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The Fall of the American Experiment:* Homeowner preference for HOA regimes

Homeowner preference and the unspoken consequences

Homeowners seem to prefer the private contractual government arrangement that controls and regulates not only the use of their private property, but also the behavior of the people themselves within the homeowner association community. They seem to prefer the policing and enforcement functions of the HOA designed to maintain property values, and turn a blind eye to the lack of protections of their rights and freedoms within this independent form of authoritarian government. That is, until they run afoul of the ruling “dynasty”, the HOA board, for a decision or ruling that they believe is illegal, or unjust and unfair, and would never be supported by the courts. But for many it is often too late to do anything, not even move out, and so they live under oppressive government.

In the microcosm of the greater American landscape, the local HOA government, more and more unsuspecting homeowners are discovering that they are not living in paradise on earth in a utopian society under a utopian form of government, with all their needs and desires satisfied. More and more homeowners under homeowner association rule are discovering that this vague, undefined “contractual understanding” (according to a NJ Supreme Court Justice) is inadequately expressed and stated within their Declaration of Conditions, Covenants and Restrictions and within any state disclosure requirements. Many material facts pertaining to the legal status of the HOA under the Constitution are omitted(1). The most disturbing is the fact that state constitutions and laws do not apply to their HOA contractual government that is completely contrary to the homeowner’s reasonable expectations of constitutional protections. And without the protections of state and municipality laws, and the functions and operation of public governments to which they have been educated and exposed to all their lives.

They are finding that the association operates outside the protections of the Bill of Rights that apply to all state entities, but not to private contractual governments. And among the loss of their constitutional protections are their private home property rights. They are discovering that their public government has adopted a “hands-off” homeowners associations, and that the homeowner must file a lawsuit to protect their rights they believed they had, but never, ever had.

One can only conclude that homeowners under HOA regimes must look to their private constitutions, their CC&Rs, for whatever protections they may have, and not to the US Constitution. Unfortunately, in order to make enforcement first and foremost within these regimes, old proven methods had to be employed – the suspension of fundamental rights and freedoms in the HOA “constitutions”.

The failure of the planned community scheme

This seems an acceptable trade-off for many homeowners in *New America*. Many Americans do not seem to have any problem between living in a centrally planned regime (by the developer and not the “people”) with its required communal living, and the cries against big government (I suppose small, centralized government is OK) and for individual freedoms and rights. These homeowners believe that after some 43 years (from the date of the HOA “bible, TB#50) they can still establish a better community, create a “decent place to live”, and achieve a better form of government by means of binding contractual Declarations based on maintaining property values over our fundamental rights and freedoms.

Homeowners continue to tweak the leaky boat, plugging up one wrong and then another, always fighting the establishment that is protecting this authoritarian community government, not realizing that our government officials want to get out of the government business and turn it over to unsupervised private entities. They are always complaining that they are not getting a fair deal. And are not willing to accept the reality that the concept is faulty, without merit, defective and contrary to the principals generally accepted in the country as to what we seek as good government and healthy communities.

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.

It would be market driven, not private entity profit driven. And, of course, it may not sell as widely as the private groups or municipal governments would like, but it would be a better representation of local rule than the oppressive, adhesion contract Declarations. It would be faithful to the Founding Fathers and to American values and principles.

OPPOSE NEW AMERICA! Write your legislator and governor and start the New Year in the right direction.

Your legal status in the New America (emphasis added)

Once upon a time in America, only a short time ago:

In 1958 Supreme Court Justice Marshall said "*that the orders of [the federal] district court . . . must be respected and cannot be suspended and cannot be interfered with by the legislature or anybody else*" [meaning state officials and the Governor]). *Cooper v. Aaron*(2).

And today in the New America, the NJ Supreme Court said(3),

Our holding does not suggest, however, that residents of a homeowners' association **may never successfully seek constitutional redress** against a governing association that unreasonably infringes their free speech rights.

Moreover, common interest residents have other protections. First, **the business judgment rule protects** common interest community residents from arbitrary decision-making. [The BJR serves as a substitute for the Bill of Rights?].

NOTES

* *The American Experiment* series, James MacGregor Burns (Alfred A. Knopf 1982). A three-volume set on American history. The first volume, *The Vineyard of Liberty*, is subtitled as "The sunburst of leadership, political and intellectual, that marked the founding and shaping of the American nation".

1. US Constitution (emphasis added).

"The Constitution and the laws of the United States . . . **shall be the supreme law of the land;** and the judges in every state shall be bound thereby, **any thing in the Constitution or laws of any state to the contrary notwithstanding**" [a very emphatic statement as to the supremacy of the Constitution]. Art. VI, cl. 2.

"[T]he members of the several state legislatures, and all executive and judicial officers, both of the United States and of the several states, **shall be bound by oath or affirmation, to support the Constitution.**" Art. VI, cl. 3.

2. *Cooper v. Aaron*, 351 US 8 (1958) (You may recall Arkansas Governor Orval Faubus calling out the National Guard to restore order due to opposition, and postponed school integration as nine black students attempted to attend all-white schools under the US Supreme Court's holding in *Brown v. Bd of Educ.* (1954) . Faubus declared that "*the Supreme Court is not the law of the land.*". Pres. Eisenhower nationalized the Guard, putting them under federal control. The Court heard the case that solidly thrashed the Governor of Arkansas and state's rightists.

3. *CBTR v. Twin Rivers HOA*, 929 A.2d 1060 (2007). A committee of homeowners filed violations of the NJ state constitution in regard to freedom of speech issues, and the court ruled on HOA covenants pertaining to the display of signage, equal use of the HOA community center, and equal access to the HOA newsletter or "house organ" for political purposes.