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Planning Board HOA 'exaction': your civil liberties for property values

It has long been recognized that local planning boards have preferred, and in increasingly more and more municipalities have mandated, that new developments must have a homeowners association. Political scientist Steven Siegel writes,

> I argue here that local governments, on a broad scale and independent of market forces, effectively have *required* developers of new subdivisions to create community associations to operate and maintain the subdivision in lieu of the municipality providing traditionally municipal services to the subdivision, including such services as street maintenance, sewer service, water supply, drainage, curbside refuse collection, parks and even traditional police patrols of public streets. Local governments have been able to achieve this purpose -- with virtually unfettered discretion and an absence of judicial review.[1]

The author calls this requirement for the private provision of traditionally public services a "public service exaction." Turning to the nature of this extraction -- the restrictive covenants under which homeowners are legally bound and by which the subdivision is governed -- one finds that problems with the HOA private government scheme have surfaced across the country[2],

> [M]ounting evidence suggests that the CIC [common interest community or HOA] phenomenon is, increasingly, the direct product of conscious and deliberate government policy aimed at load-shedding municipal functions and services onto newly created CICs. . . . A well-functioning marketplace usually requires some rough equality of bargaining power between the market players, or, in the alternative, a strong governmental role in protecting the consumer.
>
> But developer and homeowner interests are *not* congruent. . . . [T]he "dead hand" of the developer all too often bequeaths to the CIC a rule regime that does not

> necessarily comport with the needs of the residents themselves . . . . The rule-bound boilerplate that governs the traditional CIC is best replaced by a legal template that places far less emphasis on regimentation and punishment and far greater reliance on the power of social trust and community.

Essentially, what is being argued amounts to the encouragement, cooperation and coercion to support and protect HOAs in a symbiotic relationship that is beneficial to the state and the private association, but is clearly detrimental to the exercise of the freedoms and liberties of the homeowners. There is indeed a close nexus and entwinement in the operations of the HOA by the municipality that is supported by state laws. Such a description satisfies the US Supreme Court criteria for state actors.[3]

This promotion and protection of authoritarian regimes that are unaccountable and unanswerable to the Constitutional protections of the Fourteenth Amendment amounts to the outsourcing of government functions and responsibilities to the extreme, where the government itself has been outsourced and privatized. This is truly a New America. It is the sanctioning of a private government unanswerable under the Constitution and state municipality codes as is required by all other government entities.

Some may argue that there is a legitimate government interest for this privatization. Some argue that this amounts to a "taking" of property rights and interests as if it were a traditional and direct government taking under eminent domain laws. The argument can be made that the justification for this active support for homeowners associations is not a necessity, but a convenience, and as such, fails to meet conditions for the loss of constitutional and civil rights and freedoms. The essential justification for this "public service exaction" has been the mutual financial benefits to both the HOA and the municipality as a result of the association's enforcement of restrictive covenants to maintain property values. This is the "raison d'etre" for HOA governance as contained in every declaration of covenants. Yet, the results of an HUD sponsored study on housing prices in 2004 revealed that (emphasis added),

> [S]ampled prices for single-family homes in areas of Houston that were (1) zoned, (2) governed by covenants, and (3) governed by neither zoning nor covenants . . . [and] found <u>no significant difference between values in zoned and covenanted areas</u>, but found both were significantly higher than values in areas lacking both.[4]

It appears, therefore, that the support and protection of associations reflects a preference rather than a necessity toward accomplishing the municipality goals of better-maintained properties to make better revenue streams. And that such a state policy serves to establish a New America of privatized governments that deprive the people of their rights and freedoms, and that are not answerable under the Constitution.

This policy has created disharmony, discord, hostility and antagonism within these associations, and this public policy cannot be said to promote domestic tranquility.

[1] Steven Siegel, "*The Public Role in Establishing Private Residential Communities*", 38 Urban Lawyer 859-948 (Fall 2006).

2 Paula A. Franzese & Steven Siegel, "Trust and Community: The Common Interest Community as Metaphor and Paradox," 72 Missouri L. Rev. 1111-1157 (2007).

[3] See *Brentwood Academy v. Tennessee Athletic School*, 531 US 288 (2001) for a summary and explanation of these criteria.

[4] John M. Quigley and Larry A. Rosenthal, "*The Effects of Land-Use Regulation on the Price of Housing: What Do We Know? What Can We Learn?"*, Program on Housing and Urban Policy University of California, Berkeley Berkeley, CA 94720-6105, April 2004.