http://pvtgov.wordpress.com

Legislative dereliction of duty: support for secessionist HOAs

George K. Staropoli
April 18, 2021

I have strongly and repeatedly argued that the HOA declaration of CC&Rs is a devise — a legal maneuver — by real estate interests to avoid the application of the federal and state constitutions to HOAs.[1] Professor Evan McKenzie said it quite plainly in his 1994 seminal book, *Privatopia*. *"CIDS [HOAs] currently engage in many activities that would be prohibited if they were viewed by the courts as the equivalent of local* governments." [2]

In 2014 Andy Ostrowski put teeth into McKenzie's claim above.

"I am astounded at how 20% of the population can be subjected to this private property management system that is supported by legislative schemes that are all-but drafted by the corporate owners of these associations, and a judiciary beholden to those interests that has lead to a national epidemic of abuse and corruption that is tearing apart the lives of thousands, but gets little or no coverage by the national media, or even local media, and nothing more than lip service in legislatures across the country.

"One common complaint I have heard of is that these HOA contracts are contracts of adhesion, i.e., they are "take-it-or-leave-it . . . . These provisions are then being used to hold the homeowners to the waiver of their constitutional rights. If we do credit the argument that this all falls under the rubric of "freedom of contract," there are still some shortcomings that need to be addressed."

Legislative use of HOA "may" avoids enabling act

It is important that the public and board members understand the grant of authority to HOAs as contained in statutes by using the word "may." The word "may," as found prolifically in HOA statutes, serves to legalize acts and powers of the private HOA entity in a round-about, subtle manner. For example, generally found in the various state HOA acts are phrases like, "*the board of directors may impose reasonable*

monetary penalties," "may be foreclosed in the same manner," "may regulate the location and size of flagpoles," all of which make said acts legal and enforceable.

Without the use of the "may clause," an act of the HOA can be challenged as illegal even though it is stated in the declaration agreement that is treated as a contract. Thus, state legislatures avoid a constitutionally mandated enabling act that delegates authority to any agency or public-private entity.

Freedom of contract, creatures of contract or of statute

The claim of freedom of contract raises the issue of ***a creature of contract*** and its antithesis, ***a creature of statute***, which was central to the Illinois Supreme Court opinion in *Spanish Court*.[3] This 2014 case involved a homeowner refusing to pay assessments until the HOA made obligatory repairs.

The appellate court viewed the obligation to pay assessments, and the obligation to repair and maintain the common elements, as mutually exchanged promises, and concluded that under principles of contract law, a material breach of the repair obligation could warrant nonpayment of assessments. However, the Supreme Court saw it differently. Quoting Polikoff[4] (emphasis added),

> *"Although contract principles have sometimes been applied to the relationship between a condominium association and its unit owners based on the condominium's declaration, bylaws, and rules and regulations. . . . Although these duties may also be reflected in the condominium declaration and bylaws, as they are in this case, they are imposed by statute and exist independent of the association's governing documents. Accordingly, a unit owner's obligation to pay assessments is not [a] purely contractual obligation.*

Creatures of statute, enabling acts, fundamental right to contract

Let's take a look at what can easily be seen as unconstitutional special laws for special entitles.

In *Lochner v. New York (*198 U.S. 45, 1905) the Supreme Court found that the right to make a private contract is a fundamental right. In *West Coast v. Parrish* (300 U.S. 379, 1937), however, the Court found that there is not a fundamental right to contract: "*There is no absolute freedom to do as one wills or to contract as one chooses*." In other words, the constitutional protection against contract interference touted by CAI and others is not absolute.

An enabling act is a piece of legislation by which a legislative body grants an entity which depends on it (for authorization or legitimacy) the power to take certain actions.

For example, enabling acts often establish government agencies to carry out specific government policies in a modern nation.

Constitutionally, counties, cities and special districts are legal "Creatures of the State." Local governments are created by state government to help carry out the state's work. All powers are derived from the state government. Local governments have no inherent rights independent of what the state gives them. Each agency or public-private entity has only the powers and authority granted by such delegation of the legislature's authority.

Home rule statutes, constitutionality

(The governing body of the condo or subdivision is an association commonly known as the HOA).

A broad enabling act granting extensive of local power and authority to local municipal governments can be found in a state's *home rule* statutes. Home rule, in general, allows for local government independence from general state laws in areas of local application only. I have maintained that It's time to approach "the HOA is or is not a government controversy from a new perspective — home rule*." "Article 13, Section 2 [Arizona Constitution] requires city charters to be "consistent with, and subject to, the Constitution and the laws of the state."*

Quoting *A Discussion of Home Rule In Nevada, "Most states grant a portion of their governing power . . . to establish laws, levy taxes, and administer government on a local level . . . without obtaining legislative approval."*[5]

The acceptance of home rule doctrine and statutes, by all states, would seem to negate any justification under judicial review for creating special laws for HOAs. Home rule offers an alternative measure to satisfy any genuine government interest, thus making HOAs unnecessary. The HOA, therefore, would be *ab initio* (from the very start) unconstitutional. Subjecting HOA to home rule would also return these private governments to compliance and obedience to the US Constitution.

Given the above, HOAs are irresponsibly permitted to exist and function and are implicitly enabled by acts of omission by state legislatures. There is no explicit enabling act for HOAs, just statutes that regulate HOAs by permitting and thereby legalizing certain powers and authority over the community.

Protecting the survivability of the HOA – Spanish Court decision

It appears that the Court's opinion was heavily influenced by Florida's CAI Gary Poliakoff.[6] I viewed the arguments put forth by Poliakoff as a cry for the protection of

the survivability of the HOA, **and the equal protection of the law for homeowners be damned!**

> *"The necessity of a "quick method" for collection of past due assessments . . . is manifest when we consider . . . the impact a nullification defense [nonpayment] would have on their very existence [¶ 29].*[7]

> *"The association's ability to administer the property is dependent upon the timely payment of assessments, and "any delinquency in unit owners' payments of their proportionate share of common expenses may result in the default of the association "[¶ 30].*[8]

So it appears that businesses can fail as well as cities, towns and states but, heaven forbid, not the private HOA government. Also, in view of the above position, it takes no stretch of the imagination that the above attests to the implied homeowner pledge of his home as collateral for the survival of the HOA. California lawyer and L.A. columnist, Donie Vanitzian (deceased), reminds us that:

> *"It is the titleholder's [homeowner's] personal asset that functions as a kind of perverse collateral, requiring the owner to pay assessments to the association-entity or lose his asset. . . . On purchase of that home and without anything more, the titleholder's asset became a personal risk and personal liability for the owner. Instantly, the titleholder's asset also became collateral for the association-entity."*[9]

And yet, everywhere you look, defenders of the HOA legal scheme shout, "you signed a contract" and "you agreed to be bound by the agreement" — contrary to Spanish Court, Polikaoff and statutes that regulate HOAs. Instead the courts standby HOAs are creatures of contract.

Mandating HOA compliance to the US Constitution

What more evidence, what more justification, what more reason is needed to pass legislation making HOAs subject to the Constitution as another form of local government? In my recent commentary, HOAs are another form of local government, I asked, *"So why is there so much opposition to requiring the HOA to be subject to the Constitution like all other forms of local government?"* A simple, straight-forward, no frills bill was proposed,[10]

> *"The association hereby waivers 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.*

"Furthermore, any governing documents of an association not in compliance with the above shall be deemed amended to be in compliance, and notwithstanding the provisions of any law to the contrary, a homeowners' association shall be deemed to have amended its governing documents to be in compliance."

References

---

[1] CC&Rs are a devise for de facto HOA governments to escape constitutional government
[2] Evan McKenzie. *Privatopia: Homeowners Associations and the Rise of Private Residential Government*, Yale Univ. Press, 1994.
[3] *Spanish Court II v. Carlson*, Docket No. 115342) March 21, 2014.
[4] Gary A. Poliakoff, *The Law of Condominium Operations* § 1:23 (1988 and Supp. 2012-13)).
[5] Anthony C. Nicholas, "A Discussion of Home Rule in Nevada," February 18, 2010 (6 MB). The court makes no reference to the Dillon Doctrine.
[6] Supra n 2, paragraphs ¶¶ 21, 26 (footnote 1), 39, 30, 40, and 46.
[7] *Supra n 2,* ¶ 29.
[8] *Supra n 2,* ¶ 30.
[9] Donie Vanitzian, *California Common Interest Developments — Homeowner's Guide*, p. xviii, xix, Thomson – West 2006.
[10] See HOA member Declaration of US and State citizenship (2012).