

HOA
Common Sense
rejecting private government

George K. Staropoli

copyright (c) George K. Staropoli 2013

HOA Common Sense:
rejecting private government

George K. Staropoli

Copyright © 2013 George K. Staropoli

Grant of Copyright license



This work by George K. Staropoli is licensed to allow for copying under the terms of a [Creative Commons Attribution-NonCommercial-NoDerivs 3.0 Unported License](https://creativecommons.org/licenses/by-nc-nd/3.0/). Attribution must be made to George K. Staropoli as author.
ISBN 978-0-9744488-6-2

Published by
StarMan Publishing, LLC
5419 E. Piping Rock Rd
Scottsdale, AZ 85254

info@pvtgov.org <http://pvtgov.org> <http://pvtgov.wordpress.com>

Printed in the United States of America

PREFACE

The title of this pamphlet, “Common Sense,” was chosen to identify and relate to the aims and purposes of the original 1776 pamphlet by Thomas Paine, *Common Sense*. Prior to the American Revolution it was Paine who provided the reasons and justifications for overthrowing the oppression government of King George III. He raised the consciousness of the colonists as to their second-class citizenship with respect to the British Empire, and something had to be done about. It was widely read by the Founding Fathers who did do something about it.

With a similar object in regard to oppressive, authoritarian HOA regimes, I present a summary of the essential issues that must be similarly remedied to bring about substantive changes to planned community/condo private governance.

Table of Contents

The New America of HOA-Land, No. 1.....	1
The new Enlightenment Age, No. 2.....	2
The Path to HOA Enlightenment, No. 3.....	3
Consent to be governed, No. 4.....	4
Democratic elections, No. 5.....	6
Fair and just hearings, No. 6.....	7
HOA Boards can do no wrong, No. 7.....	9
Draconian punishment and intimidation, No. 8.....	10
HOA Governments in fact, No. 9.....	13
References.....	16

The New America of HOA-Land, No. 1

This Commentary is the first in a series on the topic of *HOA Common Sense*. The political and social changes in our society brought about by the adoption and acceptance of the HOA legal scheme has created a new America of authoritarian, private governments known as HOAs. They function as independent principalities. The values, beliefs, principles, ethics, and morality of today's America would shock the *Founding Fathers*.

In 2008 I wrote, “*Historians have referred to the American Revolution as the ‘American Experiment’*” and

The birth of the Second American Experiment went largely unnoticed. Under an unspoken alliance, the public was not informed of this experiment in the privatization of government. . . . This second experiment was not a strengthening of democracy, but one that promoted and established - with the support and cooperation of the state legislatures - private, contractual, authoritarian, government regimes. ([Homeowners Associations: the Second American Experiment](#)).

Earlier, in the 2007 paper, *The Fall of the American Experiment: * Homeowner preference for HOA regimes*, it was argued that,

As with the Articles of Confederation, the HOA Declaration must be scraped and replaced with a new “constitution,” a municipal charter that allows for local individual ordinances and access to community amenities based on a community taxing district model, but subject to the same obligations, restrictions and laws as are our municipal entities. This approach would indeed retain the subdivision planned community real estate “package”, and would be a much-improved model of local autonomy, of local home-rule, still within the framework of the Constitution and laws of the land.

The people of America must escape the dogmas of today that have brought about a dysfunctional federal government and dysfunctional state legislatures that have renounced the Constitution. State governments have permitted the HOA principalities to function and govern the people independent of the Constitution. What purpose, then, does our Constitution serve?

These HOA governments are also dysfunctional and reflect our society. The people must replace these irrational dogmas with a sensible analysis of the current social and politic climate of America. A common sense approach by the people is needed to take a fresh look and what's wrong with America and what's wrong with the HOA legal scheme – for their children and their grandchildren.

The new Enlightenment Age, No. 2

I ended HOA Common Sense No. 1 with a call for the people to strip away their dogmatic views about HOAs and adopt a fresh, common sense approach to understanding the nature and functioning of their community - a local political and social community. It must be asked, why is an imposed contractual government without the protections of the Constitution better than a local public entity subject to the Constitution?

Consider that the alleged contract signed at the time of purchase can be modified without the buyer's consent, and without compensation, making the "contract" a meaningless piece of paper. A condition that is not possible under the Constitution, which prohibits *ex post facto* laws – laws that change the legality of past conditions. Your agreed to CC&Rs can be so amended to alter the terms and conditions of your agreement.

What sense does that make? Why would anyone with any common sense accept this condition? And there are many other questions that cast legitimate concerns of a rational decision by buyers to accept the CC&Rs adhesion contract.

The policy makers, the public and the homeowners must understand that they have been living in a "cave" created by the promotion and mass merchandising¹ of the HOA legal scheme, eagerly accepted in exchange for empty promises of maintaining property values.² As prisoners within the cave, HOA members can only see the shadows of reality cast by the false light of the special interest propaganda.³ Those who have escaped the cave and have gone into "the light" of reality become enlightened.

The difficulty before our society is for the *Enlightened* to be able and willing to return to the cave, the HOA, and inform the members about the truth of the

HOA legal scheme. But, the members reject these arguments as false, because they have not seen the reality. This task of enlightening society in general is a major task. However, *“This ‘no negatives about HOAs’ unspoken alliance that has served the industry’s special interests by keeping things under wrap, and not letting the sunlight expose these legal issues that include violations of constitutional law, is collapsing.”*⁴

A people, a society, that bases its actions on a false reality will never resolve problems. The underlying assumption is a firm belief that the people want to do what is right and just. The Dalai Lama wrote, *“Where ethical restraint is lacking, there can be no hope of overcoming problems.”*⁵ Where ethical restraint has been replaced with material concerns and especially concerns for money, and with “Me first”, “Greed is good”, and “I want it now!” it is understandable why our government of the people is so dysfunctional.⁶ And that includes HOA private governments.

The Path to HOA Enlightenment, No. 3

I ended HOA Common Sense No. 2 with a call for the people, following their ethical and moral conscience, to lose their false views of reality in order to successfully resolve long standing, endemic HOA problems. The authoritarian, private HOA government was not created to and has no legal obligation to protect and maintain individual rights and freedoms as does public government under our Constitution with its Bill of Rights.

This difficult task for substantial HOA legislative reforms can be accomplished by choosing the path that requires the people to 1) step *outside the box* created by the pro-HOA special interests and to reject dogmatic attitudes that refuse to consider opposing and dissenting arguments, and 2) that we confront and challenge the pro-HOA supporters demanding that they defend their half-truth, misleading, and false mantras with documentation and legal authority.

This path to a successful resolution of endemic HOA problems is rational and sensible. It is up to the people to choose the America of tomorrow, that of the

Founding Fathers or of the New America of HOA-Land, for their children and grandchildren.

It's just common sense for Americans to reject the authoritarian HOA private government, and to support our democratic system of government of 226 years.

Consent to be governed, No. 4

When pro-HOA supporters are pushed to justify the conditions of living in an HOA they usually end up with: "you agreed to the contract," "if you don't like it move out," or "remaining in the HOA means acceptance to be governed." Here I will show that these defenses lack merit.

First, the application of contract law to the CC&Rs agreement reveals the many invalid aspects of the CC&Rs as a bona fide contract. It is obvious from a simple review of contract law. Yet, courts have held that the CC&Rs are a contract or are to be interpreted as a contract, and have even analyzed the meanings of CC&Rs in the same manner as a contract. But, the courts do not question the validity of the CC&RS contract with respect to contract law. The courts resort to equitable servitudes law, which simply requires the acceptance of a deed in order to bind the home buyer to the CC&Rs sight unseen.

This *apples and oranges* approach doesn't make sense, does it? Unless, of course, the motivation is to coerce acceptance of the HOA legal scheme by violating the Constitution's requirement for "the equal protection of the laws" for all citizens. A common sense approach for a just and fair contract says that this is all wrong; that applying servitudes law to coerce private government acceptance makes a mockery of the Constitution.

Second, for illustrative purposes, let us look at current events in regard to Obamacare, where the people are discovering what was said in support of Obamacare is turning out to be not so true. That certain claims were misrepresentations and half-truths, which were obviously made to induce acceptance of Obamacare. However noble the ends of Obamacare the means to achieve it are deplorable. However noble the ends served by the bill that Arizona Representative Michelle Ugenti may have believed the deliberate violation of the Arizona Constitution was not an acceptable means.

This is the same scenario that was played out in the mass merchandising of HOAs by the stakeholders, including state legislatures. This scenario holds that the beneficial ends served by HOAs justify the false and misleading means to obtain acceptance. A society that accepts such conduct is dysfunctional and does not build a better community, but destroys it. Think about it!

If indeed HOAs are the next best thing to *Mom's apple pie*, wouldn't it be sensible for the proponents of HOAs to put the matter to a test. Where is the full disclosure, as contained in the "*Truth in HOAs Disclosure*,"⁷ for example, of material facts regarding HOA regimes? If there is true consent by home buyers, why is CAI afraid to conduct this poll or state legislatures to draft legislation that requires such a disclosure? Common sense tells us that this is the just and ethical thing to do, unless there is something to hide.

Third, rather than proceed as suggested above, the faithful HOA defenders have resorted to the mantras (I use this term to indicate unsupported and irrational dogmatic statements) such as "move out" and "HOAs are not for everybody." The argument that remaining in the HOA amounts to consent to be governed is without merit.⁸ Aside from the ethical questions presented by this argument, it ignores the charges of fraud and misrepresentation to induce home buyers to accept the HOA agreement. It ignores the failure to pass judicial scrutiny⁹ for the waiver or surrender of constitutional rights. In other words, the HOA comes with *unclean hands*, which greatly weakens the legitimacy of its position to demand consent and that to remain in the HOA is full consent to all that the HOA does.

For example, where's the common sense to expect obedience to the rules and regulations when no notice has been provided of what constitutes a violation? Unlike in the public arena where all violations of the law are made public (publicized in code books, online, etc.), not having knowledge of the law is no defense for a lawbreaker.

I find it hard to believe that the vast majority of HOA members fully consented to be treated as second class citizens resulting from the lack of Constitutional protections that they were told, since childhood, are guaranteed to all Americans. I find it hard to believe that most members did not have a reasonable expectation that the state would not protect them and not provide

meaningful enforcement against HOA board lawbreakers, or to believe that *ex post facto* amendments were valid, or to believe that the HOA would engage in a wide range of questionable activities under its grant of broad powers.

But this is what the pro-HOA special interests want you to believe! That the good people of America seek unequal status, and prefer it (all those CAI surveys). This is a disparaging and belittling attitude toward the good people of America, isn't it?

Obedience in conscience to a government requires fair and just laws. In fact, the legitimacy of a government is based upon promulgating fair and just laws.¹⁰ It is the fundamental basis of the social contract between the people and the government. And it is common sense to expect the same from private HOA governments.

Homeowners in HOAs must demand equal status with non-HOA homeowners and demand that the government justify why there should be unequal treatment and the loss of their rights, freedoms, and privileges and immunities under the Constitution. Homeowners in HOAs must demand the defensive justifications that will meet and pass judicial scrutiny.

Democratic elections, No. 5

HOA members have repeatedly been told that they can change things in their HOA by voting for board members and even by changing the governing documents; that HOAs are democratic because members can vote to make these changes happen. Well, does that make real sense when we know that countries like China and Cuba allow their people to vote? Yes, the people are allowed to vote, but no one would think to call these countries democratic. Use your common sense! You are being conned!

HOA members should read my discussion of the California case holding the HOA to have violated the law on fair elections procedures in *Wittenberg v. Beachwalk HOA*.¹¹ Such activities as only containing the board's view of candidates, continuing holding elections until the board wins, and not allowing equal access for 'town hall' meetings by members.

Why is it that this country would participate in seeing that fair elections take place in other countries, but do nothing for the 23% of the American population living in HOAs? While a few states like California have detailed statutes dealing with HOA elections, most do not have an oversight entity watching the elections as undertaken with these foreign country's elections. Worst of all, generally it is the HOA attorney or HOA manager who tally and report on the voting, but both cannot be seen as independent observers or neutral parties. They are both agents of the HOA and not the membership. That is like having a business' attorney overseeing union elections.

Furthermore, the defenses of voting the bums out and changing the governing documents are without merit. These defenses reflect the erroneous implicit attitude that HOAs are the same as public entities. They are not! The HOA's "constitution and laws" are contained in an agreement between a single member and the HOA. To say that "you", a single member, can change governing documents or vote the bums out misstates the law and the single member's ability or right to accomplish this goal. The member needs the assistance, the cooperation and votes of other members in order to accomplish these changes.

Without fair elections procedures that contain enforcement against HOA board wrongful acts, including retaliatory acts and intimidation by the board, voting in an HOA is a mockery of democracy. Is this HOA government better than public government? Common sense tells us no!

Fair and just hearings, No. 6

What is meant by "fair and just hearings"? The HOA attorneys tell you it's "*after notice and an opportunity to be heard*" as found in almost all CC&Rs and in the vast majority of state HOA laws. This simple statement is a contractual provision and law as applied to HOAs, but it is not what the US Supreme Court holds as procedures meeting the Constitution's and the 14th Amendment's due process requirements. HOA members have been shortchanged!

As a private entity, HOAs are not subject to the Constitution and are not required to establish justice, which is a goal not found in any CC&Rs

'constitution,' but found in the Preamble to the US Constitution. Was this important fact explained to you when you bought into an HOA with its dream home? Why not?

Supreme Appeals Court Justice Henry Friendly in his well-regarded article, "Some Kind of Hearing," generated a list that remains highly influential, as to both content and relative priority:¹²

1. unbiased tribunal [independent 'judges']
2. notice of proposed action and grounds asserted for it [document showing all the rules]
3. opportunity to present reasons why should not occur [defense of allegations]
4. right to call witnesses
5. right to know opposing evidence
6. right to have decision based exclusively on evidence presented
7. right to counsel [especially if HOA attorney is present]
8. making of record
9. availability of statement of reasons [public awareness of defense]
10. public attendance [transparency]
11. judicial review [appeal to civil court]

I've inserted annotations as applicable to the HOA version of justice. As you can see, members are being shortchanged by HOA attorney/lobbyists who influence and dominate state legislatures, and who write and rewrite the CC&Rs and bylaws. HOA kangaroo courts make homeowners second class citizens, and their foolish appeals to their HOA attorney go nowhere, because no one told you that he represents the board, not the members. You know, like management vs. employees.

And since there is no legal obligation of the HOA to establish justice, providing for some form of public defender equivalent falls on deaf ears. The HOA wins in this lopsided "playing field" since it has the money to hire attorneys to legally maneuver the system to make it costly for the homeowner to complain. And don't forget the public ostracizing of members who complain: they are costing you money; they are not good neighbors. Don't forget that there's no opportunity for the homeowner to answer in the same media as used by the HOA – the newsletter, board meetings and website.

Yet, government interference to protect your rights as citizens is violently frowned upon by HOA members. Why? It doesn't make sense, doing nothing about your loss of protections. For what?

HOA Boards can do no wrong, No. 7

In shocking contrast to our common sense and all that has been said about the need to protect the people from government, state legislators see no need for effective and meaningful enforcement that average people are transformed into angels when they become board members. James Madison must be in a rage, wherever he may be, at this slap at his advice that, *"If men were angels there would be no need for government."*

State legislators have said that the complaining HOA member signed a contract and is now trying to get out of it because he now thinks it's a bad contract, and that he will not support any such legislation. Furthermore, anyone who didn't read the contract or get a lawyer is not too smart and that he, the legislator, would have never done that. What do you think of that attitude in light of the above papers 3 - 6? And don't forget that you are being held to have agreed to be treated in such a demeaning way by your elected officials.

Where are the fair and just laws argued for in paper No. 4? They are not there! Instead, we have special laws for special entities, the HOA, without a necessary and compelling government interest to deprive citizens of the rights and freedoms.¹³ What a travesty of our American way of life!

You may ask, What for? The answer is obvious: for the survival and acceptance of a defective legal scheme that seeks to impose authoritarian governments on unsuspecting people. If boards and offers are to be held accountable, who would volunteer? Well, why not pay them a salary so accountability can be demanded? WHAT!!! If they are going to be held be paid and held accountable, then members have a right to demand qualified board members and not any ole body who would like to be on the board.

Wait! Wait! I can see readers recoiling in horror. *The horror . . . the horror . . .* (from the movie *Apocalypse Now!*). Consequently we are told that we must accept the lunacy that all volunteers can do no wrong and if they do, well, that's your fault for electing them! And let's not forget that the board has *hired hands* to protect them – the attorney and manager. At your expense. The homeowners pay for the board's wrongful acts.

So, why aren't the members more involved in watching over the acts of the board? Well, maybe it would help if the laws backed the members up with effective and practical means to enforce HOA wrongful acts; otherwise it's just an exercise in futility. The game is rigged in favor of these independent principalities!

But those living in HOAs must share the blame for this state of affairs. They have repeatedly failed to unite in an organized common cause to produce intelligent legislation that addresses these fundamental HOA defects.¹⁴ CAI in Arizona made that clear when it told the legislature that only the stakeholders produce meaningful bills; the homeowners just raise a multitude of personal issue bills.¹⁵

And so, in all practicality considering this state of affairs, the board can do no wrong. Get used to it!

If there is no penalty [for] disobedience, the resolutions or commands which pretend to be laws will, in fact, amount to nothing more than advice or recommendation." (Alexander Hamilton, Federalist #15)

Draconian punishment and intimidation, No. 8

The Tennessee appellate court in *Brooks* found "*that the foreclosure sale price shocked the conscience of the court.*"¹⁶ A home valued at over \$321,000 was foreclosed for just \$12,800 of which \$6,734, more than half, went directly into the attorney's hands.¹⁷ That's more than 25 times the "damages" to the HOA. *The Charleston Regional Business Review* reported that the average foreclosure debt was about \$4,500 and the average home value foreclosed was about \$160,000, or 36 times the debt.

An award of more than the 10 times for punitive damages was held by the US Supreme Court in *State Farm v. Campbell*¹⁸ to be a cruel and unusual punishment in violation of the 8th Amendment. This right to foreclose in unjust and draconian, taking away a person's home and leaving him with nothing! It is unconscionable and discriminatory as explained below. Furthermore, HOAs assessments are considered a consensual lien and are exempt from homestead protections. (See paper No.4 above, speaking about your legitimate consent to be bound.)

With respect to HOA foreclosures, we once again discover that HOA assessments are being treated the same as public government taxes and property assessments -- must be paid and your property can be foreclosed for non-payment. Both taxes and HOA assessments are not related to hard cash payments for which the lender is entitled to foreclosure to protect his loan, nor are they based on any specific transactions, like payments for garbage collection, for electricity, or for police protection, etc.

Why should the HOA be given this right when other entities do not have foreclosure rights, and when there are other available collection methods -- garnishment, sale of other property, etc. -- to collect on bad debts? Other entities, both public and private, must face the possibility of failure or bankruptcy – there are no guarantees in life. A standard accounting procedure, and used by CAI Central in its financial statements, is what is called “Bad debts reserve” or “Reserves for bad debts,” which is an annual estimate of uncollected assessments.

Using common sense, we can understand the value to the HOA to “evict” the non-payer and to replace him with a new owner who will make timely assessment payments. That's logical. There is very little opportunity to raise additional funds for expenses except by means of increased assessments on other members, the “it's not fair” argument. While the *end* of the foreclosure action has a rational value, the *means* is highly suspect.

In addition to the arguments of special rights as enjoyed by public entities and an unconscionable punishment, HOA foreclosures are discriminatory. The following quote is from an Arizona CAI attorney:

Assuming foreclosure eligibility requirements are met, whether foreclosure is a viable option depends largely on what other liens, interests, and encumbrances burden the subject property. . . . If the property is not subject to a mortgage or there is a minimal first mortgage, foreclosure is a viable option as there is likely equity in the property. . . . Even if the property is subject to a recorded first mortgage and there is no equity in the property, foreclosure still may be a viable option. Sometimes the threat of foreclosure alone is enough to get a delinquent owner's attention. . . . the owner will often pay the association in order to keep his/her home.¹⁹

This is an admission of the discriminatory nature of the foreclosure process — works only if the homeowner was an upstanding citizen who had paid his mortgage and assessments for many years, and had created all that equity that the HOA now seeks. It is also an admission of the punitive and intimidation motives of the HOA — “*the owner will often pay the association in order to keep his/her home*” — without facing the reality that “you can’t get blood from a turnip”! The HOA attorneys promote the view that the non-payers are scowflaws and deadbeats who are seeking to stick it to the good, assessment paying members. “It isn’t fair!” goes the cry.

What the foreclosure process does do, and is not mentioned by the CAI attorney, is that the attorney can claim fees many times in excess of the amounts owed the HOA. So, who really benefits? Certainly not the homeowner who loses everything with this draconian punishment. And there are other methods available to collect bad debts, and if not viable, well, then that’s *the cost of doing business*.

Is this good public policy to treat homeowners facing hardship not of their doing -- take away their home and leave them with nothing? Legislation must be put into place to protect against intimidation and wrongful foreclosure, and to ensure a strict enforcement of the foreclosure process, especially requiring documentation and an exact specification of the undisputed debt owed.

As to the broader solution, there is a just and compassionate legal solution to this state of affairs that can be put into place quickly and effectively. Allow the homestead exemption for HOA assessments! If a state has no homestead protection, simply enact one ASAP! This is a fair, compassionate, and sensible solution.

I anticipate strong opposition to this proposal, but I remind the opponents to be prepared to address the *unclean hands* of the HOA as summarized in this *Common Sense* booklet.

HOA Governments in fact, No. 9

I believe all HOAs should be required to have a sign at the main entrances to the subdivision that clearly states: “***You are now leaving the American Zone.***”²⁰

De facto governments.

Is the HOA a mini or quasi government? Is it a state actor? Or is it just another business with special privileges? I believe we all can agree that the status of HOAs is that they are de facto – they exist -- governments, not recognized by the state under municipality statutes just as Cuba is a de facto government not recognized by the US.

What is the uniquely defining attribute of a government that distinguishes it from a business or non-profit charity? Understand that all the functions that the CAI lawyers claim to make the HOA a business can also be used to claim that businesses are governments. Think about it. Yes, they share the same functions – taxes/assessments, fines/penalties, courts/hearings, ordinance/rules and regs, etc. But the basic criterion is that “*modern states are territorial, their governing body exercise control over the persons and things within their frontiers.*”²¹ This alone singles distinguishes a government from a business or charity.

Black’s Law²² attempts to clarify what is commonly accepted as a political government: A government is “*The principles and rules determining how a state is regulated.*” A nation is “*a community of people inhabiting a defined territory and organized under an independent government; a sovereign political state.*” And politics is “*The science of the organization and administration of the state.*” The general understanding uses the terms ‘people,’ ‘territory,’ ‘regulation,’ and ‘state/nation’.

Now, I know the above may be confusing, but the skilled HOA attorneys will do their parsing and *word game* analysis (depends on what the meaning of ‘is,’ is)

of these definitions seeking to create reasonable doubt as to what the people know to mean as “government.” You know, such as the argumentative asinine statement that, Is the owner of a football stadium that regulates the people in the stadium a government?

I prefer the simpler, down to earth answer given by Justice Stewart regarding what is pornography,

I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description [hard-core pornography]; and perhaps I could never succeed in intelligibly doing so. But I know it when I see it²³

It is interesting to note that David Wolfe, a founder of CAI back in 1973, had the following to say in 1978 when CAI debated the status of HOAs as a government.

One legal opinion offered in support of construing CAs [HOAs] as a government noted that the Supreme Court had required constitutional procedures in a ‘company town’ and with ‘political parties’; from this view CA actions were ‘public’ in a constitutional sense. . . . Wolfe concluded that a new definition of a CA as a government was needed to bring about Lewis Mumford’s vision of a democracy.²⁴

And long ago in 1994 Prof. McKenzie wrote, “HOAs currently engage in many activities that would be prohibited if they were viewed by the courts as the equivalent of local governments.”²⁵

The defective legal scheme

Please understand that all substantive (as opposed to changes to laws affecting HOA operating methods and procedures) reform legislation is an attempt to restore your rights, freedoms, privileges and immunities as citizens. They were taken away by the HOA biased laws that granted the HOA power to deny or did not prohibit the HOA from denying your constitutional rights. Yet, even the most independent local control over people found in a state’s *home rule* statutes requires allegiance to the US and state constitutions.²⁶ Why do HOAs get special laws? Why are they exempt from the Constitution? It doesn’t add up!

You may ask, What for? The answer is obvious: for the survival and acceptance of a defective legal scheme that seeks to impose authoritarian governments on unsuspecting people. If boards and officers are to be held accountable, who would volunteer? Well, why not pay them a salary so accountability can be demanded? WHAT!!! If they are going to be paid and held accountable, then members have a right to demand qualified board members and not any ole body who would like to be on the board.

Wait! Wait! I can see readers recoiling in horror. “*The horror . . . the horror.*” (from the movie Apocalypse Now!). So, boards are generally not paid and are volunteers, without any special training. At least the legislature and city councils have tradition and long established rules and procedures with staff to assist the law makers, but HOAs are “on the fly” – *on the job*, decide as you go. No wonder we have all these problems with capable governance. And the volunteers and the special interests lament, “but we are volunteers helping to make a better community. You can’t hold us responsible and accountable. We need a free reign.” Yeah! Right! Free to create havoc!

All because the mass merchandising of the HOA concept could not be sold under such conditions that demanded prudent accountability.

And, the concept could not fly without mandatory members and compulsory dues. The founders of the HOA scheme who wrote the HOA “bible” in 1964 well knew this. And in order for the HOA to legally bind subsequent home owners the founders had to resort to servitudes running with the land, or equitable servitudes/covenants.²⁷

But, the equitable servitudes doctrine brought a host of ills detrimental to the US Constitution and the Bill of Rights, which very disappointedly the courts have held superior to the supreme law of the land.²⁸ They have allowed for the establishment of the *New America of HOA-Land* with communities governed by de facto authoritarian, private government regimes known as HOAs.

HOA member Declaration of US and State citizenship

All that is needed to have HOAs rejoin the Union is for state legislatures to pass a bill that states:

“Notwithstanding anything to the contrary in the governing documents, or other laws to the contrary,

“Wherefore, the members of the association, having not waived or surrendered their rights, freedoms, privileges and immunities as citizens of the United States under Section 1 of the Fourteenth Amendment, and as citizens of the state within which they reside, the CC&Rs or Declaration for any planned community, condominium association or homeowners association shall state, or be amended to comply, that,

“The association hereby waives and surrenders any rights or claims it may have under law and herewith unconditionally and irrevocably agrees 1) to be bound by the US and State Constitutions, and laws of the State within which it is located as if it were a subdivision of the state and a local public government entity, and 2) that constitutional law shall prevail as the supreme law of the land including over conflicting laws and legal doctrines of equitable servitudes.”

References

¹ See “Part 1, The Mass Merchandising of HOAs,” *The Foundations of Homeowners Associations and the New America*, George K. Staropoli, StarMan Publishing (eBook) 2009.

² Here I make the argument that the people, in general, have been conned. Readers should refresh themselves with Hans Christian Andersen’s [*The Emperor’s New Clothes*](#).

³ See Plato’s allegory of the cave in Book VII, *The Republic*. For a summary and a simplification of the allegory, see the YouTube video at <http://youtu.be/sAu-CNSH9F0>.

⁴ For a general discussion see, [HOA Enlightenment Movement is forcing legislatures to protect property values](#).

⁵ The Dalai Lama, *Ethics for the New Millennium*, Riverhead Books, 1999.

⁶ Jim Wallis, *Rediscovering Values: On Wall Street, Main Street, and Your Street*, p. 27, Howard Books, 2010; Ron Brownstein, “America Divided”, *The Second Civil War: How Extreme Partisanship Has Paralyzed Washington and Polarized America*, Penguin Books, 2007.

⁷ See, [Homeowner Association \(HOA\) Buyer “Truth in HOAs” Disclosure & Consent to be Governed Agreement](#)

⁸ See [Contracts, the Constitution and consent to be governed](#) that addresses public government, yet applies to HOAs.

⁹ The Supreme Court has set tests for the constitutionality of legislation depending on the nature of the rights being violated. The most demanding is a necessary and compelling justification for the law, and that no other alternative is available, to a simple demonstration that the law serves a genuine government interest.

¹⁰ Prof. Randy Barnett wrote; “A constitution that lacks adequate procedures to ensure the justice of valid laws is illegitimate even if it was consented to by a majority ... constitutional legitimacy can even be seen as a product of procedural assurances that legal commands are not unjust”. “A law may be ‘valid’ because it was produced in accordance with all the procedures required by a particular lawmaking system, but be ‘illegitimate’ because these procedures were inadequate to provide assurances that a law is just”. (*Restoring the Lost Constitution*, Princeton Univ. Press, 2004).

¹¹ [CA CAI opposes fair election protection for homeowners.](#)

¹² Henry J. Friendly, “Some Kind of Hearing,” 123 U. PA. L. REV. 1267 (1975).

¹³ *Supra* n. 9, in No. 4.

¹⁴ See a nationwide proposal at [Organize, organize, organize, but organize your local HOA.](#)

¹⁵ See, [The influence of HOA special interests on an AZ legislator — SB 1454.](#)

¹⁶ Cited in [Courts finally realizing the gross injustice of HOA foreclosures.](#)

¹⁷ Quoted in [HOA foreclosure ratio of 36 times violates the 14th Amendment against cruel and unusual punishment.](#)

¹⁸ *Id.*

¹⁹ Quoted in [HOA foreclosures: will the real CAI stand up.](#)

²⁰ As contained on the *On The Commons* website, Shu Bartholomew, Producer and Host (<http://onthecommons.us>).

²¹ “State”, Black’s Law Dictionary, 7th Ed.

²² *Id.*

²³ *Jacobellis v. Ohio*, 378 US 184 (1964).

²⁴ Quoted in *Community Associations: The Emergence and Acceptance of a Quiet Innovation in Housing*, Donald R. Stabile (Greenwood Press, 2000), pp. 164 -167. Lewis Mumford was a 1920s utopian community promotor.

²⁵ Evan McKenzie, *Privatopia: Homeowners Associations and the Rise of Residential Private Governments*, Yale Univ. Press, 1994.

²⁶ A legislature's grant of autonomy for local government to act without legislative approval on acceptance of certain terms (Blacks' Law Dictionary, 7th Ed.); "as long as they obey the state and federal constitutions" (Home Rule, Wikipedia (<http://tinyurl.com/nyqpd2a>)).

²⁷ *The Homes Association Handbook*, Urban Land Institute Technical Bulletin #50 (1964); See my analysis at [Analysis of The Homes Association Handbook](#).

²⁸ Most notable are: *Inwood v. Harris*, 736 S.W.2d 632 (Tex. 1987) (Texas Constitution overridden by covenants running with the land); *Villa de Las Palmas v. Terifaj*, 90 P.3d 1223 (CAL. 2004) (amended restrictions are binding on all in violation of ex post facto prohibition doctrine); *Committee for a Better Twin Rivers v. Twin Rivers*, 929 A.2d 1060 (NJ 2007) (fundamental rights denied and business judgment rule is sufficient protection of homeowner rights).