5419 E. Piping Rock Road, Scottsdale, AZ 85254-2952
602-228-2891 / 480 907-2196 (efax)
info@pvtgov.org http://pvtgov.org

March 26, 2011

By: George K. Staropoli

Arizona bill serves to punish HOA homeowners, and is therefore a bill of attainder and an act of tyranny

Arizona's HB 2441 is an unconstitutional Bill of Attainder under the US (Art. I, § 9, cl. 3) and Arizona Constitutions (Art. 2, Section 25). It is a violation of the "separation of powers" doctrine as the legislature has acted to punish certain members of its citizenry — the taking of private property rights from homeowners living in HOAs — by a "trial of the legislature" and a legislative exercise of a judicial function. As such, a bill of attainder has been described as an act of tyranny (*US v. Brown*, 381 US 437 (1965)).

Those of you familiar with the legislative process will immediately recognize that the public is allowed, not guaranteed, to make a statement to the committee. There is no questioning or rebuttal of the opposition, no time (you are usually restricted to 3 minutes in controversial bills) to present evidence or to demand evidence from the opposition. It functions not as a bona fide judicial procedure with its protections, but more like your HOA hearing.

1. HB 2441 grants authority to allow a minority faction to grasp and maintain control of the HOA community

A careful reading of the Senate amended version of HB 2441 reveals nothing of substance that would change the impact of subsections B and C(3), the heart of the bill. These subsections sanction — permit and declare it is not illegal to so act — the taking of private property rights from Arizona citizens without their consent, and in violation of their contractual rights. The wording is a mandated choice by the state — if you choose to amend, then you must follow this law — and to suggest that the state is not a mandate because the homeowner can still exercise his vote is fallacious. A single homeowner is incapable of protecting his rights from a minority decision, a repudiation of his consent to abide by the vote of the majority in a democratic society. This bill, by its "blessings" that it has now been declared legal for a minority to so act and therefore incumbent on the homeowner to be obey, opens the "barn door" to the establishment of the oligarchical control of the community.

All other subsections only serve the illusion of a fair and just bill, but offer nothing to

offset the statutory mandate and government intrusion that deprives a homeowner of his contractual private property rights. In the words of the vernacular, these subsections only serve to "baffle them with bullshit."

Those subsections that give the appearance of protection are simply a restatement of existing laws (subsection H of 33-1227, for example, with its constitutional protection wording). Yet subsection J of the bill raises the bar for homeowners to challenge any amendment with its "presumed valid" wording. The rewording of subsection L of 33-1227 only serves to protect the declarant, not the homeowner.

<u>The taking of private property rights</u>

Hardly noticed is the simple addition to subsection A of 33-1227, and stated in subsection A of the new 33-1817, *"The declaration may be amended pursuant to any procedure in the declaration."* This is the "barn door" opener that is needed in order to establish procedures in the declaration that can serve the interests of the attorney dominated board. (Who do you think wrote this bill, some board member?) They can then impose further "state" — the HOA — objectives on the members. And herein lies the danger of this unconstitutional bill. There are no restrictions as to what may not be done, including the complete rewriting of the CC&Rs, as has been happening for some time now.

For example, the wording contained in subsection L of 33-1227 gives the illusion of homeowner protection, but in reality does not. An amendment may be enacted that removes any identification of "Class B" members, the standard designation of homeowners who are not the Declarant, making subsections A and L of 33-1227 meaningless. There is nothing in this bill to prevent the board from establishing itself as absolute authority" to manage the HOA, and to set up procedures for mock democracy, or an oligarchy of "the chosen few." Nothing, once the barn door has been opened. Once the above is accomplished, the "barn door" will be shut tight. All with the sanction, the permission, of the Legislature if this bill is made law.

CAI, the authors of this bill, have failed for 44 years, since its inception to solve HOA problems, and yet the legislature is giving this failed group one more draconian right to solidify the authoritarian control over the good people of Arizona,. It is as if an estimated 20% of its citizens living in HOAs earnestly desire to be so mistreated. Recall the CAI lobbyist's statements before the committees that this bill will remove the legislature from hearing more reform bills and will allow local control of the HOA. His true meaning, as argued above, is to further solidify the HOA principality under an oligarchical government in repudiation of the Constitution and Arizona's Declaration of Rights. It's that obvious.

2. HB 2441 is an act of tyranny as an unconstitutional bill of attainder

Given the above understanding, HB 2441 is an unconstitutional Bill of Attainder under the US (Art. I, § 9, cl. 3) and Arizona Constitutions (Art. 2, Section 25). It is a violation of the "separation of powers" doctrine as the legislature has acted to punish certain members of its citizenry by a "trial of the legislature" and a legislative exercise of a judicial function. As such, a bill of attainder has been described as an act of tyranny (*US v. Brown*, 381 US 437 (1965)).

> *"A bill of attainder was a legislative act that singled out one or more persons and imposed punishment on them, without benefit of trial. Such actions were regarded as odious by the framers of the Constitution because it was the traditional role of a court, judging an individual case, to impose punishment."* (William H. Rehnquist, *The Supreme Court*, p. 166).

In *Brown*, the Supreme Court held,

> 1. The Bill of Attainder Clause was intended to implement the separation of powers among the three branches of the Government by guarding against the legislative exercise of judicial power.
>
> 2. The Bill of Attainder Clause is to be liberally construed in the light of its purpose to prevent legislative punishment of designated persons or groups.
>
> 3. A statute which inflicts its deprivation upon named or described persons or groups constitutes a bill of attainder whether its aim is retributive, punishing past acts, or preventive, discouraging future conduct.
>
> 4. The deprivation of any rights, civil or political, previously enjoyed, may be punishment, the circumstances attending and the causes of the deprivation determining this fact.

James Madison, in the Federalist Papers #54, offered the rationale for prohibitions against bills of attainders,

> Bills of attainder, ex post facto laws, and laws impairing the obligations of contracts, are contrary to the first principles of the social compact, and to every principle of sound legislation. ... The sober people of America are weary of the fluctuating policy which has directed the public councils. They have seen with regret and indignation that sudden changes and legislative interferences, in cases affecting personal rights, become jobs in the hands of enterprising and influential speculators, and snares to the more-industrious and less-informed part of the community.

3. <u>HB 2441 repudiates the fundamental premise of democracy — majority rule</u>

The CAI lobbyist argued before the Arizona committees that the committees themself use "a vote of those cast," and that in our public elections we also adhere to the "a vote of those cast" for valid approvals. In such a procedure, indeed a minority may have its way. Yet, he omits mentioning the standard procedure in both Robert's Rules of Order for private organizations and the rule for public government deliberations of "a vote of the entire body," when it concerns amendments to the corporate charter or to the US or state constitutions. As it is well known, and the lobbyist admitted to knowing, amending these documents requires a super-majority vote of all the members. This bill is a special law for a private party and is prohibited under state and federal constitutions.

The purpose of this bill is quite clear — to allow the "state", the HOA, to dominate its

members without regard to constitutional protections of due process and the equal application of the law. And, in real life, it is the HOA attorneys who exert undue, self-serving influence over the volunteer HOA boards.