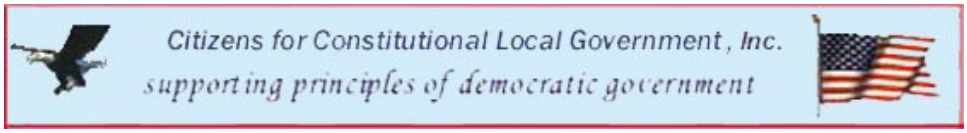

Contracts, the Constitution, and the consent to be governed

> "That to secure these rights, governments are instituted among men, deriving their just powers from the consent of the governed, that whenever any form of government becomes destructive of these ends, it is the right of the people to alter or to abolish it, and to institute new government, laying its foundations on such principles, and organizing its powers in such form, as to them shall seem most likely to effect their safety and happiness." Decl. of Independence

Given this belief in the legitimacy of government, where do contractual private agreements called CC&Rs fit into our American form of government? This question raises two very important unanswered questions that are fundamental to whether or not the US Constitution remains the supreme law of the land. Are HOAs indeed a form of governance? Do CC&RS reflect a bona fide consent to be governed?

The special interests do not want these issues addressed and debated. However, CAI has made its position on the Constitution as the supreme law of the land in its amicus brief to the NJ appellate court in the Twin Rivers HOA free speech case. It warned the court about *"the unwise extension of constitutional rights to the use of private property by members"*. It feared that judicial intervention would "*serve as the preferred mechanism for decision-making, rather than members effectuating change through the democratic process."* Which raises a third serious issue of the unregulated behavior of a group of people unanswerable to the laws of the land, justifiable because any changes would occur under an alleged democratic process. And, of course, outside the constitutional protections of homeowner rights.

Until these issues are addressed, legislatures will continue with quick fixes to try and make these private constitutions look like the US Constitution, and they will continue to fail in their efforts. Here, I will deal with the simpler of these issues, the consent to be governed.

The validity and legitimacy of the HOA board has been advanced by the special interests on the basis that homeowners chose to live in an HOA and could have freely chosen to do otherwise, and that they are free to leave the HOA if they are not happy. (I will ignore, for the moment, the ever-increasing mandatory HOA requirements of planning boards). This basis is a misguided application of the arguments with respect to public governments, where residents are deemed to have freely consented to be governed by the laws of the state and municipality by living and remaining within their jurisdictions. Where there is no need for them to be given the statutes and ordinances to explicitly give their consent to be governed.

How does a person exhibit his consent to be governed? Constitutional scholar Randy Barnett explains this theory of consent,

> 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.[1]

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.[2]

As for the argument that one is bound by the outcome of the voting process in place where one lives, failing to vote is taken as a tacit agreement to be governed by the outcome of the vote. Barnett argues that is not a real choice, a real consent, if there is no opportunity to register an explicit "I do not consent" vote. The implication of allowing such an alternative is obvious in regard to consent to be governed and, in good conscience, to obey the law.

In regard to majority rule, the mantra of HOAs, Barnett writes,

> For a law is just and binding in conscience, if its restrictions are (1) necessary to protect the rights of others, and (2) proper insofar as they do not violate the preexisting rights of the persons on whom they are imposed.
>
> Every freedom restricting law must be scrutinized to see if it is necessary to protect the rights of others without improperly violating the rights of those whose freedom is being restricted. In the absence of actual consent, a legitimate lawmaking process is one that provides adequate assurances that the laws it validates are *just* in this respect.[3]

However, let us not forget that these theories apply to public government and not to private contractual government, as are homeowners associations. Are we to ignore the legally binding covenants that create not public government under state or municipality laws, but create corporate government? And what evidences "consent" in the contractual arena? Contract law 101, with its requirements for a meeting of the minds, a bargain and exchange process, with disclosure of the facts material to the decision-making process.[4] But, unfortunately, not even these laws prevail in the HOA arena. It's the laws of equitable servitudes and its constructive notice doctrine of posting to the county recorders office, without any need to read, initial or sign one's consent to be so bound by the CC&Rs that prevails.[5]

It's an interesting side note that the word "equitable" has been stricken from the Restatement of Laws in the Third edition that contains the common laws on servitudes and covenants. Also, please note that the Arizona Realtor purchase contract is a huge nine-page document of over 500 lines, not including several addendums that may be attached to the contract, where the buyer is required to initial each page as well as adding his signature. The other "binding contract", the

Declaration, is ignored in the purchase process and left to the buyer's due diligence under a "caveat emptor" philosophy.

What are some of the other facts that support this unjust treatment of the good people of Arizona? It's hard to imagine a willful consent to the following:

1. The CC&Rs are imposed on the homeowner by profit seeking developers in what amounts to an adhesion contract – take it or leave it – with all the powers to the HOA.

2. Why is there this 25 or 30-year prohibition on terminating the declaration, amounting to indentured servitude and definitely not permitting the expression of the will of the people? Could it be as a result of the initial mass merchandising of HOAs back in 1964 in order to get builders to build planned communities? The FHA still requires this feature to protect it loans, so goes the special interest argument, but the developer is gone in 5 – 10 years. Why the 30 year requirement? The developer's lenders were paid in full very quickly and there is no justification whatsoever for this prohibition.

3. Do you really believe that a homeowner has freely consented to have his home foreclosed on by his HOA when the HOA is not in the position of a lender that has advanced any funds to the homeowner? And, at the same time, the homeowner is not permitted to withhold funds while the HOA is permitted to continue in any dispute over payments that have not been resolved, a clear violation of the FDCPA. Did he fully agree to this?

4. Do you really believe that the homeowner fully agreed to be bound by ex post facto amendments that are not allowed under the state constitution?

5. Or that he has willfully granted a gift to the HOA of his homestead exemption rights that could amount to $150,000?

If your answer to these questions is a "Yes", then you have a very negative and demeaning view of the citizens. Your views would reflect a dumb and stupid citizenry that seeks to "put one over" on the HOA and to get out of a binding agreement. It supposes a citizenry more knowledgeable and informed than many legislators or attorneys, and that they understand the consequences and impact of agreeing to the declaration. And, obviously, there would be no need to consumer protection pamphlets or brochures to alert homebuyers to the fact that the HOA government is not at all like public government, and that the homeowner cannot look to his government for any protection of his rights.

The Legislature cannot hold that there is genuine consent to be so governed. The Legislature cannot continue to believe and to hold that this is a fair and just treatment of the people of Arizona. To use the words of Florida Representative Julio Robaina as directed to an HOA attorney before his committee, *"While what you've done may be legal, it is morally and ethically wrong. And we will make changes to the law to correct it."*

I ask, "Who is protecting the rights and freedoms of the people of Arizona"? Has any homeowner come forth, who is not a director or officer of an HOA, and has wholeheartedly

agreed with the special interest lobbyists who are all so willing to give the legislators a helping hand? In whose interests are do these lobbyists come before you? Surely not the HOAs, since HOAs are not permitted to be members of CAI since 2005. Whose interests, then, are they speaking for?

Legislators must decide whether homeowners associations are subject to either contract laws or to municipality laws. As the elected representatives of the people under the state and federal constitutions, there is only one answer – a municipal government under the just laws of the State of Arizona. Allow me to paraphrase a speech by that Illinois Congressman,

> "A house divided cannot stand. We are more than a collection of condo and homeowners associations. We are, and always will be, the United States of America. Maybe Arizona doesn't have to be run by lobbyists anymore. Maybe the voice of Arizonans can finally be heard again. Homeowners are tired of being disappointed, and tired of being let down, and tired of hearing promises being made . . . and nothing changed. We have to choose between change and more of the same." (Barack Obama's Super Tuesday Speech).

Who is protecting the rights and freedoms of the homeowners?

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[1] *Restoring the Lost Constitution: The Presumption of Liberty*, Randy E. Barnett, p. 17, Princeton University Press, 2004.
[2] Id, p. 19.
[3] Id, p. 44-45.
[4] It is interesting to note that the Contracts Clause of the US Constitution contains neither the word "private" nor "interference". However, it does carry with it the presumption explicitly expressed in an Act passed by the Continental Congress at about the same time as the Constitution was written, The Northwest Ordinance of 1787. This Act dealt with the governance of the territories northwest of the Ohio River that were not part of the then existing colonies. In Art. 2nd, its version of the contract clause reads: "And in the just preservation of rights and property . . . no law ought to be made . . . that shall . . . interfere with or effect private contracts or engagements, *bona fide*, and without fraud, previously made."
[5] See generally, *Restatement Third, Property (Servitudes)*, and in particular Sec. 3.1, Validity of Servitudes, General Rule, and Chapter 6, Common-Interest Communities.