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## **Are the American people rejecting democracy at the local level?**

### **The Second American Experiment: HOAs**

I've characterized this "*emergence and acceptance of a quiet innovation in housing*"<sup>1</sup>, otherwise known as the widespread acceptance of homeowner associations, as the Second American Experiment.<sup>2</sup> The first being the American representative democracy form of government arising from the American Revolution, and never before adopted. As with all experiments, the question on everyone's mind was: How long would this innovative form of government endure?

All social and political change starts with some document. Our First Experiment in American governance, after a short run with the Articles of Confederation, had its Declaration of Independence, which was crystalized in the Constitution of the United States of America. Our Second American Experiment has its *Homes Association Handbook*<sup>3</sup> written in 1964 by real estate interests and supported by HUD without any concerns for the application of American principles of democratic governance.<sup>4</sup> Over the years, this Second Experiment has withered away democratic governance at the local level, replacing it with a private, authoritarian, contractual government that is held by state legislatures and the courts as not being subject to constitutional law. And the courts holding the common law of equitable servitudes (covenants running with the land) superior to constitutional and contract laws.<sup>5</sup>

Are the American people rejecting democracy at the local level, at the "town hall" level, for private HOA governance with its primary objective of "maintaining property values?" Based on the current status of HOAs spreading across the country, where roughly 20% of the population now lives under these private regimes<sup>6</sup>, unanswerable to state government or the Constitution, the answer seems to be a resounding, "YES!" In spite of the pockets of protest from homeowner rights advocates over the years, and the scattering of critical papers in legal journals, the best explanation, in my view, is that the policy makers believe that there is general "consent to be governed" by those living in HOAs. One common

defense for this apparent preference for HOAs is that, “They could move out if they really objected.” Another is that the HOA community is the voice of the people and is democracy at work at its most basic level.

I’ve already dwelt on the weak and over-simplified argument of remaining in the HOA as applying a public body concept — living within a government jurisdiction implies consent to be governed by that jurisdiction — to a contractual issue absent any such terms and conditions.<sup>7</sup>

In regard to HOAs being the best mechanism for town hall democracy, as claimed by CAI and other supporters of HOAs, I advanced the argument that voting alone does not make an entity democratic — just look to China, Cuba and other totalitarian governments. Or for that matter, whenever has it been heard that a corporate form of government was democracy at work?

### **The American preference for HOA-Land**

In spite of the above arguments, the reality before us is that the overwhelming majority of those living in HOAs want their HOA to continue — with perhaps a few changes here and there as applicable to their own personal HOA issues. In his 2005 paper, Prof. Fatovic bases his criticism of HOA democracy on Tocqueville’s *Democracy in America*. He wrote of homeowner acceptance and their willingness to forego democratic principle<sup>8</sup>,

Many home owners also insist that it is imperative to control the activities of their neighbors to maintain high property values. . . . It is also claimed that strict enforcement of the rules fosters a stable and predictable environment, which is an attractive feature to many prospective buyers seeking greater control over their environments.

In addition to these appeals to material self-interest and well-being . . . the strict enforcement of rules that curtail individual freedom is legitimate because 1) HOAs are voluntary associations formed by the consent of individuals 2) who want to maintain a particular way of life in a communal setting 3) that maximizes opportunities for participation and democratic self-government. (*P. 12*).

But Fatovic questions this consent by homeowners to deny themselves a democratic government.

However, the history and current practice of CIDs belie this Panglossian [*“all is for the best in the best of all possible worlds”*] view of home owners associations. As noted above, the CC&Rs are not created by prospective homeowners in a contemporary state of nature, but by builders interested in protecting their own investments and minimizing their own costs. . . . Those who will actually reside in CIDs rarely, if ever, have an opportunity to

participate in the formulation of the rules that will govern their lives. The deed restrictions are non-negotiable, take-it-or-leave-it offers. . . . There is also considerable evidence that many prospective homeowners are uninformed about the specific regulations. . . . [to which] they are “consenting.” The length of CC&Rs often deters residents from reading documents that may restrict their constitutional rights. (P. 15).

Americans are rejecting democratic principles at the local level, the community level. This is self-evident. But why are they? I’ve introduced the argument, based on the Mayer interviews,<sup>9</sup> that the dynamics at work here in America parallel those offered by the common German people when they were asked about why and how the Nazis took power. Milton Mayer reported that replies from his interviews reveal the dynamics of this acceptance of perceived positive benefits. These perceived benefits outweighed other factors, including justice, morality and a respect for individual rights and freedoms.

Mayer explains the perceived benefits, among which were: “*Because it promised to solve the unemployment. In what you and I call the blessings of life . . . every one of my ten friends [those interviewed] was better off than he had ever been before.*” He also explains the factors within Germany and its dictatorial system that, in effect, created a favorable mindset, a brainwashing, of the populace.

None of them ever heard anything bad about the Nazi regime except, as they believe, from their enemies. All of the blessing of the New Order, advertised everywhere, reached ‘everybody.’ There were horrors, too, but those were advertised nowhere, reached ‘nobody.’

But, are the community’s attitudes respectable? We – you and I – want the community’s approval on the community’s basis. We don’t want the approval of criminals, but the community decides what is criminal and what is not. To live in this process is absolutely not to be able to notice it – unless one has a greater degree of political awareness, acuity than most of us ever had an opportunity to develop.

On the one hand your enemies, the law, the regime, the Party intimidate you. On the other hand, your colleagues pooh-pooh you as pessimistic, or even neurotic. Now you live in a world of hate and fear, and the people who hate and fear do not even know it themselves. . [The dictatorship] provided an excuse not to think, for people who did not want to think anyway. “But the one shocking occasion, when tens or hundreds of thousands of people will join you, never comes.”

Mayer also addressed the reactions of the “good” people, and those who could understand what was happening. They went along “*in the usual sincerity that required them only to abandon one principle after another, to throw away, little by little, all that was good.*” They

further rationalized that “when men who understand what is happening — the motion of history not the single events or developments — when such men do not object or protest, men who do not understand cannot be expected to.”

## **HOA-Land — The failure to democratize**

Will the acceptance of authoritarian private local governments in the US from constitutional government result in a weakening of democracy in America, and destroy “one nation, indivisible, with liberty and justice for all”?

“Democratization” describes the processes underlying “the emergence, the deepening, and survival of democracy” in a society. Democratization is also concerned with the forces that affect the sustainability of a democracy. And that’s the issue before us: Has the First American Experiment with representative democracy succumbed to the “*emergence and acceptance of a quiet innovation in housing*,” the Second American Experiment? ***This New America of HOA-Land?***<sup>10</sup> In his “Theories of Democratization”,<sup>11</sup> Christian Welzel presents a case well applicable to HOA societies. Welzel believes that, “*Democratization is sustainable to the extent to which it advances in response to pressures from within a society.*” It appears that HOA-Land dwellers feel no need to pressure for change, just like Mayer discovered with his interviews after WW II.

People power is institutionalized through civic freedoms that entitle people to govern their lives, allowing them to follow their personal preferences in governing their private lives and to make their political preferences count in governing public life.

Since democracy is about people power, it originates in conditions that place resources of power in the hands of wider parts of the populace, such that authorities cannot access these resources without making concessions to their beholders. But when rulers gain access to a source of revenue they can bring under their control without anyone’s consent, they have the means to finance tools of coercion.

The above amply defines the dynamics of political machines and power cliques that operate, more or less, within all HOAs from benevolent dictatorships to rogue boards. And with respect to voting as the sole indicator of a democracy, it is well known that HOAs are woefully deficient in fair and just elections, with no “fair elections” laws in effect. Welzel goes on to say,

Many new democracies have successfully installed competitive electoral regimes but their elites are corrupt and lack a commitment to the rule of law

that is needed to enforce the civic freedoms that define democracy. These deficiencies render democracy ineffective. The installation of electoral democracy can be triggered by external forces and incentives. But whether electoral democracy becomes effective in respecting and protecting people's civic freedoms depends on domestic factors. Democracies have become effective only where the masses put the elites under pressure to respect their freedoms.

Once again we are told that there's a need for pressure from within, from those living in HOAs, to uphold their Constitutional protections. Even if state governments decide to enforce constitutional protections and the equal application of state laws, it remains with the HOA-Land residents to defend our system of government. Welzel reaffirms this essential requirement, *"It is only when people come to find appeal in the freedoms that define democracy that they begin to consider dictatorial powers as illegitimate."*

Welzel offers a path to victory to stop this erosion of democracy within America that is highly applicable to the social movement for HOA reforms.

As social movement research has shown, powerful mass movements do not simply emerge from growing resources among the population. Social movements must be inspired by a common cause that motivates their supporters to take costly and risky actions. This requires ideological 'frames' that create meaning and grant legitimacy to a common cause so that people follow it with inner conviction.

This is why values are important. To advance democracy, people have not only to be capable to struggle for its advancement; they also have to be willing to do so. And for this to happen, they must value the freedoms that define democracy. This is not always a given, and is subject to changes in the process of value transformation.

### **And what about our elected officials?**

However, although Welzel writes that *"elites [those in power, the cliques] concede democracy even in the absence of mass pressures"*, it is only *"when these elites depend on the will of external powers and when these powers are pushing for democracy."* But, with respect to HOA regimes, Americans cannot accept this state of affairs by state legislatures, especially not with respect to these fundamental issues of democratic governance — the very soul of this country. The absence of legislative support, *sua sponte* (on their own), for HOA reforms throughout the country is inexcusable!

State legislatures, and the public interest organizations, have failed to answer or to debate the following 4 questions, initially posed in 2007:

1. Is it proper for the state to create, permit, encourage, support or defend a form of local government of a community of people, whether that form of government is established as a municipal corporation or as a private organization that is not compatible with our American system of government?
2. Is it proper for the state to permit the existence of private quasi-governments with contractual “constitutions” that regulate and control the behavior of citizens without the same due process and equal protection clauses of the 14th Amendment; that do not conform to the state’s municipal charter or incorporation requirements; or do not provide for the same compliance with the state’s Constitution, statutes or administrative code as required by public local government entities?
3. When did “whatever the people privately contract” dominate the protections of the US Constitution? The New Jersey Appeals Court didn’t think so. Does “constructive notice”, the “nailing to the wall”, the medieval method of notice, measure up to the requisite level of notice and informed consent to permit the loss of Constitutional protections?
4. Please state what, if any, are the government’s interests in supporting HOAs that deny the people their constitutional rights?

It has become quite evident that, as stated by Welzel, the people — not only those within HOAs, but especially our government officials who take an oath to uphold the Constitution — *“must value the freedoms that define democracy.”* And the overwhelming evidence is that too many Americans no longer value their private property rights and their freedoms in spite of all the false demagoguery in support of individual rights and freedoms. So, I end with,

**Welcome to the New America of HOA-Land.**

## Endnotes

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<sup>1</sup> *Community Associations: The Emergence and Acceptance of a Quiet Innovation in Housing*, Donald R. Stabile (Greenwood Press 2000).

<sup>2</sup> [Homeowners Associations: the Second American Experiment](#), George K. Staropoli, HOA Constitutional Government, July 2008.

<sup>3</sup> *The Homes Association Handbook, Technical Bulletin # 50*, Mary Jo Cornish, ed. (Urban Land Institute 1964). Funding for this publication came from: The Federal Housing Administration, US Public Health Service, Office of Civil Defense, Urban Renewal Administration, Veterans Administration, and the National Association of Home Builders. The Urban Land Institute (ULI) was formed in 1936 as a research division of the National Association of Real Estate Boards (now the National Association of Realtors) under the name of the National Real Estate Foundation.

<sup>4</sup> See critique of the Handbook in part 3, "The Mass Merchandising of HOAs" in *Establishing the New America of independent HOA principalities*, George K. Staropoli (StarMan Publishing, LLC 2008).

<sup>5</sup> See Part III, "American political governments: private under servitudes law and public under constitutional law", George K. Staropoli, *Understanding the New America of HOA-Lands* (StarMan Publishing, LLC 2010).

<sup>6</sup> See [Have HOAs hit a growth plateau?](#), HOA Constitutional Government, May 22, 2010, and the [CAI Industry Data](#) web page showing an estimated 62 million living in HOAs. US Census shows 308,745,538 as total population of the US.

<sup>7</sup> See discussion of court opinion relating to adhesion contracts in [court examines consent and surrender of rights in HOA CC&Rs](#), HOA Constitutional Government, Sept. 23, 2010.

<sup>8</sup> [Restricted Area: A Tocquevillean Critique of Homeowners Associations](#). Clement Fatovic. (Paper prepared for presentation at the American Political Science Association Conference, Washington, D.C. September 1-4, 2005).

<sup>9</sup> *They Thought They Were Free*, Milton Mayer (Univ. of Chicago Press, 1955).

<sup>10</sup> [Understanding the New America of HOA-Land](#), George K. Staropoli (StarMan Publishing 2010).

<sup>11</sup> "Theories of Democratization", Christian Welzel, *Democratization*, Christian W. Haerpfer, ed. (Oxford University Press USA 2009).