should be required to surrender one rights, privileges and immunities under the Constitution? Surely not vague and imprecise covenants, or "agreements to agree", all of which would invalidate an otherwise bona

fide contract? Or, the filing of the "agreement" at the county clerk's office? While there are numerous laws restricting the right to agree, in the name of good public policy to protect the general welfare, such as truth in advertising, truth in lending, equal employment, fair housing, etc, it appears that Goldwater opposes any protections when people are implicitly agreeing to surrender their rights to a homeowners association form of government.

Is it good public policy and in the best interests of the people not to provide protections for persons unwittingly succeeding from the state and becoming subject to a separate body of laws inconsistent with state municipality statutes? Does Goldwater believe in the Constitution, or does it interpret the Constitution so as to hold the freedom of unrestrained contract, with respect to homeowners associations, superior to all other rights and freedoms granted by the Constitution?

Today, some 6 years later, Bolick argues for judicial activism based on doing justice, and not on conservative or liberal philosophies (see his recent book, *David's Hammer*[2]). Bolick comments on an instructional movie on eminent domain, The Castle, apply equally well to the HOA problem, when he speaks about the plot,

> Only then do the families realize how few rights they have and how easily those rights can be taken away by voracious governments acting on behalf of favored interests[3] . . . . Too often real people when faced with government oppression have no idea how to fight back. They lack the time, the resources, or the experience to organize the community toward political action. They do not have the money to hire lawyers.[4]

Similarities exist between eminent domain and the HOA legal scheme of private governance. It's not too difficult to argue that the differences relate to a direct taking in the case of eminent domain, and an indirect taking in the case of the HOA legal scheme. Pro-HOA statutes allow private organizations to do what the legislature cannot do directly by the mere existence of a statute using the word "may" as opposed to "may not", The word "shall" directly mandates an action, and the word "may" indirectly allows an action. "May" grants permission to the HOA to choose to perform an act that is held not in violation of the law; "may not" denies this permission. And the court reminds us that the "legislature may not do indirectly what it cannot do directly."[5]

These pro-HOA statutes contain questionable provisions that mimic many of the standard provisions of the private CC&Rs agreement, raising questions of due process violations and the unequal protection of the laws. For example, the right to foreclose for debts owed the HOA for amounts far in excess of the debt owed the association, and for which the HOA had not advanced funds or incurred actual damages as would be in the case with mortgage lenders; the removal of homestead protections for HOA debts under a statutory lien, and a questionable consent to the home as security for the payment of assessments; and due process failures in regard to independent tribunals with the right to confront and question witnesses, and failures to post the HOA "crimes" and punishments.

In addition to concerns for homeowner justice, these pro-HOA statues raise the specter of "unconstitutional conditions" especially with respect to mandated homeowners associations.

> Where the "state has absolute discretion to grant or deny a privilege or benefit, it cannot grant the privilege subject to conditions that improperly 'coerce,' 'pressure,' or 'induce' the waiver of constitutional rights." And when there is no

mandating of HOAs, the question of limiting government police powers with respect to voluntary consent can still be addressed.

Why should there be any limitation at all on a system of government power that rests on the actual consent of the individuals whose rights are thereby abridged? To be sure, even the system of free markets recognizes some limitations upon the principle of consent in ordinary contracts between private individuals. Duress, force, misrepresentation, undue influence, and incompetence may be used to set aside contracts that otherwise meet the normal requirements of offer, acceptance, consideration, and consent. But none of these conventional grounds accounts for the doctrine of unconstitutional conditions, which comes into play only after all these conventional hurdles to consensual union have been overcome. [6] (Emphasis added).

EX POST FACTO AMENDMENTS

SB1162 also seeks to prohibit ex post facto amendments to the CC&Rs, just as the Constitution prohibits ex post facto amendments. Yet, Goldwater ignores this provision in the bill. Is Goldwater saying that the CC&Rs that permit subsequent revisions to the declaration contract without the homeowner's explicit consent constitute a valid contract? Or, that it's a valid private "taking" of a homeowner's private property? Is the CC&R contract really sacred, or is it just a meaningless piece of paper given that the law currently enforces ex post facto CC&Rs amendments? Can a bona fide, valid contract be found in "an agreement to agree", which best characterizes the open-ended CC&R amendment process, permitted and supported by the courts? Which is it? A sacred contract or a meaningless piece of paper? Or, does Goldwater believe in separate Constitutions for private governments?

How much “wide latitude”, to use Bolick’s words again, should the people be permitted in order to form their own private governments that stand in stark contrast to the US Constitution? These private constitutions create authoritarian governments with a single fixed objective to maintain property values, reflecting a single-minded concern for financial returns. They offer no protection of those rights and freedoms that Goldwater, and other public policy organizations, cherish, defend and protect. Goldwater’s position seems to do an about-face when it allows the individual rights of homeowners to be so readily surrendered by implicit consent and unjust property, not constitutional, laws. And if there’s a conflict between property and constitutional laws, does Goldwater also support the property law comment that, “The question whether a servitude unreasonably burdens a fundamental constitutional right is determined as a matter of property law, and not constitutional law”? [7]

As for implicit consent, does living and remaining in an HOA, as defenders of the “implicit consent” argument often use, rise to the level of necessary and sufficient consent to be governed by these authoritarian private governments? First, the pro-HOA defenders are once more using public government attributes and ascribing them to the private, contractual HOA government, where there is no basis in the agreement to support this “living amongst” argument. HOAs are not de jure public governments.

Second, constitutional scholar Randy Barnett doesn’t think so either. He explains this “consent to be governed” theory,

> One consents to obey the laws of the land because one has chosen to live here. Just as you are bound to obey your employer (within limits) . . . you are bound to obey the commands of the lawmaking system in place where you have chosen to live. . . . So long as you chose to remain, you have "tacitly" consented to obey the laws." Call it the "love it or leave it" version of consent.[8]

While explicitly saying, "I consent" is unambiguous, Barnett argues that,

> Simply remaining in this country, however, is highly ambiguous. It might mean that you consent to be bound by the laws . . . or it might mean that you have a good job and could not find a better one [elsewhere] . . . or that you do not want to leave your loved ones behind. It is simply unwarranted that to conclude from the mere act of remaining . . . that one has consented to all and any of the laws thereof.[9]

Those rights being surrendered include such fundamental rights as due process protections and the equal protection of the law. In its 2006 Policy Report[10], the Goldwater Institute argues for the interpretation of the Arizona Constitution based on an adherence to "fundamental principles". Section 1 of Article 2, Declaration of Rights, states that *"frequent recurrence to fundamental principles is essential to the security of individual rights and the perpetuity of free government."* Article 2 contains more rights than just the right to contract freely from government interference.

This dogmatic defense of freedom to contract by the public interest groups and pro-HOA supporters, such as the national lobbying organization, Community Associations Institute (CAI)[11], has played a major role in the establishment and acceptance of the New America of HOAs. These authoritarian contractual governments exist pursuant to their "constitutions" with their "state" objective of maintaining property values. These constitutions exclude, omit, and are devoid of a concern for the protection of individual and property rights so staunchly defended by Goldwater and other public interest groups. Constitutions that are quite opposed to and foreign to the America of our Founding Fathers.

A QUEST FOR "EQUAL JUSTICE UNDER THE LAW"

My argument, to make my position clear, is not against "freedom to contract", but the "freedom from contract"[12], as imposed by statutes that ignore the bona fide consent to be governed by the homeowners. It is against the special laws and the granting of special immunities and privileges that the state has either explicitly granted to homeowners associations, or has refused to protect the public from unforeseen and unwanted consequences, such as the loss of rights and privileges enjoyed by those not living in HOAs.

I ask, whose job is it to protect one faction of the population from another faction? To protect the homeowner against the powerful special interests? If not the government, then who? A major concern by the Founding Fathers for the proper functioning of a democracy was their concern for the tyranny of the majority and the tyranny of the legislature that fails to ignore the rights of the minority.[13] In our current times this quest for equal justice for all was well expressed by the President of the American Bar Association,

> It is important that from time to time we pause to consider whether our system of justice is truly available. Nothing is more essential to the health and sanctity of

> our democracy than the accessibility by all Americans to the judiciary. A nation with the finest judges, most capable counsel, most enlightened laws, and most far-reaching civil rights is nevertheless flawed if access to that country's court system is limited to just a very few.[14]

Appendix A is a copy of an email containing a sample of court opinions in regard to CC&Rs, membership in HOAs, and how CC&R amendments are binding on all homeowners, even without a homeowner's explicit consent. It is hard to image that a homeowner under a true bargain give-and-take agreement would accept such an arrangement.

The opposition to SB1162 by the Goldwater Institute with its single-minded focus on freedom to contract is disturbing in its failure to recognize the history, evidence to the contrary, and legal environment of homeowners associations. (See Appendix B, References, below).

SB1162 must be made into law in order to level the litigation playing field and to protect private property rights in support of "equal justice under the law", including homeowners living in HOAs.

A CALL for a NATIONAL DEBATE

There is an urgent need, following the lead from a comment made by an Arizona senator in regard to a predecessor bill, HB2724, that *"this bill tries to correct the ills of society"* (it died in the Rules Committee), to address these HOA problems. It is estimated that some 18.8% of the population in 2005 lived under a homeowners association regime, which is a greater percent of the population than either that of the Black (13.8%) or Hispanic (14.8%) minority groups.[15]

It's well beyond the time for a national debate on the HOA problem by public interest firms. Aside from the public interest constitutional lawyers, there are a number of attorneys presenting rguments favorable to homeowner rights advocates. To name a few: Steven Siegel (Twin Rivers amicus author and author of several current articles), David Kahane (AARP Bill of Rights), Frank Askin (ACLU of Twin Rivers fame), and even McKenzie (his 1994 statements in his book, *Privatopia*).

As frequently raised in litigation, there are material differences of fact and the application of the laws to warrant, in the interest of justice, such a national debate based on appropriately conducted, unbiased studies and research.

Appendix A. Court Opinions

Here are a few cases on this important issue of HOA "takings" without consent.

In response to the Goldwater position on SB1162, one would conclude that homeowners voluntarily, and with full consent, agree to be governed by each of the following court opinions. Understand that what has happened here, and continues to happen. The courts are making new law by there opinions. And when there are so many "surprise" opinions, how can Goldwater offer that simplified opinion on a bill before the AZ legislature? What, ignorance of the law is no excuse?

*Shamrock v. Wagon Wheel Park Homeowners Association***,** No. 1 CA-CV 02-0403 (**Ariz.App.Div**.1 08/26/2003) (imposing mandatory HOA on existing subdivision).("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".) [However, one issue was the validity of an amendment making the association a mandatory membership HOA.]

"As a general rule, the acceptance by the grantee of a deed containing covenants to perform is binding upon him". [Do deeds "contain" covenants, or just a reference? Do they say "the CC&Rs are incorporated into the deed"? Does the purchase contract say, "the CC&Rs are hereby incorporated into and are a part of this purchase contract"?]

But, as to CC&Rs with amendment procedures:

Maatta v. Dead River, 689 N.W.2d 491(MI App 2004) (non-uniform amending CC&Rs without unanimous consent).

""where a deed restriction properly allows a majority, or a greater percentage, of owners within a particular subdivision to change, modify or alter given restrictions, other owners are bound by properly passed and recorded changes in the same manner as those contained in any original grant and restriction. . . . Because we find that the trial court erred by holding that defendant could, by supermajority vote, revoke a restrictive covenant regarding one particular lot, we reverse."

And did you know that,

"Historically, restrictive covenants have been used to assure uniformity of development and use of a residential area to give the owners of lots within such an area some degree of environmental stability. To permit individual lots within an area to be relieved of the burden of such covenants, in the absence of a clear expression in the instrument so providing, would destroy the right to rely on restrictive covenants which has traditionally been upheld by our law of real property."

There goes private property rights in this socialistic land. Property rights supersede constitutional rights regarding consent to surrender one's rights.

Villa de Las Palmas v. Terifaj Cal. SC S109123 (2004) (**amended restrictions are binding on all**).

Everygreen Highlands Association v. West, 73 P.3d 1 (Colo. 2003) (amendment to require mandatory HOA**). Living dangerously in HOA-land.**

"In 1995, a majority of the members of the Evergreen Highlands homeowners association voted to amend the subdivision's protective covenants. The amendment added a new article to the covenants which: (1) required all lot owners to be members of the association; (2) allowed the association to assess mandatory dues against all lot owners to pay for the maintenance of common areas of the subdivision; and (3) granted the association the power to impose liens on those lots whose owners failed to pay their assessments. . . . The court holds that the addition of the new article to the covenants falls within the permissible scope of the modification clause of the original Evergreen Highlands covenants. The court also holds that, even in the absence of an express covenant, the declarations for Evergreen Highlands were sufficient to create a common interest community by implication with the concomitant power to impose mandatory dues on lot owners to pay for the maintenance of common areas of the subdivision.

OSCA Development v. Blehm, E032843, Cal. App 4th, DIV 2 (2003) (**Desert Crest case**; validity of CC&R amendments with non-unanimous approval). READ how homeowners can be liable for consequences not reasonably anticipated or expected at the time of purchase -- anything goes.

"In resolving this question, we conclude that the association adopted the amendment in accordance with the governing documents. The amendment, which required club membership and the payment of fees, benefited the homeowners by increasing their property values and providing access to the recreational facilities. Because we conclude that article 19 was a covenant running with the land, OSCA was entitled to enforce its Lien for unpaid assessments."

Appendix B. References

A Bill of Rights for Homeowners in Associations: Basic Principles of Consumer Protection and Sample Model Statute, David A. Kahne, AARP Public Policy Institute, #2006-15, July 2006. (Cites *The Case Against State Protection of Homeowners Association,* George K. Staropoli, Infinity Press, 2003 in footnote 104).

Brief of Amicus Curiae AARP, Steven Siegel, Franco A. Munoz and Susan Ann Silverstein, in *Comm. For Better Twin Rivers v. Twin Rivers Homeowners Assn.,* 929 A.2d 1060 (N.J. 2007). (Opinion on constitutional rights and quasi-government; free speech in HOA issue).

Common Interest Communities: Private Governments and the Public Interest , Barton & Silverman, eds, Institute of Governmental Studies Press, Univ. of California, Berkeley, 1994. (Numerous research studies on homeowners associations).

Community Associations: The Emergence and Acceptance of a Quiet Innovation in Housing, Donald R. Stabile, Greenwood Press, 2000. (Partially funded by ULI and CAI).

The Constitution and Private Government: Toward the Recognition of Constitutional Rights in Private Residential Communities Fifty Years After Marsh v. Alabama, Steven Siegel, William & Mary Bill of Rights Journal 461 (1998) Volume 6, Issue 2, Spring 1998, pages 461-563. (A comprehensive analysis of HOAs as state actors).

Fortress America: Gated Communities in the United States , Blakely & Synder, Brookings Institute, 1999.

The Homes Association Handbook, Technical Bulletin 50, The Urban Land Institute, 1964. (The manual serving as the ”bible” for the creation, acceptance and mass merchandising of the current version of planned communities. Available from the research division of ULI).

Neighborhood Politics: Residential Community Associations in American Governance, Robert J. Dilger, New York University Press, 1992.

Privatopia: Homeowners Associations and the Rise of Residential Private Government, Dr. Evan McKenzie , Yale University Press, 1994. (Highly cited seminal work on homeowners associations and private governments).

The Public Role in Establishing Private Residential Communities: Towards a New Formulation of Local Government Land Use Policies That Eliminate the Legal Requirements to Privatize New Communities in the United States, Vol. 38 Urban Law Review, (Fall 2006)**.**

Trust and Community: The Common Interest Community as Metaphor and Paradox, Paula A Franzese and Steven Siegel, p. 1111-1157, The Missouri Law Review, vol. 72, 2007. (Article critical of homeowners associations).

Endnotes

[1] *Regulating HOAs Violates Freedom of Contract*, Nick Dranias, The Goldwater Daily Report, May 28, 2008, (http://goldwaterinstitute.org/AboutUs/ArticleView.aspx?id=2204).
[2] *David's Hammer: The Case for an Activist Judiciary*, Clint Bolick, Cato Institute 2007.
[3] Id., p. 157.
[4] Id., p. 158.
[5] *Cain v. Horne*, CA-CV 2007-0143, Ariz. App. Div.2, May 15, 2008), citing *Crozier v. Frohmiller*, 179 P.2d 445, 447 (Ariz. 1947) (constitutionality of school vouchers).
[6] *The Supreme Court 1987 Term: Unconstitutional Conditions, State Power, and the Limits of Consent*, Richard A. Epstein, Harvard Law Review, November 1988.
7 *The Restatement Third, Property: Servitudes*, § 3.1, Comment h, p. 359.
[8] *Restoring the Lost Constitution: The Presumption of Liberty*, Randy E. Barnett, p. 17, Princeton University Press, 2004.
[9] Id, p. 19.
[10] *Defining the Fundamental Principles of the Arizona Constitution: A Blueprint for Constitutional Jurisprudence*, Goldwater Institute Policy Report No. 214, November 1, 2006, , Benjamin Barr and Dorothy D. and Joseph A. Moller (http://goldwaterinstitute.org/AboutUs/ArticleView.aspx?id=1167).
[11] CAI took a boader stance on the interference of the courts in regard to homeowners associations: "In the context of community associations, the unwise extension of constitutional rights to the use of private property by members (as opposed to the public) raises the likelihood that judicial intervention will become the norm, and serve as the preferred mechanism for decision-making, rather than members effectuating change through the democratic process.", *Committee For A Better Twin Rivers v. Twin Rivers Homeowners Association (TRHA)*, Docket No. C-121-00, NJ Appellate Div. of the Superior Court, 2004. In regard to "the democratic process", CAI argues that the right to vote is the sole requirement for a democacry, "Community associations are not governments — many years of legislation and court rulings have established that fact beyond a reasonable doubt. Yet they are clearly democratic in their operations, electing their leadership from among the homeowners on a periodic basis. . . ." See CAI Ungated blog entry of April 2, 2008 (http://cai.blogware.com/blog/_archives/2008/4/2/3616608.html). Ignored are the other "ingredients" of a true democracy: separation of powers, checks and balances, and a concern for individual rights, all absent from HOA "constitutions".
[12] *The Structure of Liberty: Justice and the Rule of Law*, Randy Barnett, p. 92, Oxford University Press 1998. "Freedom of contract" is explained as having two components: "the right of freedom *to* contract and the right of freedom *from* contract. Freedom to contract holds that persons may consent to legally enforceable [contracts]; freedom from contract holds transfers of property rights should not be imposed upon them without their consent."
[13] See generally, *The Federalist Papers*, No. 10 and 78.
[14] Robert E. Hirshon, *Equal Justice as an American Quest*, Law Day Chair's Message, Law Day Planning Guide, May 1, 2002 (http://www.abanet.org/publiced/lawday/guide2002.pdf May 25, 2008).
[15] *Memorial Day: American soldiers are defending a New America, one without democratic protections*, George K. Staropoli, HOA Constitutional Government website (http://pvtgov.wordpress.com/2007/05/28/memorial-day-american-soldiers-are-defending-a-new-america-one-without-democratic-protections/). Estimates are based on data from Community Associations Institute and the US Census.