Http://pvtgov.org

By George K. Staropoli

george@pvtgov.org

Rejecting a Bad Bill: HB 2441 (Arizona)

Opinion

This bill should not be heard in any committee!

It is contradictory and confusing, and ideal for attorney involvement in the expected challenges to the interpretations of the statutes. Also, it is definitely aimed at destroying any vestige of democratic governance in homeowner and condo associations. This bill denies access to the courts.

Introduction

The Carpenter Hazlewood Delgado & Wood blog of Jan. 18, 2011, written by Scott Carpenter, "HB2441 – CC&R Amendments," argues: *"This change would enable community association to change their documents without onerous approval requirements that count a failure to participate as a 'no' vote."* (Emphasis added). The exercise of the democratic right to vote and to protect one's private property is considered "onerous" by the CAI Legislative Action Committee co-chair, Scott Carpenter.

Carpenter's Dec. 17, 2010 letter, titled "Bad Documents," to CAI lobbyist DeMenna proposed a change in the laws. The letter includes HB 2441, verbatim, under the title "Easier to Amend Bad Documents." This bill did not originate with the bill's sponsors, but from the CAI lobbying organization that supports not you, the homeowner, but that legal corporate person known as the HOA. The Sponsors are just the vehicle doing CAI's bidding.

The title of the bill itself simply reads: "homeowners' associations; declaration amendments," and the bill extends well beyond just changing the voting requirements to amend the CC&Rs. Some of these changes are good for homeowner protection, but are offset by the draconian attack on homeowner property rights. CAI argues, in Carpenter's letter to DeMenna, that the proposed voting procedure is just like public voting laws, but fails to provide the necessary public government protections, and ignores the legal fact of the private contract in operation here, the CC&Rs agreement. HB2441 is another top-down imposition of government interference, which otherwise in instances involving the protection of homeowner rights, is vehemently opposed by CAI.

As you read this bill, remember that the courts take the everyday meaning of the words used, and if not clear, or seemingly contradictory, the court will look to intent. Courts have held that if word "x" was

not actually stated, then the drafters should have included word "x" if that was their meaning or intent. Read the bill carefully as written, and think how your opponent could challenge the wording in the courts.

Analysis (please follow along with a copy of the bill to better understand the analysis)

1. Subsection "A" under condo statutes listing a number of statutory exceptions. These all pertain to special conditions: Leaseholds, boundary alignment, eminent domain, subdividing and termination of the condo. It also ignores the lender's rights as set forth in the PUD rider attached to every homeowner's deed.

2. Changes to subsections "A" are dangerous. The changes make the declaration's amendment procedures controlling, period. In other words, if a statute does not apply, the voting procedure in the declaration controls how to amend the declaration. Why is there the need for statutory authority -- that's what a law does – over the operations of a private organization when said organization already has provisions for amending its declaration? This is an intertwinement, a cooperation between the state and the private organization, much like "The association has a lien . . ." (ARS 33-1807(A) and ARS 333-1256(A)) when the declaration already says as much?

3. The danger with subsection A lies in its misleading use of the phrase "any procedure in the declaration." Subsection "B" rejects the seemingly innocent wording of subsection "A" with its, *"notwithstanding any provision in the declaration to the contrary."* Only subsection "B" applies not as a covenant in the declaration, but as a matter of law. If this bill becomes law, then a minority of members, presumably board stalwarts, can then set any new voting procedure and it will be binding as a matter of law. For example, once the minority get to control the amendment process, amendments to only allow the board, or the management company, or the HOA attorney to further amend the declaration would all be perfectly legal. Or, impose additional financial obligations or negatively alter your property rights, such as found in several cases, including country club or golf club dues that were once the obligation of only those who choose to be a country club member. If you thought you had no rights or protections in your beloved HOA, wait until this bill is passed and see what happens.

4. Beware! The wording of the various sections flip between "declaration" and "condo/community documents", which are not identical. ARS 33-1802 and 33-1202 define these documents identically as, "2 'Community documents' means the declaration, bylaws, articles of incorporation, if any, and rules, if any" and "11. 'Condominium documents' means the declaration, bylaws, articles of incorporation, if any, and rules, if any.", respectively.

5. The wording of the two "does not apply" subsections (with 13 conditions) is very confusing in its choice of "documents" over "declaration." It says that the new voting changes to declaration amendments do "not apply to a modification of the . . . documents." It can only make sense if the amendment to the declaration changed a bylaw or rule. But we already know that the bylaws and rules are subordinate to the declaration. I think these subsections are propaganda to give the impression that the homeowner is protected from any adverse effect. However, he is already protected under the existing declaration. These subsections only apply to the proposed minority voting requirements to amend the declaration, not from any such amendments at all by

means of existing amendment procedures.

6. Paragraph (5) above is contradicted by the subsections (H or G) following the "does not apply" sections. These subsequent subsections contradict "H" or "G" with, *"do not prevent or limit the board of directors"* to amend the community or condo documents," emphasis added. What does "does not apply" mean if not to limit the actions of the board to amend the declaration?

7. Speaking of due process protections, subsections I or G allow the court to invalidate anything put down as a "does not apply" condition. CAI is saying, in effect, "You know, we were only kidding and we can go to court to invalidate it if necessary." Like, remember HB 2824, OAH adjudication of disputes?

8. The most dangerous and undemocratic, and probably to be declared invalid and contrary to public policy, is the imposition of state law to deny you, the homeowner, of your due process rights to go to the courts (see subsections "I" or "J", as appropriate). *"The validity of an amendment to the declaration shall not be challenged if the amendment was adopted in accordance with this section or the association's declaration."* What arrogance! Just because CAI had OAH adjudication declared unconstitutional it seems that they need not fear the courts. Using state law to deny persons their due process protections is a solid instance of a state action, making the HOA an arm of the state and subject to constitutional restrictions. (Please bear in mind, however, that this statute with all its contradictions and vagueness can be challenged in court).

9. The danger in this denial of court challenges is that anything could change without fear of judicial interference. (Under this bill, the HOA would be indeed one step closer to an independent principality). While the courts have upheld the existing open-ended and vague amendment procedures found in the declaration, even when a procedurally valid amendment strips a homeowner of his private property rights, the decisions have not been challenged under a denial of due process protections. See paragraph (3) above.

10. Today, each homeowner, while being held to the declaration under that supposedly sacred contract in existence at the time of purchase, can have his neighbors take away his property rights without his consent (while the Constitution prohibits ex post facto laws, there are no ex post facto amendment protections in an HOA). However, this "agreement to agree" can be challenged in court and held contrary to public policy. This bill would attempt to close this "loophole" and prevent any such challenges, even if the private taking of a homeowner's property is my a minority of his neighbors.