

We the People

Article 1

of a private HOA

~~We the People of the United~~

~~States, in Order to form a more~~

perfect Union, establish Justice,

insure domestic Tranquillity,

provide for the common

defence, promote the general

Welfare, and secure the

Blessings of Liberty to

ourselves and our Posterity, do

ordain and establish this

~~Constitution for the United~~

~~States of America.~~

THE FOUNDATIONS of

HOMEOWNERS ASSOCIATIONS

and

THE NEW AMERICA

Parts I - III

George K. Staropoli

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THE FOUNDATIONS of HOMEOWNERS ASSOCIATIONS
and
THE NEW AMERICA

George K. Staropoli

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Introduction

The material of this book first appeared as two separate papers in 2006, which became Parts I and II. Part I is my review of *The Homes Association Handbook*, Technical Bulletin #50, published in 1964 by the Urban Land Institute. It is referred to as "the bible" for planned community and homeowners association development, the blueprint for the mass merchandising of homeowners associations. It can still be obtained from the ULI Research Division.

Part II is my review of the self-congratulatory book by Donald Stabile, *Community Associations: The Emergence and Quiet Acceptance of an Innovation in Housing*. Since 1992 it has become a national lobbying business trade organization for its members, primarily attorneys and management firms. It has no HOA membership category. The book provides "an insider" account of the promotion and acceptance of homeowners associations.

This quiet acceptance of and continued growth of HOAs to where some 20% of Americans now live under these authoritarian private government regimes has established a New America. . A New America contrary to that of The Founding Fathers, and one that has not only changed the physical landscape across America, but the cultural, social and political landscapes as well.

Part III explores the dual forms of political government that currently exist here in the United States. Is the restatement of law for servitudes establishing a parallel form of local private government, not subject to constitutional restraints and the protections of individual rights and freedoms?

For further information on New America, see *Establishing the New America of independent HOA principalities*, George K. Staropoli, on [Amazon](#).

Part I

THE MASS MERCHANDISING OF PLANNED COMMUNITIES: HOW AMERICANS LOST THEIR CONSTITUTIONAL & PROPERTY RIGHTS

**Source: *THE HOMES ASSOCIATION HANDBOOK*,
Urban Land Institute Technical Bulletin #50, 1964¹
August 31, 2006**

Part II

NATIONAL LOBBYIST FOR HOA PRINCIPALITIES April 20, 2006

Part III

**American political governments:
private under servitudes law and public under
constitutional law
July 4, 2009**

¹ Study Staff: Byron R. Hanke, Jan Krasnowiecki, William C. Loring, Gene C. Tweraser, Mary J Cornish. This publication can be obtained from the Research Department of ULI for a cost of about \$180.

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Part I The Mass Merchanding of HOAs

PREFACE

Civil law, like criminal law, aims to shape people's conduct along lines which are beneficial to society – by preventing them from doing what is bad for society . . . or by compelling them to do what is good for society. . . . Civil law, like criminal law, is effective mainly because of the sanctions which the law imposes, through the courts, upon those who commit violations.²

Statutes are expressions of public policy. And common law is, after all, merely the courts' notion of what best promotes public policy.³

Law reflects the values and morals of society, but it can argued that too often the society reflected by the law is that of the rich and the powerful, including special interest groups. As the theory goes, the powerful enact laws to help them make and protect wealth, and then use the criminal laws to coerce others into helping them in the process.⁴

OVERVIEW

The reader of this publication cannot but come away with the distinct realization that the authors promoted certain aspects of planned communities while deliberately avoiding a solid presentation of a number of serious concerns. It is a comprehensive manual, except for any discussion of the form of democratic governance of the community, for the mass merchandising of a profit-making business enterprise. Not only does this 422 page publication promote the selling of planned

² Wayne R. LaFave, *Criminal Law*, p. 12 (West Group 2000).

³ Id, p.15.

⁴ James W. H. & Sandra L. McCord, *Criminal Law and Procedure for the Paralegal*, p. 12 (West Legal Studies 2001).

communities to the public, the federal government agencies, local governments, the mortgage companies and to the Realtors, it provides sample Declarations, Articles of Incorporation and Bylaws for use by the attorneys for developers.⁵ This use of sample forms⁶ (similar to the legal forms that can be found in any legal research library) serve as guidelines and is a common practice used by the attorneys, which explains the commonality of many of the most oppressive and harsh terms and conditions imposed on homebuyers.

Yet, the word “democracy” is mentioned only a handful of times, and in the context of democratic form of leadership as with,

The other [as opposed to a bureaucratic style of leadership] requires more participation **in order to give members a feeling of satisfaction with association operations**; it may be called the ‘democratic style’. [emphasis added].⁷

And, when the Handbook addresses specific covenants for inclusion in the Declaration for the developer turnover of the association to the homeowners the authors advise,

It is our conclusion, however, that generally it is unwise to plan for the selection of the management of a homes association by something less than a fully democratic process (See Chapter 15).

However, Chapter 15, “Creating the Association and its Facilities”, simply deals with a variety of non-governing topics, and includes marketing techniques as well as weighted voting in favor of the developer and benevolent paternalism by the developer controlled board.

Another example of the complete disregard for the constitutional and property rights of the homebuyers are the guidelines for handling the priority of liens that the authors felt was needed to protect the interests of

⁵ Appendices F, G, H.

⁶ Appendices K, L.

⁷ In Chapter 16, Leadership Style, Skill and Sources, § 16.2, Bureaucratic of Democratic? It May Depend on Common Facilities.

the developer and the mortgagor, and to insure the continued existence of the corporate entity proposed to manage the planned community, the “automatic homes association”⁸. While this Handbook recognizes the problem with the timing of when the covenants running with the land become binding, at the time the developer sells the first lot, it advises that the states will protect the HOA from any homestead exemption because of this priority of liens⁹, but urges the need to insert wording to grant the mortgagor a priority lien before this “developer” lien.¹⁰ The home-buying public protections, as was the intention of the various state legislatures when creating the homestead protection, was intentional disregarded by the advertising of this technical oversight.

Over the 42 years since the publication of *The Homes Association Handbook*, it has become the “bible” for the mass merchandising of planned communities with the accompanying affect on American society, its values and the loss of individual property rights, and the loss of fundamental rights and freedoms upon which this country was founded. The Handbook was supported by several federal agencies and real estate interests¹¹, and continues to be supported by these same entities along with state legislatures and local municipalities, with the same apparent disdain for the protection of American liberties and freedoms.

The mantra of “less government intervention”, this call for a laissez-faire policy by reputable libertarian public interest firms, masks the prevalent protectionism of planned communities by the states and their

⁸ Term used for today’s mandatory membership association.

⁹ “We believe that the lien of assessments will, in all states, be recognized as superior to and unaffected by the homestead exemption”. P. 322.

¹⁰ “In absence of an express provision altering priorities, the court held that the lien of the assessments was superior to the lien of the mortgagor . . . a suggested provision dealing with priorities may be found in Appendix F.” p. 321.

¹¹ From the cover page: 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 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 (see generally, *Community Associations: The Emergence and Acceptance of a Quiet Innovation in Housing*, Donald R. Stabile (Greenwood Press 2000).

failure to protect a segment of society from the predator marketing tactics of the real estate industry.

THE MASS MERCHANDISING OF PLANNED COMMUNITIES

What is remarkable, and disgraceful, is the failure of state governments across the country to impose sanctions for board member violators of planned community, homeowners and condo owners associations. Homeowner violators are subject to fines, penalties, interest with accompanying liens on their homes, and even the HOA's right to foreclose on the their homes. It seems as though state governments have set a laissez-faire approach as good public policy when it comes to holding planned community governments accountable to the state. Such an attitude can only be interpreted, as cited above, as "this is beneficial and good for society." One-sided enforcement of the laws against homeowners has become the standard of what is beneficial for the American people.

These HOAs have risen to a level that surpasses the accountability of governmental entities under the law, while granting these authoritarian private governments almost equal status and powers as if they were indeed governmental entities. HOA assessments have been given the same status as federal tax payments under the recent changes in the federal bankruptcy laws, and while a person has help and can negotiate a workout plan under federal guidelines for the payment of his taxes owed, there are no similar laws that requires a workout for the payment of HOA assessments owed the private organization, the HOA.

The origins of how this came to be here in America, the bastion of democracy, can be traced back to the ULI's Technical Bulletin #50, that was prepared and supported by the real estate special interests, and aided by federal agencies (See Appendix 1, TB#50 Table of Contents). The effects of this 1964 guide to the selling of planned communities to the public, the media, and the legislatures can still be seen today with several states having adopted a UCIOA (Uniform Common Interest Ownership Act) law, or are considering the adoption of such a law, as, for example, are Texas and California. UCIOA can be seen as the extension of the

premises and protection of business interests, made into law. The repeated calls for a Bill of Rights, due process and the equal application of the laws protections, as all governmental bodies are held, remains shockingly absent from all versions of UCIOA.

This paper makes extensive use of quotes from TB#50 so the reader can, for himself, assess the tone and true motivation of the authors and promoters of planned communities.

The Framework

HOA supporters, including legislators:

Some people do not know how to live in an HOA. They entered into a contract and now they are trying to break it because of something they do not agree with. We expect people to live up to their contracts.

The courts:

You, Mr. homeowner, do not have these rights because you surrendered them when you agreed to be bound by the CC&Rs, which are a binding contract.

The homeowners:

I did not know I entered into a contract when I bought my home. I signed no CC&Rs or contract to obey any rules. And I never agreed to surrender any rights. Nobody told me that I was doing all of this.

The Con

The “pat ourselves on the back” book by Donald R. Stabile¹², which was partially funded by ULI and the Community Associations Institute

¹² *Community Associations: The Emergence and Acceptance of a Quiet Innovation in Housing*, Donald R. Stabile (Greenwood Press 2000).

(CAI)¹³, carries the subtitle: The Emergence and Acceptance of a Quiet Innovation in Housing. However, the reader of TB#50, this bible on how to make the planned community concept work, comes away with a far more sinister picture of corporate collusion and conspiracy, and government willingness to look the other way and hear no evil, see no evil and speak no evil.

This quiet acceptance was accomplished by the mass merchandising of the planned community model by entities with a strong business profit-making motive, who published and distributed TB#50 as the tool to overcome any objections by the public, the real estate agents, the mortgage companies, the state legislatures and the local planning boards. TB#50 had something to say on how to sell the concept of HOAs to everybody. And it accomplished this task in a typical business marketing and promotional plan that had answers to the legal concerns, the operation of the HOAs, the physical infrastructure and amenities of the planned communities, down to how to select the right people from the homeowners in order to properly run the homeowners association. All in such a way as not to disturb the profit picture for the developer or mortgage company, and in a way that mandated the loss of homeowner fundamental rights and freedoms by means of an unconscionable adhesion contract, the Declaration. The need for state legislation in order to make the planned community model viable was stressed in TB#50.

A common theme that the reader encounters through out TB#50 is the requirement to perpetuate the business-developer's plan for the community, unchallenged by any government agency and made extremely difficult to amend by the association members (just recall the difficulty in amending the US Constitution). This guideline strongly

¹³CAI was created by in 1973, some nine years after the publication of TB#50, to stop the problems that were occurring with planned communities. It was to provide educational services to HOAs, the government, and the public. Its organization paralleled that of a typical state agency with a board or commission consisting of representative organizations affected by the agency. In 1992, with continued HOA problems and severe criticism by political scientists, such as, Robert Jay Dilger, Evan McKenzie, Stephen E. Barton, Carol J. Silverman, and Gregory S. Alexander, CAI reorganized as a trade group in order to concentrate on lobbying state legislatures to support planned communities and HOAs. See generally, Supra note 4; *Privatopia: Homeowner Associations and the Rise of Residential Private Government*, Evan McKenzie (Yale Univ. Press 1994).

emphasizes that the HOA association and planned community must endure as a monument to the developer, or was it to reassure the mortgage company about property values, and to mollify local government that it will not be required to become involved in what amounts to independent principalities.

THE ULI BLUEPRINT FOR SELLING PLANNED COMMUNITIES

Some of the more serious and sensitive issues of the past, 42 years ago, and still continuing today are presented below.

The Necessity for Covenants Running with the Land

TB#50 makes it very clear in Chapter 1 that the homes association, by definition, is tied to covenants running with the land:

[W]e have taken the position that no organization is a homes association unless provided for, in some manner, in the covenants, deeds, or other recorded legal documents which affect title to the land within the development.”¹⁴

[T]he right to membership in such an association is automatic [mandatory in today’s jargon] for every home owner because it cannot be withheld from an owner whose land is charged with the obligation to pay its assessments.”¹⁵

This bible for creating planned communities impresses upon its readers that the community’s source of income is from maintenance funds, the assessments, that are legally levied against the land by recorded covenants, which bind each and every owner as a lien against

¹⁴ Chapter 1, “*Is it a Homes Association or Isn’t it?*”, p.5,

¹⁵ Id, p. 6.

the land. Numerous pages then explain and inform of the necessity for properly worded covenants that run with the land be part of the recorded declaration in order to make the association's assessments on these members legally binding. The collection of assessments is the life-blood of the HOA, its source of revenue just as the state collects taxes to pay for its operation.

This obsession with the acceptance and survivability of the planned community dominates any concern for constitutional protections of homeowner rights to the extent that foreclosure becomes a weapon of enforcement against non-payment of assessments. This enforcement tool (for a detailed discussion of foreclosure, see Foreclosure below) is available because,

Fundamental to the legal arrangement for a homes association is the covenant for assessments which must be made to run with the land so that the association can be assured of a continuing, legally enforceable source of maintenance funds.¹⁶

In this manner, making use of equitable servitudes and covenants running with the land, TB#50 has side-stepped any and all contract law elements relating to a proper meeting of the minds, misrepresentation, proper notice of the covenants and restrictions, sufficient due process with respect to any surrender of constitutional rights. All these issues are easily bypassed by the real estate doctrine of constructive notice, the posting to the county clerk's office leaving it the obligation of average Americans seeking to buy a home to discover what they had agreed to when they took possession of their new HOA controlled home. Recording the declaration also *"establishes a 'uniform scheme' of land use . . . which is mutually enforceable among the home owners and by the homes association as their representative."*¹⁷

¹⁶ Chapter 23, "Affirmative Covenants", p. 314.

¹⁷ Chapter 12, "Setting the Legal Foundation", p. 199.

Superiority of Liens: Homestead Exemption loophole and mortgage liens

TB#50 advises that the states will protect the HOA from any homestead exemption because of this priority of liens, but urges the need to insert wording to grant the mortgagor a priority lien before this “developer” lien. The home-buying public protections, as was the intention of the various state legislatures when creating the homestead protection, was intentional disregarded by the advertising of this technical oversight.

We believe that the lien of assessments will, in all states, be recognized as superior to and unaffected by the homestead exemption.¹⁸

In absence of an express provision altering priorities, the court held that the lien of the assessments was superior to the lien of the mortgagor . . . a suggested provision dealing with priorities may be found in Appendix F.¹⁹

Section 10 of Appendix F contains the simple wording almost identical to that found in most declarations and state laws: “*The lien of the assessments provided herein shall be subordinate to the lien of any mortgage . . .*”²⁰ The reason for this limitation upon the homeowner is obvious -- to insure the acceptance of favorable loans to the developer, and to insure the viability of the planned community. (See the 30 year restriction below). It is a plus in favor of the mortgagor who obviously will accept higher property values given the private HOA maintenance of the community, meaning higher sales prices for the developer. “Inadequate maintenance of the common properties will impair the value of the homes and so of the mortgage lender’s security”.²¹

¹⁸ Supra n. 16, p. 322.

¹⁹ Supra n. 16, p. 321.

²⁰ Appendix F, Covenants, p.391.

²¹ Supra n. 17, p. 210.

So, from the initial concept and model of the planned community, the individual homebuyer has entangled himself in the financing of the developer by allowing the mortgagor to have a first lien for payments in arrears not directly affecting the owner's private property, but for payments on common property that is owned by the HOA. Please understand what is happening here. The mortgage company does not want to collect the assessments as part of the mortgage payment along with the insurance and taxes. Why not? Is it because the mortgage companies recognize the frailty of HOA boards and the legalities of its operation? Perhaps they do not want to become involved in HOA-homeowner squabbles relating to questions of legitimacy and validity of HOA actions.

The homebuyer has granted the mortgagor a favored position not related to the condition of his private home, but to the possible devaluation of the common areas that the homeowner does not directly own or control. Why must the mortgagor be granted this additional protection and assurances, if not but to assist and aid in the viability of the HOA that is only, at most, a third-party beneficiary of the homeowner's mortgage loan?

The lien of assessments unpaid for by the home owner . . . would, if permitted to come ahead of the mortgage, eat into the mortgage security. For this reason, the mortgage lender is justified in asking that the lien be postponed to his mortgage."²²

What about the justification of the homeowner for his equity in his home in regard to the loss of his homestead exemption or foreclosure as excessive punishment that leaves him, in reality, with nothing?

The Necessity of Foreclosure

Why is it necessary for the HOA to foreclose on a home for failure to pay assessments? Granted that the HOA's survival, like any other governmental entity of non-profit organization, depends on a revenue

²² Supra n. 17, p. 211.

stream of contributions, donations, and taxes. But, only the state or federal government is allowed, and will, take a person's home for the nonpayment of taxes, but only after protective procedures have had a chance at a workout. Why do so many state laws mimic the ubiquitous covenants, including the model homes association forms contained within TB#50,²³ and legally permit the HOA to foreclose? As stated in the Preface to this paper, such laws reflect the legislature's view of good public policy, and these foreclosure laws say that it's good public policy to permit an HOA to foreclose on a person's home.

Of course, the homeowner has agreed to allow this foreclosure on his home, but the question is one of the equal application of the laws, due process protections and good public policy especially with the lack of any constitutional protections of the homeowner's rights within the HOA constitution, the Declaration. And, there's the issue of the lack of any state enforcement of wrongful acts committed by the governing body, the HOA board. Other entities that have the right to foreclose have a bona fide stake in the failure to make payments to them, namely the mortgage company that advanced substantial sums as the mortgage loan. But, what is the substantial amount of hard cash has the HOA advanced, and what bona fide stake does it have to warrant foreclosure rights, to warrant such draconian measures?

Foreclosing on a \$200 HOA debt with over \$2,000 in attorney fees causing the homeowner to lose his equity in his home that can have a market value of \$120,000 or \$200,000 or even \$1,000,000, representing a 200 to 5,000 times ratio of damages to losses, is extremely excessive. Can the HOA substantiate damages in this amount? No! **So just what does the right to foreclose reflect? The punishment of offenders!** A hideous "crime", an act against the best interests of the community, the HOA, that warrants severe punishment as a deterrent to other homeowners. **Foreclosure is nothing more than excessive punishment by the HOA.**

Excessive punishments, as in excessive punitive damages, has been found by the US Supreme Court to be an unconstitutional violation of the

²³ Appendix F, Covenants, and Appendix H, Bylaws.

14th Amendment's due process clause and a deprivation of property.²⁴. The Court offered a 10 to 1 or less ratio as acceptable ratios for punitive damages.

Disregarding the above concerns, in 1964, with the highly motivated special interests seeking to make the planned community model with its mandatory authoritarian homes association acceptable and successful, TB#50 strongly argued for the right to foreclose as an effective legal means to “guarantee” HOA revenues. the primary purpose of TB#50 was to demonstrating how the promoters had taken steps to protect the interests of the industry participants, steps that were necessary for the acceptance and survival of this new approach to home ownership. The right to foreclose was a paramount selling point, and is directly connected to properly word covenants granting the HOA the right to collect assessments and to lien the homeowner for the non-payment of assessments (see “The Necessity for Covenants Running with the Land”, above).

The covenant for maintenance assessments, unlike protective covenants, looks to legal enforcement which will result in a collection of a sum of money. Such enforcement can be made through a proceeding to foreclose a lien on a house.”²⁵

Such enforcement can be made through a proceeding to foreclose on the home . . . It [the lien] is enforced by foreclosure proceedings . . . Moreover, foreclosure of a lien is the best remedy available Foreclosure proceedings . . . do not require personal service of process

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²⁴ *State Farm v. Campbell*, 538 US 408 (2003). This action involved the amount of an insurance claim award. (“The Due Process Clause of the 14th Amendment’ prohibits the imposition grossly excessive and arbitrary punishments a tortfeasor [wrong-doer]; [The \$145 million award was] neither reasonable nor proportionate to the wrong committed, and it was an irrational and arbitrary deprivation of the property of the defendant”).

²⁵ Supra n. 16, p. 314.

²⁶ Supra n. 17, p. 202.

The Exercise of State Police Powers to Fine and Penalize

While the authors spend much time concerned with the legalities of assessments and enforcement by means of liens and foreclosure, very little is said about violations of the CC&Rs and rules of the HOA. They do advise that the rules be publicized with information about penalties, and that they be few and be simple.²⁷

As to penalties for violations of the rules, TB#50 is careful to not to specific monetary penalties and liens, but does advise that, “Penalties for abuse of the rules should be appropriate to the facility, the abuse, and the offender.”²⁸ It is clear that the penalties refer to acts committed at some common area facility, and not for any violations outside the common areas.

However, the authors recognize the need for effective enforcement against rule-breakers, but seem to have developed a blind eye to the enforcement of violations by uninformed and incompetent boards. The authors advise getting local authorities involved to help with enforcement of the private organization rules,

Since empty threats will only tempt the rule-breaker [board members appear to be excluded from this advice] the association must be strong enough to enforce its rules and must have the cooperation of local authorities, when necessary, as an aid to enforcement.²⁹

The reader of TB#50 is strongly warned that,

The right to enforce a covenant against a particular violation can be lost if action is not taken promptly; by proceeding in court if necessary. . . Thus, the failure to enforce covenants may have a snowballing effect leading to a destruction of the neighborhood plan.³⁰

²⁷ Chapter 18, “Using the Common Property”, p. 283-4.

²⁸ Id, p. 285.

²⁹ Id, p. 283.

³⁰ Chapter 20, “Conserving the Neighborhood”, p. 297-8.

And the reader is further warned, of a common wrongful act that occurs frequently today, that to delay enforcement may be bring greater penalties. Referring to the equitable doctrine of estoppel by latches, without mentioning the doctrine, *“The principal of equity which operates here is the same as that which would deny enforcement because of delay.”*³¹

Again, the authors are more concerned about conserving the neighborhood and the detrimental affect that the owners of the HOA, the homeowners, may have on the community, but fail to offer equally strong wording relating to the proper and effective governance by board members. The board member, that other class of owner, seems to be somehow blessed with the virtues of angels, and can do no wrong.

A surprising result from the reading of TB#50 relates to the non-appearance of monetary fines for violations of the covenants, just the failure to pay assessments. Nothing is even mentioned about foreclosing for failure to pay fines and penalties. Not even a mention of the disenfranchisement. However, Article 3, Section 3 of the sample bylaws does permit the suspension of facilities for violations of the rules, for up to 30 days. Could the use of these enforcement techniques have arisen today from the laissez-faire treatment of HOAs by the state, leading to “we can do anything we want” attitude by HOA boards?

The 30 Year Restriction on HOA termination – Preserving the Developer’s Plan

For some unspecified reason, the authors are opposed to democratic rule by the homeowners, in spite of statements made elsewhere in the guideline (see “Democracy and Planned Communities” below). “Interim” modifications, those less than the initial term of 30 – 40 years are opposed on the grounds that

“A provision which would allow for substantial modifications to the covenants at any time would throw

³¹ Id, p. 298.

away one of the significant advantages of covenants as compared to zoning – that covenants need not be left open to continuous struggle.”

And again, unspecified reasons are given for requiring an initial non-modifiable declaration period: *“It is generally agreed that the first period should run . . . as long as it will take to amortize the initial home mortgages”*³²[emphasis added]. What is so unique about the initial mortgages, and the counting of the time period that undemocratically binds all future homeowners? The answer is never provided, and it appears to be an arbitrary and capricious time in favor of the initial, and therefore higher risk, mortgages.

Amending the Declaration with less Than 100% of the Owners

This is another controversial issue also addressed by TB#50, 42 years ago, and is still alive today, being subjected to many court decisions with opposing answers. Contractually, a person’s property cannot be taken away without his consent, unless of course the government invokes its eminent domain powers for the public benefit. With respect to the dreadful termination of the HOA, the guidelines warn readers that if the CC&R provisions cease to apply after a certain time, *“certain legal objections can be raised to a provision which allows them to be reattached by the vote of less than all the owners.”*³³ This is another contradiction to the democratic voice of the homeowners, and a clear statement of authoritarian dictatorship in the best tradition of National Socialism. As Fascist Benito Mussolini said, *“All within the state, nothing outside the state, nothing against the state,”*³⁴ except we now can equate “developer” with the “state.”

Furthermore, TB#50 carefully points out the need to require more than 50% of the homeowners to **terminate** the covenants, as the declarations are commonly worded today, rather than to **reinstate** them

³² Supra n. 17, p. 212.

³³ Id. (There is a discussion concerning amendments that increase the homeowners burden will be objected to if not approved by all the homeowners).

³⁴ Benito Mussolini Wikiquote, http://en.wikiquote.org/wiki/Benito_Mussolini (August 29, 2006).

“Although most homeowners would rather see the covenants continue, a majority to reinstate them may be difficult to muster.”³⁵

Weighted Voting in Favor of Developer

Advice provided to readers of the guideline comes from a real-life developer:

The developer should maintain control of the homes association . . . Obviously, conflict can arise between an autonomous association and the developer . . . If the developer is not careful to define the lines of authority and responsibilities, he might find that he has a Frankenstein that continuously interferes with his plans.³⁶

The developer is warned that he “*must prevent the destruction of his plan of development and of his market by a run-away association.*”³⁷ And in spite of cautionary statements that if the developer is doing a good job, he can expect a good proportion of the owners to see things his way and vote accordingly, the developer is told that he “*may further extend his control of the association board by providing for staggered elections . . .*” and by “*giving the developer extra voting power . . . with a weighted voting ratio where “the developer will lose control only when 75 per cent of the homes have been sold.”*”³⁸

DEMOCRACY and PLANNED COMMUNITIES

“Democratic planned communities” is simply an oxymoron. In planned communities, the homeowners’ constitution, or private government charter, was cast without any homeowner representation by the profit-seeking developer long before any homeowner entered into the picture. The supposedly democratic mechanism of voting to amend the plan in accordance with the will of the majority is, in all practicality, a

³⁵ Supra n. 9.

³⁶ Chapter 15, ‘Creating the Association and its Facilities’, p. 240-1

³⁷ Id.

³⁸ Id., p. 241.

myth in the CC&Rs, which were promulgated with the intent not to be able to change the plan. TB#50 reflects an understanding that the association is not truly democratic and that the board will, in reality, really control the association.

Homebuyers bring with them the expectation that the HOA would be a democratic form of government with all the protections of the US Constitution backed by the laws of the land. They are not told in this handbook that the Bill of Rights does not apply to private agreements and contracts, as the Declaration is regarded. Homeowners bring with them the expectation that even if the governing documents contained outlandish provisions, the courts would not hold them to be valid and any such provisions would violate their fundamental rights and freedoms. Nobody tells them any different, not even state agencies with the obligation to protect consumers, going back to the beginning with TB#50.

And that's all TB#50 has to say about the democratic governance of planned communities. There is no discussion of the Constitution, or the Bill of Rights, or any protection of homeowner rights that are available to those not living in a planned community. It cannot say more because there is no similarity of corporate boards of directors and public governments, nor are there laws to equate the private, contractual HOA government with our public system of government with all its protections of our rights and freedoms. If municipalities are bound to the US Constitution, why can private, contractual governments be permitted to bypass the Constitution?³⁹ Will the state allow planned communities to succeed from America as being argued by some scholars?⁴⁰

³⁹ *We are a nation not of 'city-states' nor HOAs, but of States*, Constitutional Local Government, <http://pvtgov.blogspot.com/2005/06/we-are-nation-not-of-city-states-nor.html> (September 1, 2006) US Court of Appeals, 630 F.2d, at 717, cited in COMMUNITY COMMUNICATIONS CO., v. BOULDER, 455 U.S. 40 (1982).

⁴⁰ *HOA Secession from Local Government: The future of Planned Communities?*, Constitutional Local Government, <http://pvtgov.blogspot.com/2005/09/hoa-secession-from-local-government.html> (Sept 1, 2006).

Reasons for the Inclusion of Voting privileges

Those who have been involved in homeowner rights advocacy over the years have heard the oft-repeated statement made by the supporters of HOAs, as well as pro-HOA legislators, that HOAs are good examples of a democracy because the homeowner can vote for the board of directors. Period. That is all that these supporters have to say about HOA democracy. Where did this false and oversimplified argument originate? From within TB#50.

The other [as opposed to a bureaucratic style of leadership] requires more participation **in order to give members a feeling of satisfaction with association operations**; it may be called the ‘democratic style’. [emphasis added].⁴¹

The members can always fall back on democratic controls provided in the bylaws [the corporate governance form of bylaws] to exercise their power to correct a situation But usually members will not involve themselves in active participation.⁴²

The right of every home owner to membership and to vote is, in our opinion, critical to the strength and success of an automatic homes association.⁴³

Because the articles and bylaws of a corporation are relatively easy to change, further strength will be lent to this arrangement [mandatory assessments require membership] by inserting a provision governing membership and voting rights in the association in the text of the declaration of covenants and restrictions.⁴⁴

⁴¹ Chapter 16, “Leadership Style, Skill and Sources”, § 16.2, “Bureaucratic of Democratic? It May Depend on Common Facilities”, p. 247.

⁴² Id, p.248.

⁴³ Chapter 27, ‘Special Points in the Articles or the Covenants’, p. 347.

⁴⁴ Supra n.17, p. 209.

One cannot help but reflect on the fact that countries like Cuba and China allow their citizens to vote in public elections, but no one refers them as examples of democracy at work.

Promoting Planned Communities

The reader, who was not the public at-large or the homebuyer but the various special interest groups, is assured that,

As with the law of the State, the home owner in the automatic association cannot plead ignorance of the covenants to excuse his failure to pay assessments. These are as sure as taxes.”⁴⁵

Almost everyone today has knowledge of what a homeowners association is all about from real estate agents, developers, the media and any public agency informational links, such as from real estate departments or other agency regulating builders or professional organizations. Such information is a sharp disconnect from the guidelines provided by TB#50 as outlined above. However, the guideline does not ignore the selling, marketing and promotional aspects to creating planned communities. Such promotional material is consistent with what homebuyers, at this time, are told about HOAs.

In extolling the virtues of planned communities, in the opening chapter, the authors make their position quite clear with,

“Constructive forces are needed to counteract these aspects [the destruction of a sense of community] and to utilize the opportunity that growth offers to build better communities an organization of home owners . . . whose major purpose is to maintain and provide common facilities and services.”⁴⁶

⁴⁵ Supra n. 36, p. 233-4.

⁴⁶ Supra n. 14 p.4.

With that statement addressing a societal problem, the authors speak to the developers, lenders, professionals and municipalities saying that the *“can reach broader markets and achieve significant cost savings by using the homes association concept.”* *“Federal agencies should give private industry maximum encouragement in the use of homes associations . . . ; “Lawyers, appraisers, planners and others . . . can increase their services to society by creating better neighborhoods through the homes association approach.”*⁴⁷

Yet, the political concerns of imposing a contractual private government under an authoritarian form of governance without constitutional protections for the assessment payers, the owners of the associations, goes without discussion or concern. **There is no concern in TB#50 for the effect of this privatization of community government on the stated objectives of planned communities: creating better communities.**

As an illustration of the benefits to the community, the learned authors then dare to compare a community having a homeowners association with one not having an association. Highland Gardens, a suburb of Philadelphia [as best as can be determined some 42 later], is compared with Sunnyside Gardens in New York City,

When responsibility for common areas lies with a citizens association, the results are likely to resemble the situation shown [as the suburb]. The same type property, under jurisdiction of an automatic homes association, turns out looking like [Sunnyside Gardens].⁴⁸

This comparison is extremely biased and inexcusable, since Highland Gardens was just another community while Sunnyside Gardens was the result of influential persons with a belief in utopian societies. Supporters of the Sunnyside model, frequently cited with regard to early utopian attempts at community living, included the leading idealist of the times

⁴⁷ “Highlights of the Findings and Recommendations”, p. x

⁴⁸ Supra n. 14, p. 5.

(1924) Ebenezer Howard, and Eleanor Roosevelt.⁴⁹ This comparison is pure hype and borderline misrepresentation. It's hardly a fair comparison at all from a federal government supported study.

Figure 15A, pp. 324-5, (See Appendix 2, Promotion) depicts an existing country club as an example of a planned community, stating *"yours automatically . . . membership is automatic – without any membership fees or assessments . . . the resident members are the owners . . ."* The guidelines contain another real-life quote that *"All such members shall execute a written membership agreement . . . that the proposed member subscribes to and agrees to be bound by the [governing documents]"*.

Why there is so much emphasis today regarding the dissemination of the governing documents? What does the disclosure of the governing documents, with their inherent and developer biased and restricted covenants, but absent any discussion of buying a business or joining a private government operating outside the US Constitutional protections, constitute a full disclosure of all the material facts affecting the purchase of real property? The guideline advises, *"It is most important that new buyers be informed before they buy of the bylaws and restrictions on their property."*⁵⁰ And then the guideline makes the unsupported and misleading assertion that, *"In short, all parties are protected by the dissemination and acknowledgment of all the facts concerning the buyer's relations with his new community"* [emphasis added].⁵¹ The informed public knows better.

The developer must⁵²

- *"thoroughly indoctrinate his own sales force in selling and informing the home buyer about the homes association" and "be thoroughly sold on the worth of the association."*

⁴⁹ Sunnyside Gardens Preservation Alliance,
<http://www.sunnysidegardens.org/history/history.html> (August 29, 2006).

⁵⁰ Supra n. 36 p. 236.

⁵¹ Supra n. 36 p. 237.

⁵² Supra n. 36, p.236-7.

- Convince the public officials in the area of the development “*that the automatic homes association is, **by virtue of its legal rights and obligations**, quite different from the combative neighborhood associations they have known before*” [emphasis added], and
- “*That **the homes association represents all the owners** of an area and is organized to produce a healthful residential environment and preserve its values. Thus it is a limited partner of the local public body and a *bona fide* interpreter of public interest.*” [emphasis added].

Local planning boards are advised to,

“Be sure that the covenants running with the land provide for an automatic rather than a non-automatic homes association, for adequate maintenance assessments and other safeguards for the home owner and the local public agency.”⁵³

And for the Realtors and other sales people,

Feature the common areas and facilities in sales promotions. Emphasize particularly that the automatic homes association **gives the home owner an effective voice in control and operation** of these facilities ...”⁵⁴ [emphasis added].

And for the lenders,

Recognize in your appraisals and mortgages the values of these rights in the individual properties so that the developer and builder can include them in sales price.⁵⁵

⁵³ Chapter 3, “Special Viewpoints and Recommendations”, p.30.

⁵⁴ Id, p. 32.

⁵⁵ Id.

CONTEMPORANEOUS CRITIQUE OF TB#50

In 1967, just three years after the ULI publication of *The Handbook*, a Univ. of Calif. Public Affairs Report criticized the concept or model of a homes associations, as HOAs were called back then. The value in looking back is that after the passage of many years there has been the inescapable slow, but steady, erosion of the values and attitudes that once were. Looking back, we can see more clearly what was gained, and what was lost.

First, here's a quote from what the editors of the 1994 book, *Common Interest Communities* (see n. 99, *infra*) wrote:

"Scott raised doubts about the increasing use of mandatory homeowners' associations . . . [they] weakened citizens' connection with their local government; their exclusivity encouraged economic and racial segregation, thus weakening the fabric of American society; and the central role of the developer and the requirement of property ownership . . . weakened local democracy."

Scott is concerned with the privatization of government by profit seeking developers who bypasses local government.

"Basic criticisms of the FHA-ULI homes association policy are . . . the assignment of open space, parks . . . bypasses local government [who are] custodians of such property. . . Any significant inclusion of multiple dwellings appears to be discouraged by FHA policies, and lower-income brackets [renters, perhaps] are viewed as a likely source of special problems. Policies of *exclusiveness* [sic] are only thinly veiled as efforts to 'maintain high standards', or 'insure property values', or provide a 'private community.' [Note the inclusion of the mortgage entity].

"The automatic homes association and its binding covenant would be designed and *established by the developer* [sic] before a single house had been sold -- that is why they are called 'automatic.' Yet anything so important as the life of a community as control of . . . shared facilities is sufficiently affected with public interest to justify a strong public role . . . when the community-to-be is without residents.

For the protection of its own interests, FHA-ULI urge *the developer to retain control* [sic] of each homes association [and] to exercise a strong benevolent paternalism [like a grandfatherly autocratic government] in determining the composition of the association's

leadership and influencing its policies. Surely alternative methods can be found for a more publicly responsible stewardship The 1964 ULI report [The Homes Association Handbook] recognizes some real difficulties in making these '*private governments*' [sic] work effectively and responsibly.

"The legitimate desire for maximum financial stability and security of the housing developments -- viewed as investments -- [read as developer and FHA investments] appears to be given overriding importance that it may obscure other equally important goals [like democratic governance and remaining subject to the Constitution]."

In this 1967 article, Scott concludes with, ***"Associations are not the final answer. We should not be satisfied -- as FHA and the Urban Land Institute appear to have been -- with the assumption that home association provides a final answer."***

We should ask ourselves what has happened over the past 43 years since this 1967 report. Why weren't corrective measures taken by state legislatures to recognize HOAs as indeed de facto governments, and that they must be made equivalent to a public entity? To what extent did the creation of the Community Associations Institute (CAI) in 1973, just 6 years after this the publication of this report, have on future developments? Many of us who are interested in the facts can see how CAI influenced legislatures as they re-constituted themselves as a national lobbying organization in 1992 to oppose the voices of reform.

SUMMARY

The Urban Land Institute Technical Bulletin #50, *The Homes Association Handbook*, was the vehicle for this mass merchandising of planned communities with influence today on events and attitudes.

The model and concept of planned communities with their mandated homeowners associations has been presented and sold to the legislatures, government agencies, commissions and officials, and to the media and public in general as the unquestionable means to better, healthier, vibrant and desirable communities. And the means to this noble end was the HOA governing body supported by unconscionable adhesion contracts in the form of covenants, conditions, and restrictions, including the HOA bylaws, that would maintain property values for the benefit of all -- the

local municipalities, the homeowners, and the real estate special interests.

Sadly, in their effort to sell this concept to Americans, the promoters found it necessary to cast a scant eye on the constitutional protections of homeowner rights. This intentional disregard in the presentation, explanation, selling and mass merchandising of this new order of society -- communal living under authoritarian HOA regimes -- amounts to a con on Americans. The emergence and quiet acceptance of this innovation in housing -- as ULI and Community Associations Institute proudly announced in the subtitle of *Community Associations*,⁵⁶ a book that they partially funded in 2000 -- was accomplished with subterfuge and a disregard for the values and beliefs in the democratic institutions upon which this country was founded.

This effort has been an attempt to set the record straight so all concerned and interested parties, especially the policy makers and public interest firms, can take a fresh look at the real motivations behind planned communities. It can be asked:

- Is the continued government support, cooperation, encouragement and protection of planned communities and homeowners associations warranted, considering the corresponding detrimental affect on the American social order warranted and political system of government?
- Can property values be maintained under a democratic form of governance that retains the homeowner protections guaranteed to those not living in an HOA?
- When will the state hold these independent, private governments accountable to society, as are all other state entities?

⁵⁶ Supra n. 12.

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Appendix 2. Promotional Brochure.

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Appendix 3. A Poetic History

And the Land Shall Be Made Good Again *george k. staropoli*

*In the beginning
There was the land,
And the land was good
And the people were happy.*



*Soon upon the land
Came the moneychangers
In the guise of builders
Of the community.*

*And the moneychangers said
Behold, the covenants, conditions and restrictions
Were sacred and holy works,
And the people shall flourish and prosper.*

*And the legislature looked upon these CCRs
And said they were sacred and holy,
And that land values shall multiply ten-fold,
And the people shall flourish and prosper.*

*But the moneychangers were not content,
Seeking laws that forced the people
Against their judgment and wishes
Into mandated planned communities.*

Soon, the multitude became angry at their plight,

*Yet the moneychangers and legislature
Cast the people into involuntary servitudes
With continued tithes while disputes went unresolved.*

*The child-like people, seeking paradise
On earth and the gates of heaven,
Were not permitted audiences
With the magistrates.*

*And so the multitude suffered
A long and terrible time,
Praying for a savior one day
To deliver them from their existence.*

*One sect sought the accomodation
With the ruling powers and moneychangers.
Another sought a cleansing
Of an unworkable oppression upon the people.*

*Those seeking accommodation held fast to their desires
To see their fortunes on earth multiply ten-fold,
And that all such plans were good and just,
For the land values increased for all the community.*

*But many saw the desecration of the beliefs, values and ideals
Of the founders of the Great Nation that covered the land,
Saying behold the society that thou hast created,
Where Me First has replaced Love Thy Neighbor.*

*A babble of communities arose
By the followers of the moneychangers,*

*With beliefs, values and ideals of the Old Ways,
Once rejected by the Founders of the Great Nation.*

*Woe unto the followers of the moneychangers
For the sins of the fathers shall be cast upon the sons.
Repent now and restore the beliefs, values and ideals
Of the Great Nation and make the land good once again.*

Part II NATIONAL LOBBYIST FOR HOA
PRINCIPALITIES

April 20, 2006

**Community Associations Institute: Dominating the Emergence and
Acceptance in America of a Quiet Political Revolution in
Authoritarian, Contractual Private Local Government.**

Overview

In the late 1950s, a well-known commentary on Communist Russia related to its Five Year Economic Plans. As the story goes Communist Russia was viewed by some as a democracy, because its people could vote, and because they had freedom of choice. You could buy any color of shoe in Russia so long as it was black. Why? Because that's the only color of shoe that the government allowed to be made.

Jump some 60 –70 years to the America of today, the bastion of democracy that is being expounded to countries all over the world. In America today, people can live in any type home that they choose, so long as it's in a homeowners association. Why? Because that's the only type of home the government will permit for new housing. Couple this requirement with state statutes that echo provisions of the unconscionable⁵⁷ adherence contract, the CC&Rs, a "contract" that a home buyer is not even required to sign as evidence of his voluntary and fully informed consent⁵⁸, the difference between Communist Russia and the United States becomes somewhat blurred.

State statutes that have removed civil and constitutional rights and freedoms, freedoms that Americans not living in homeowners associations continue to enjoy, contribute to and "validate" the oppressive nature of these authoritarian governments.⁵⁹ There is no accountability by the HOA to obey the laws of the land that is required of every other government body in this country under the 5th and 14th Amendments. These statutes have no enforcement provisions, or very weak enforcement, to make them quite plainly "policy statements", yet the homeowner, by statute echoing the CC&Rs, can suffer severe financial consequences from liens and foreclosure on his home for

⁵⁷ See general discussion, *Maxwell v. Fidelity Financial Services., Inc.*, 907 P.2d 51 (Ariz. 1995) (sale of solar heater under unconscionable contract)

⁵⁸ Under the equitable services and covenants running with the land doctrines, constructive notice, or filing CC&Rs with the county recorders office, is accepted as meeting proper notice requirements in real estate transactions.

⁵⁹ The debate over the status of HOAs as a government or private corporation, or whether or not HOAs are state actors, is avoided here. There are numerous discussions on this issue, the latest statement being the New Jersey Appellate court, *infra* n. 24 and the US Supreme Court tests for state actors, other than the "public functions" test, in *Brentwood Academy v. Tennessee Athletic School*, 531 US 288 (2001).

amounts far in excess of the debts owed to the HOA. Nor can damages be shown that would meet the US Supreme Court's tests for excessive punishment as pertaining to punitive award damages in civil cases.⁶⁰

What has happened to America? How did this sad state of affairs come to be, here in America?

Homeowner associations and planned communities, in their current form, date back to the 1950s and 1960s. This land usage policy was backed and promoted by the Urban Land Institute, the National Real Estate Board and the National Association of Home Builders, with early stage financial support provided by HUD.⁶¹ The history of planned communities and HOAs clearly reveals as business undertaking that was sold under public policy arguments of "affordable housing" and efficient land usage since "the land was getting scarce." Only lip service was given to concerns for democratic governance, and the necessity of mandatory membership with compulsory dues in order to make this model work was obvious from the very beginning. This was big business, and was it BIG!⁶²

The answer can be found in the words of a Texas real estate attorney proposing a new HOA act, TUPCA, before the Texas House Business & Industry hearing on March 31, 2006, which met to examine what should be done with HOA statutes. In answer to questions about the provisions and protections of the HOA, she replied, "There's really an entwined relationship between HOAs and cities. They do that to protect the finances of the association. That was considered a progressive thing 25 years ago."⁶³ That was a revealing response since the Community

⁶⁰ Cf. *State Farm v. Campbell*, 538 U.S. 408 (2003) (excessive punitive damages violate 14th Amendment)

⁶¹ See *Privatopia: Homeowner Associations and the Rise of Residential Private Government*, Evan McKenzie, p. 113 (Yale Univ. Press 1994); *Community Associations: The Emergence and Acceptance of a Quiet Innovation in Housing*, Donald R. Stabile, p. 90-92 (Greenwood Press 2000)

⁶² Community Associations Institute, Data on U.S. Community Associations, <http://caionline.org/about/facts.cfm> (April 7, 2006); web site shows the growth from some 10,000 HOAs with 2.1 million residents in 1970, to over 274,000 associations with 54.6 million residents in 2005, in just 35 years.

⁶³ Sharon Reuler, in *Homeowner Rights Advocates 2006 Texas Campaign*, Vol. 1, part 1 (April 7, 2006) (privately published DVD, StarMan Publishing, LLC, Scottsdale, 1/24/2010

Associations Institute, CAI, was formed only 33 years ago as a result of problems, even then, with homeowner associations. The progressive movement dates back to the 1920s and 1930s, some 70 – 80 years ago. No, her response better reflects a state protection of a private industry that had no interests in the American system of government and its values and cherished freedoms.

A National Lobbying Organization

CAI was formed in 1973 by several real estate/land usage special interest groups: Urban Land Institute, National Association of Home Builders, National Real Estate Board with financial support from HUD/FHA.⁶⁴ In 1992, less than 20 years later, with strong criticism of HOAs continuing, CAI restructured itself to no longer be an educational tax exempt nonprofit organization, but a business trade group in order to focus on extensive lobbying efforts. Based on its own data, CAI has some 26,000 members or just some 9% of all the HOAs, 274,000, in the country. If the percentage of homeowners/HOA members, 60%, is factored in, then CAI has only some 6% of the HOAs or HOA members for the entire country. In comparison, the Arizona Association of Realtors boasts over 20,000 agents in Arizona alone.

McKenzie writes that “CAI shifted its emphasis toward legislative advocacy and other forms of political action, including grassroots mobilization of its thousands of members at the national, state, and local levels.”⁶⁵ CAI Founder, Byron Hanke, wrote in 1992 of his concerns for the change in direction of CAI, stating that CAI’s funding was based on it being “a research and education institute, not a lobbying/political organization, trade association or professional society with a narrow focus.”⁶⁶ Today, CAI requires:

Every dollar of the mandatory \$15 Advocacy Support fee goes directly to states with Legislative Action

AZ); excerpts from the video CD of Texas House Business & Industry hearing on March 31, 2006.

⁶⁴ See supra n. 61.

⁶⁵ Privatopia at 116, supra n. 61.

⁶⁶ Community Associations at 141, supra n.61.

Committees and supports the efforts of CAI to represent and protect our members on state legislative and regulatory efforts.⁶⁷

Viewers to its web site are told,

CAI also advocates for legislative and regulatory policies that support responsible governance and effective management. We represent the interests of our members before the U.S. Congress, federal agencies, and other policy-setting bodies on issues such as taxes, insurance, bankruptcy reform and fair housing. In addition, state Legislative Action Committees represent CAI members before state legislatures and agencies on issues such as assessment collection, foreclosure, and construction defects.⁶⁸

CAI maintains detailed information on legislative activities affecting planned communities and homeowner associations in all 50 states, and supplies such information with its current (2004) Legislative Action Committees established in 27 of its state chapters.⁶⁹ (See Appendix A for a copy of the first page of the detailed list). The extent to which the California chapters are involved in lobbying activities is shown in Appendix B (note that CAI is still claiming that it represents homeowners, consumers, although it's a business trade organization).⁷⁰ Less strident is the Texas LAC (<http://tlac.org>), but the New Jersey LAC had a lot to say,

Finally, in early March the New Jersey Assembly passed the Uniform Common Interest Ownership Act (A 798) (UCIOA) by a vote of 55 to 17, with 6 abstentions.

⁶⁷ Community Associations Institute, *CAI Community Association Leader and Homeowner Application*, <http://caionline.org/shop/join/volunteer.pdf> (April 8, 2006).

⁶⁸ Community Associations Institute, *About CAI*, <http://caionline.org/about/index.cfm> (April 8, 2006).

⁶⁹ Community Associations Institute, *CAI Political "Heads Up"*, http://caionline.org/govt/news/legislative_trends.pdf; *About Government & Public Affairs*, <http://caionline.org/govt/about.cfm> (April 8, 2006).

⁷⁰ Community Associations Institute, *California Legislative Action Committee*, <http://clac.org/> (April 8, 2006).

Congratulations to the members of the UCIOA task force for their unending efforts and thanks also to those who took the time to write and appear and make their positions known. UCIOA now heads to the New Jersey Senate for further consideration. Stay tuned.⁷¹

Yet, in a recent response to direct questions on the existence of laws reflecting the protection of homeowners associations and their private governments by contract (see Appendix F), the Community Associations Institute (CAI) President, Tom Skiba, is quoted as saying,

The fact is that by statute, common law, contract, and decades of practice, community associations are not-for-profit entities . . . and are and should be subject to the relevant and applicable business law, contract law, and specific community association or common-interest-development law in each state.⁷²

In this rather disingenuous statement, Mr. Skiba continues the masquerade that CAI is here to serve the public interest and provide what homeowners want – more planned communities.

Public Policy Contradictions

CAI is a highly political organization and skilled in the effective use of propaganda to achieve its political objectives. To the legislators and policy makers it speaks with one voice, and to the local HOA homeowners its chapter members speak with a completely contrary voice. There is substantial evidence of the direction and the actual CAI intention behind these broad policy statements.

First, as an example, an examination of its much-publicized “position paper” on how people in HOAs should conduct themselves is provided in its “Rights and Responsibilities for Better Communities” reveals a disclaimer:

⁷¹ Community Associations Institute, *New Jersey Legislative Action Committee*, <http://www.cainj.com/Legislative/index.htm> (April 8, 2006).

⁷² Chris Durso, *Call & Response*, July-August 2006, Common Ground).

Rights and Responsibilities was developed as an ideal standard to which communities could aspire, a goal-based statement of principles designed to foster harmonious, vibrant, responsive and competent community associations. The principles were not designed to be in complete harmony with existing laws and regulations in 50 states, and in no way are they intended to subsume existing statutes.⁷³

In spite of its inference of addressing the larger society, “those of the community as a whole”, the document pertains only to the HOA community alone, and not the town or city within which the HOA exists.⁷⁴ It treats the HOA community as an independent principality with its own constitution and existing outside the laws of the greater political body, the town or state. There is no mention of the greater political environment of the HOA.

Furthermore, reflecting the continued misrepresentation of its true intentions and status to the unsuspecting public, this statement of principles contains the following footnote: “Community Associations Institute (CAI) is a national, nonprofit 501(c)(6) association created in 1973 to provide education and resources to America's estimated 274,000 residential condominium, cooperative, and homeowner associations and related professionals and service providers.”⁷⁵ As mentioned above, CAI has been a business trade group, 501(c)6 tax exempt, focused on lobbying efforts since 1992, some 14 years ago, but the average viewer would not realize that CAI was a trade group on the basis of the above statement. How can it represent consumer organizations like HOAs or their constituent consumer members, the homeowners? CAI prefers to equate the nonprofit corporate entity with its members, while, as is the point of this discussion, really supporting positions contrary to the best

⁷³ Community Associations Institute, *Rights and Responsibilities for Better Communities*, <http://caionline.org/rightsandresponsibilities/index.cfm> (April , 2006).

⁷⁴ Community Associations Institute, *Rights and Responsibilities for Better Communities*, <http://caionline.org/rightsandresponsibilities/rights.pdf> (April 9, 2006).

⁷⁵ Community Associations Institute, *Community Associations Institute Press Room: Questions and Answers for Media* <http://caionline.org/news/faq.cfm> (April 10, 2006).
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interests of the homeowners themselves. It well beyond a reasonable time for CAI to make true and accurate statements to the public, the media and the legislators.

Bankruptcy law changes elevating Assessments to a tax status

Finally, Why would an HOA seek to exclude assessments from bankruptcy for HOAs? Homeowner must be out of their minds if, indeed, they actually voted to have their board represent them in this way. Such activity by CAI is a striking demonstration of the rift between corporate board obligations and a representative democracy where the people come first. This exclusion raises assessments to the same level as federal and state taxes, and without maintaining that delicate balance to protect homeowner rights. Where are those protections against HOA government abuse that we have in place for public government abuse?

CAI really doesn't provide any legitimate government interest to support another unequal application of the laws against homeowners. Notice the mantra in the last sentence, "while all other association residents are left to pick up the tab."

CAI's public policy web page, on bankruptcy law changes, states

In particular, Section 523(a) (16) should be amended to include homeowners associations and commercial condominium associations because homeowner associations, condominium associations and cooperatives are all just different types of community associations.

Without these changes, bankrupt owners in all types of community associations will continue to avoid their assessment obligations whenever their units are vacant or occupied by people who do not pay rent – while all other association residents are left to pick up the tab.

See note 76 at 17.

Government Regulation of HOAs (emphasis added)

Second, here are CAI's public policy statements on three important issues: the regulation of HOAs, UCIOA, and homeowner rights. The statements must be read carefully and applied to the activities of CAI, both at the national and chapter levels.

In regard to the government regulation of HOAs,

Community Associations Institute supports effective state legislation – when it is deemed necessary for consumer protection, conversion limitations, protections for ongoing operations or other additions to existing statutes or common law to ensure that community association housing is developed and maintained consistent with legitimate public policy objectives **and standards that protect individual consumers, balancing the legitimate rights of the development industry.**

Local legislation concerning the creation or governance of community associations is antithetical to a balanced, well-considered assessment of all issues and interests affecting community associations. It also encourages a patchwork of regulations within an individual state and is, therefore, better dealt with at the state level.⁷⁶

In the following CAI statement from its Rights and Responsibilities policy, one can see its real purpose in urging HOAs to adopt this policy,

By adopting Rights and Responsibilities, communities will help prevent unnecessary or unduly restrictive legislation and regulation. As more and more communities adopt the principles, we will be able to say with increasing confidence and effectiveness that community associations are addressing many issues through self-regulation.⁷⁷

⁷⁶ Community Associations Institute, GOVERNMENT REGULATION OF COMMUNITY ASSOCIATIONS http://www.caisecure.net/public_policies.pdf, p. 46 (April 8, 2006).

⁷⁷ Supra n. 72.

The only interpretation that can be given to these two position statements is that CAI desires to set statewide laws, like the Uniform Common Interest Ownership Act, UCIOA, in which it can maintain its control over the agenda.

It is the policy of CAI to recommend that when state governments amend their basic community association development laws they consider the need for updated and comprehensive legislation to regulate the development of community association housing consistent with the above goals. **Moreover, in undertaking such review, state governments are urged to consider and give favorable treatment to one or more of the Uniform Community Association Acts.**⁷⁸

Each state will adopt its own version of the model act, and that's where CAI's domination of HOA public policy subverts the application of homeowner protections. There are no protections of fundamental homeowner rights, no bill of rights, in any of the versions of UCIOA, or in any of the numerous private contractual constitutions called CC&Rs.

Uniform Common Interest Ownership Act, UCIOA

Is it clear that there is a movement to adopt the undemocratic, authoritarian private constitutions as state imposed constitutions or charters, not subject to the states' municipality laws, and being promoted as uniform association laws under the model Uniform Common Interest Ownership Act (UCIOA)⁷⁹?

Is it clear to all that when these associations of associations, and the national lobbying trade group, CAI, contact the government they are not speaking for the homeowners, but a distinct class of HOA membership, and as a vendor, a hired-hand? Is it clear that no membership meeting was conducted electing representative and platforms to take before the

⁷⁸ Supra n. 75 at 47.

⁷⁹ Model UCIOA, <http://www.law.upenn.edu/bll/ulc/fnact99/1990s/ucioa94.htm> (1994) (after amending portions of the Act, only 7 state legislatures have adopted the model.)

various governmental commissions and agencies? As we would expect in a truly democratic process that takes place with our public elections? Is it clear that association board members are not the representatives of the homeowners, especially when those CC&Rs do not grant the boards any such powers? To presume that these powers are “implied powers” stretches the imagination; after all, the homeowner still thinks he bought a private home, period.

UCIOA does not require constitutional protections for these de facto territorial governments! The legislatures in the states of New Jersey, Texas, Colorado, Maryland and Nevada, just to name a few, are considering imposing what is not just a real estate issue, as the promoters would have you believe, but constitutional government and the application of the US Bill of Rights issues. Not one promoter of planned communities or homeowners associations is an authority on political science or government, but just have land planning and real estate backgrounds. And this is not just an accidental oversight, but the deliberate and planned marketing of a defective concept under the American system of government.

And, to repeat CAI’s position, *“Moreover, in undertaking such review, state governments are urged to consider and give favorable treatment to one or more of the Uniform Community Association Acts”*, we see that CAI has no desire to create truly democratic governments of the people, for the people, by the people.

Homeowner Bill of Rights

The Preamble to the US Bill of Rights reads,

THE Conventions of a number of the States having at the time of their adopting the Constitution, expressed a desire, in order to prevent misconstruction or abuse of its powers, that further declaratory and restrictive clauses should be added: And as extending the ground

of public confidence in the Government, will best insure the beneficent ends of its institution.⁸⁰

In regard to a homeowner bill of rights (author's emphasis),

Community Associations Institute (CAI) supports a balance of the rights of an individual owner in a community association with the need for effective management of the affairs of the association for the benefit of all owners. Reasonable association procedures which empower the board of directors and staff of the community association to perform their obligations efficiently must take into account the rights of an individual owner to privacy, enjoyment of his or her home, and full participation in the community association.⁸¹

Yet, in its amicus curiae brief in the Twin Rivers case⁸², CAI cautioned against the application of constitutional rights and the democratic process:

In the context of community associations, the unwise extension of constitutional rights to the use of private property by members (as opposed to the public) raises the likelihood that judicial intervention will become the norm, and serve as the preferred mechanism for decision-making, rather than members effectuating change through the democratic process.⁸³

⁸⁰ *The Original United States Bill of Rights*, <http://www.geocities.com/capitolhill/senate/9526/bor005.html> (April 9, 2006).

⁸¹ Community Associations Institute, COMMUNITY ASSOCIATION MEMBERS' & COMMUNITY ASSOCIATIONS' RIGHTS AND RESPONSIBILITIES, http://www.caisecure.net/public_policies.pdf, p. 26 (April 8, 2006).

⁸² Comm. For Better Twin Rivers v. Twin Rivers Homeowners Assn., A-4047-03T2 (N.J. Super. App. Div. 2006) (opinion on constitutional rights and quasi-government).

⁸³ Citizens for Constitutional Local Government, *Community Associations Institute Amicus Curiae*, p. 19, http://starman.com/hoa/cai_brief_rev.pdf (April 9, 2006).

CAI appears to be arguing a “hands-off” policy and non-interference in HOA matters, seeking no accountability under the laws of the land, unless CAI approves of it. How can vibrant communities be accomplished by refusing to apply the US Constitution to protect the rights of homeowners who were taught from grade school that the Constitution protected all Americans?

CAI doesn’t address these issues and appears to not really care. It is more interested in the effective and efficient use of government as reflected in a blog entry relating to the Twin Rivers case: “Second, treating an association as a government is not the path to efficiency and effectiveness. The reality is that corporations are inherently more efficient than governments.” (See Appendix E for the complete entry).⁸⁴ In this blog, CAI warns against board members release of public information if they were public figures, and it asks, “Will we have the nation’s partisan political atmosphere infect our associations?”

Furthermore, CAI’s own CEO makes it clear that associations are businesses and not social or political communities in his “Critical Mass” blog entry, reacting to homeowner advocates criticism. Notice the contradiction in his statements about democracy at a local level, which can only be rationalized as homeowners have openly and voluntarily subjected themselves to association governance, and openly and knowingly surrendered their fundamental democratic rights and freedoms.

Others though, hate (and I don’t think hate is too strong a word here) the very premise of associations, revolt at democracy at its most local form, and frequently can’t understand why the rules have to apply to them and not just to everyone else.

Because that is what associations are - businesses. They have assets and liabilities, governance and leaders, and shareholders/owners - just like Apple Computer or the local bakery. They aren’t governments, they aren’t personal private clubs, and

⁸⁴ Community Associations Institute, *Welcome to Ungated*,
http://cai.blogware.com/blog/_archives/2006/2/15/1764675.html (April 10, 2006).
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they certainly aren't fascist states created to deprive poor, unsuspecting homeowners of their rights. They are businesses that need to be run in a professional and business-like manner.⁸⁵

It appears that CAI does not want homeowners in planned communities to have the same Constitutional protections that all Americans are guaranteed, and does not want the HOA government to be held accountable as all other public government bodies are held accountable to the people. James Madison reminded the people that, "If angels were to govern men, neither external nor internal controls on government would be necessary".⁸⁶ It appears that CAI believes that any homeowner rights that interfere with its attainment of this goal cannot be allowed.

The history of planned communities and homeowner associations clearly reveals the intent to deliberately restrict liberties and freedoms in order to mass merchandise associations and make them viable. See McKenzie's *Privatopia*⁸⁷ and Stabile's *Community Associations*⁸⁸. See also the ULI "bible" on planned communities with mandatory associations, *The Homes Association Handbook, Technical Bulletin #50*, 1963, from which flows all our problems with HOAs.

On the basis of the above materials depicting the legal structure of HOAs, homeowner advocates ask whether HOAs can survive as a democracy? CAI, and the industry supporters, have already answered the question with a resounding, NO, which is why CAI vehemently resists any encroachment on the absolute sanctity of the CC&Rs, holding them above the laws of the land. And why all of the supporters of HOAs, those lawyers and supposedly land planners and real estate interests, avoid any discussion of democratic principles like the plague.

In what direction has CAI taken these private government communities? Understanding that the intent of planned communities

⁸⁵ Critical Mass, Tom Skiba, *Welcome to Ungated*,
http://cai.blogware.com/blog/_archives/2006/5/22/1967695.html (June 19, 2006).

⁸⁶ *The Federalist Papers*, No. 51.

⁸⁷ *Supra* n. 72.

⁸⁸ *Id.*

was not to establish a better democratic government, or a democratic government at all, it is important to ask: How democratic are they? Madison states that, “Justice is the end of government. It is the end of civil society.”⁸⁹ Professor Robert A. Dahl⁹⁰ set five criteria for measuring the performance of a democracy. He asks, “To what extent, if at all, do constitutional arrangements help to”:

- maintain the democratic system;
- protect fundamental democratic rights;
- ensure democratic fairness among citizens;
- encourage the formation of a democratic consensus; and
- provide a democratic government that is effective in solving problems?⁹¹

It is quite apparent that the governance of planned communities fails in everyone of the above criteria.

At the state level, there are further examples of the real intent of CAI with respect to the protection of homeowner rights. The Arizona chapter of CAI circulated an emails⁹² (excerpts are provided in Appendix C) to oppose the restoration of the homestead exemption for HOA liens that was removed by HOA promoted legislation in 1996, and against appropriate due process protections for homeowners against abusive allegations of violations. The homestead exemption allows all residents the right to keep the first \$150,000 of equity in their homes except for liens agreed to by the homeowner. The email avoids any discussion of the unjust and unequal application of the laws to a class of people who live in HOAs. The state has not shown the necessity to protect private organizations that cannot show actual damages for unpaid assets to warrant the sale of a person’s home. Additionally, reflecting CAI’s lack of support for homeowner constitutional rights, note the opposition to HB2824 (which was passed at that time, but has since been held in the

⁸⁹ Supra n. 85.

⁹⁰ Sterling Professor Emeritus of Political Science at Yale University, and past president of the American Political Science Association.

⁹¹ *How Democratic Is the American Constitution?*, Robert A. Dahl, p. 92-93 (Yale Univ. Press 2002).

⁹² E-mail from member of HOANET listserv, *SB1158 and the CAI*, <http://groups.yahoo.com/group/hoanet/message/25427> (April 9, 2006). Excerpt discusses HB2352 (homestead exemption) and HB2824 (due process).

Rules Committee) that provides for an independent tribunal to adjudicate disputes between HOA boards and its members. (Rules committees are 99% rubber stamps and bills are passed within days).

In California, the CAI California Legislative Action Committee, CLAC, has repeatedly acted to protect the fictional person of the HOA against the interests and rights of the HOA members. Again, with respect to foreclosure protections, what homeowner would willingly, with full knowledge and information, agree to surrender his homestead exemption or not seek a limitation on the HOA from taking his home for amounts of unproven damages, that can be only 10% owed to the HOA? CLAC seems to think homeowners are willing to offer such largess, such gifts to the HOA as witnessed by its opposition to a foreclosure limitation bill, SB137.⁹³ One can easily raise the argument of excessive punishment in violation of the 14th Amendment, since the only reason for foreclosure rights and loss of homestead protections, supported by statutes, is the punishment of offenders.⁹⁴

CAI would have everyone believe that the HOA form of community governance was the only means whereby property values could be maintained, because you cannot trust your neighbor. He must be spied upon and watched diligently, and any infraction of the rules, however minor, must be dealt with swiftly and severely. Otherwise, these neighbors would actively seek to reduce their own property values, homes of which can be quite costly to them, by inadequate landscaping, painting house in purple polka-dotted paint, and even turning their homes into auto repair yards. So much for working toward harmonious and vibrant communities, unless of course, CAI actually believes that the absolute and wholehearted adherence to the HOA governing documents will accomplish these objectives.

⁹³ California Legislative Action Committee, *CLAC Corner*, <http://clac.org/2-5.htm> (April 9, 2006).

⁹⁴ See *supra* n. 60, US Supreme Court opinion on excessive punitive damage awards. 1/24/2010

The Myth of Vibrant Communities

Homeowners vs. HOAs

The June 11, 2006 issue of The Arizona Republic surfaced this important aspect of association living in its subtitle, “*HOA warriors make some progress in defending owners from associations*”, which leads to the question: Aren’t HOAs supposed to be healthy, vibrant and responsive communities of people? Aren’t HOA boards supposed to represent the interests of the homeowners, its member-owners in an excellent example of grassroots democracy in action, as the special interests have been promoting for over 40 years? Or are there other dynamic and structural factors at play here that account for all these years of strife, hostility, and an “us against them” attitude reflected in opposing views on association reform legislation?

I still cannot understand that a homeowner, and a board member who is also a homeowner, would want to forego homestead exemption protections for the benefit of the nonprofit association to the tune of hundreds of thousands of his own dollars. Or openly, knowingly and willing surrender his due process protections and his right to have the association be held accountable before the state as any other municipal government is held? Or to pay for an attorney who will represent his adversary, the association, and will not even return his calls in many instances. Or wholeheartedly support foreclosure and loss of all his equity in his home in a legally accepted, but unconstitutional act of excessive and unusual punishment, for amounts often less than 1/10th the amount owed the association. The association has no hard cash at stake, as a bank or mortgage company may have.

Yet, state legislatures and government agencies and commissions are besieged with pro-association arguments by not only the business trade group, CAI, but by many individual board members and associations of board members. Several of CAI attorney members repeatedly contact legislators and agencies with position papers without identifying their membership in the CAI College of Community Association Lawyers (CCAL): Perl, McNulty, Ramsay, Poliakoff, Berger, Sproul, Grimm, and

Rosenberry, to name a few. But the positions of the association associations and board members raises many questions as to why this opposition, and the answers are not simple to understand.

First, Mr. Skiba's revelation that homeowner associations are businesses⁹⁵ is a surprise since nowhere can a person find this bold statement in any of CAI's numerous promotional materials to those interested in understanding community associations. Its much publicized, *Rights and Responsibilities*⁹⁶ guidelines clearly proclaims,

More than a destination at the end of the day, a community is a place you want to call home and where you feel at home. There is a difference between living in a community and being part of that community. Being part of a community means sharing with your neighbors a common desire to promote harmony and contentment.

This goal is best achieved when homeowners, non-owner residents and association leaders recognize and accept their rights and responsibilities.

But, legally and upheld many times by the courts, associations are indeed businesses run by undemocratic boards, as compared to public municipal governments, with constitutions lacking any of the American protections of a person's fundamental rights and freedoms – no bill of rights. Interestingly, still, after 40 or so years in operation, CAI and these association associations, continually oppose reforms as we see in California's SB551 (enforcement against board violations), Arizona's HB2824 (homeowner due process) and other bills.

The law states that, as such, the fiduciary duty of the board is to this fictitious person, the HOA, and not to the homeowners. And if the purpose of the association is to maintain property values, then whatever the board believes to be consistent with this goal is valid. No matter if an individual is made to suffer emotional stress, financial hardship or

⁹⁵ Supra n. 75.

⁹⁶ Supra n. 81.

loss of a home, these are not part of the objectives of the association so the board has no interest in these matters. In fact, the basis of the board's authority, the CC&Rs, are well grounded in validity as a covenant running with the land if it benefits not the individual, but the community as a whole. That's all the board needs as a basis for its actions. So, not allowing deadbeats to get away with not paying their assessments and the use of legitimized extortion laws, the homeowner will lose his home no matter what.

CAI and the various associations supporting homeowner associations, like CALL in Florida (a Becker & Poliakoff sponsored nonprofit whose Exec. Director is a member of CAI's CCAL, along with other Poliakoff attorneys) and ECHO in California (which is a misrepresentation of the organization's mission since it supports the association and not the homeowners, and should be renamed ECHOA) clearly understand this difference; yet continue to exploit the confusions and misunderstandings promoted by its redefinition of the everyday meanings of words and concepts. But the homeowners do not understand this difference. They are led to believe, by currently available promotional and "explanatory" materials, and by the absence of cautionary and warning notices that all is not as it appears when living in an association. They still believe that they are buying their private home, with some rules attached. They do not understand, and lack the appreciation for, the consequences and impact on their lives by living in an association until it is too late.

The result is this class division between management and owner-members who are treated as employees of the association with its hostility, anger and abuse as we have seen with the labor union movement of our past history. And the homeowners, like those early days of management-labor disputes, lacks the powers and means to adequately protect his individual property rights and fundamental American freedoms.

Second, do the homeowners have any rights at all? Is there a board fiduciary duty to those mandatory members, with compulsory assessments, that supply the revenues for the association to function and to even exist? Do these same requirements of a fiduciary apply to the members themselves? Of fair dealing? Of reasonable actions? Of

loyalty? And how about duties to uphold the US and state constitutions? Don't the homeowner-investors have this right, this reasonable expectation that the laws of the land apply to homeowner associations as well as to anybody else? If not, then what is community association living all about?

Is it clear to all that when these associations of associations, and the national lobbying trade group, CAI, contact the government that they are not speaking for the homeowners, but a distinct class of HOA membership and as a vendor, a hired-hand? Is it clear that no membership meeting was conducted electing representative and platforms to take before the various governmental commissions and agencies? As we would expect in a truly democratic process that takes place with our public elections? Is it clear that association board members are not the representatives of the homeowners, especially when those CC&Rs do not grant the boards any such powers? To presume that these powers are "implied powers" stretches the imagination; after all, the homeowner still thinks he bought a private home, period.

Is it clear that there is a movement to adopt the undemocratic, authoritarian private constitutions as state imposed constitutions or charters, not subject to the states' municipality laws, and being promoted as uniform association laws under the model Uniform Common Interest Ownership Act (UCIOA)? UCIOA does not require constitutional protections for these de facto territorial governments! The legislatures in the states of New Jersey, Texas, Colorado, Maryland and Nevada, just to name a few, are considering imposing what is not just a real estate issue, as the promoters would have you believe, but constitutional government and the application of the US Bill of Rights issues. Not one promoter of planned communities or homeowners associations is an authority on political science or government, but just have land planning and real estate backgrounds. And this is not just an accidental oversight, but the deliberate and planned marketing of a defective concept under the American system of government.

CAI, the various associations of associations, and other board members clearly believe in the strict corporate, business, structure of the HOA, which is why they vehemently oppose any application of accountability of the HOA to the state or any protections of homeowner

rights. And this is the primary reason why problems will continue in spite of the repeated interference in the day-today affairs of associations while substantive reforms, as we have witnessed in Arizona this session, go unaddressed.

Planned communities and Social Capital

The issue of apathy among homeowners has been raised many times by CAI, the national lobbying organization supporting private governments, or those businesses acting as de facto governments, to counter arguments by homeowner advocates that they lack a real voice in the HOA. “Get involved”, “participate”, etc are the mantras issued, even this past week by the CEO of CAI in its *Welcome to Ungated*⁹⁷ blog resorting to a 1992 in *Board Briefs* article, apparently oblivious to the trends in American society of the past 30 to 40 years -- the same period in which we see the rapid growth of planned communities across the country with their governing body organizations described as “community associations”. Based on this identical time period, a legitimate question can be asked:

To what extent has planned communities with their private, nongovernmental approved, constitutions contributed to this change?

First, let’s discuss the notion of “social capital” as stated by Robert D. Putnam in his book, *Bowling Alone*⁹⁸. Putnam is a political scientist and not a real estate specialist.

The core idea of social capital theory is that social networks have value. ... Social capital refers to connections among individuals – social networks and norms of reciprocity and trustworthiness that arises from them. ... ‘Social capital’ calls attention to the fact that civic virtue is most powerful when embodied in a dense network of reciprocal social relations. A society

⁹⁷Pearls of Wisdom - Ways to Destroy Your Association, *Welcome to Ungated*, Tom Skiba, http://cai.blogware.com/blog/_archives/2006/6/15/2034476.html (June 19, 2006).

⁹⁸ *Bowling Alone: the Collapse and Revival of American Society*, Chapter 1, Thinking About Social Change in America, Robert D. Putnam (Simon & Schuster 2000).

of many virtuous but isolated individuals is not necessarily rich in social capital.

And he writes about community involvement:

Social connections are also important for the rules of conduct that they sustain. Networks involve (almost by definition) mutual obligations; they are not interesting as mere ‘contracts.’ Networks of community engagement foster sturdy norms of reciprocity: I’ll do this for you now, in the expectation that you . . . will return the favor.

The Golden Rule is one formulation of generalized reciprocity.

The author warns about the application of social capital to the goals of the community:

Similarly, urban gangs, NIMBY (‘not in my backyard’) movements and power elites often exploit social capital to achieve ends that are antisocial from a wider perspective. Indeed, it is rhetorically useful for such groups to obscure the difference between the pro-social and antisocial consequences of community organizations.

The “dominant theme” of recent social change, according to Putnam, occurring at the same time as the “quiet innovation in housing” (a quote from part of the title of the Stabile book on Community Associations) is:

For the first two-thirds of the twentieth century a powerful tide bore Americans into ever deeper engagement in the life of their communities, but a few decades ago – silently, without warning – that tide reversed and we were taken by a treacherous rip current. Without at first noticing, we have pulled apart from one another and from our communities over the last third of the century.

Strikingly, the forms of participation that have withered most noticeably reflect organized activities at the community level. . . . These activities can be undertaken only if others in the community are also active. . . . The more my activities depend on the actions of others, the greater the drop-off in my participation.

In order to answer the question posed above, I will focus on how the planned community model with its mandatory membership, compulsory assessments and lack of homeowner protections, as one would expect in any other community environment in America, has affected the social capital, reciprocity and trustworthiness, community and social interrelationships, and communal or joint participation of homeowners living in these associations. These are the aspects of ‘community’, and not those relating to the landscaping, or swimming pools, golf courses, tennis courts or community centers, which are just the material and physical aspects of a community. A community, everyone will agree, starts and ends with the people. The people make the community, and it is they who care for its physical aspects.

Looking into earlier research on the community and political aspects of homeowners associations, even one-third back some 12 years to the 1994 publication of *Common Interest Communities*⁹⁹, which included earlier studies as far back as 1967, is revealing. In Chapter 6, Barton and Silverman write:

As one board president put it: ‘Apathy reigns supreme – most owners want some unpaid volunteer to make decisions for them rather than attending board or annual meetings. We are running out of fools who will volunteer their time.

Since the writings of Jefferson and de Tocqueville, citizens . . . have been extolled as . . . working in

⁹⁹ *Common Interest Communities*, Part IV: Community and Political Life in a Private Government, Stephen E. Barton & Carol J. Silverman, eds. (Institute of Government Studies Press, Univ. of Calif., Berkeley 1994).

voluntary associations to accomplish civic ends. It is misleading to consider the common interest development as another example of this. The CID highlights individual property interests rather than common purposes. . . . Disagreements typically are not over the best direction for the association as a whole but rather over what are perceived as individual private property rights.

The use of common ownership as a vehicle for meeting public needs violates peoples' understandings of ownership. . . . In the common interest development . . . the common good is less well understood [than in the public arena]. As in the case where only some roofs leak yet all have to pay for repairs, people do not see why they should pay.

The idea of neighbors policing neighbors is not only in contradiction to cultural understandings of ownership, but also fails to provide the internal checks and balances that people associate with fairness in the U.S. system of government. . . . The absence of separation of powers leaves associations boards vulnerable to both perceived and actual favoritism and abuse of powers.

In chapter 7, Gregory Alexander writes:

The owners were frustrated; some were acutely angry. Yet they haven't responded to their disappointment by expressing their frustration. Rather, they choose passivity. Some feel that the board has intruded on the private sphere of their property ownership with zealous policing tactics.

Passivity and apathy are expressions of experience in which living within a group lacks meaning for individuals. Others who would cooperate through active participation if they didn't feel stonewalled.

What one sees from these studies of some 13 years ago is that the same problems still exist and the national lobbying organization has not been able to make the homeowners association model of communal ownership and private governance acceptable and without serious problems. The answer to the question posed above is that the model, concept, structure and legal basis are contrary to American understandings, beliefs, expectancies and behavioral attitudes, and have contributed to the loss of participation and civic virtue. And that these associations do not create positive social capital of social networks and connections with reciprocal relationships, social interactions, trustworthiness and mutual obligations between the powerful boards and the rank and file homeowners.

CC&Rs: The Non-legitimate Social Contract

The basic foundations of our American system of democratic government can be found in many of the leading political theorists of that time, and in particular the works of John Locke, *The Second Treatise of Government* (1690), and of Jean-Jacques Rousseau, *The Social Contract* (1762). Both speak of those natural rights of man are present before the formation of any government, and as such, are unalienable by any government, even one based on majority rule. Both speak of a “contract” between each individual and the government is a clear understanding of those rights surrendered to the government **in exchange for certain guarantees and protections.**

Today, being so removed from those events and times of the foundation and formation of republics, Americans have lost sight of these important principles upon which this country was founded. Not since the founding of this country over 230 years ago has the need for everyone to understand the basis for this concept of a social contract between the people and the governance of the people. Today, there is a new social contract that is ever increasingly dominating the American social order and changing the very structures of our political system. A new social order that is totally at odds with the principles, beliefs and values upon which this country was founded. They are known as Covenants, Conditions and Restrictions, or CC&Rs for short. And they are written not based on the beliefs and views of the leading political

scientists that founded this country, but upon profit motivated housing developers who mass merchandised the CC&Rs to the unsuspecting public as the foundation leading to harmonious, vibrant communities.

Rousseau wrote,

But the social order is a sacred right which serves as a basis for all other rights. And as it is not a natural right, it must be founded on covenants. The problem is to determine what those covenants are.¹⁰⁰

Throughout Locke's *Second treatise* the reader discovers those concepts of "in the state of nature" (not subject to any political entity) and those "natural laws" (those that every person possesses), and those "unalienable rights" of the Declaration of Independence that are not and cannot be surrendered to a political government by a social contract or "compact" (emphasis added):

Political power is that power which every man having in the state of Nature has given into the hands of the society . . . **with this express or tacit trust**, that it shall be employed for their good And this power has its original only from [is based on] **compact and agreement and the mutual consent** of those who make up the community."¹⁰¹

The national lobbying organization, Community Associations Institute (CAI), promotes planned communities with their HOA governance as the means to better communities and community governance. It's promotional brochure, *Rights and Responsibilities for Better Communities*¹⁰² clearly reflects the position that the CC&Rs are a community social contract regulating and controlling the homeowners, and not a business arrangement:

¹⁰⁰ Jean-Jacques Rousseau, *The Social Contract*, Book 1, Ch. 1 (1762).

¹⁰¹ John Locke, *The Second Treatise of Government*, § 171 (1690).

¹⁰² *Rights and responsibilities*, Community Associations Institute, <http://caionline.org/rightsandresponsibilities/index.cfm> (July 2, 2006).

More than a destination at the end of the day, a community is a place you want to call home and where you feel at home. There is a difference between living in a community and being part of that community. Being part of a community means sharing with your neighbors a common desire to promote harmony and contentment.

In general, CC&Rs mandate membership with compulsory assessments (taxes, for the HOA does not sell any individual products) as if the homeowner were living in some bona fide civil government body of the state; must comply with rules and regulations (community ordinances with less protections for homeowners than provided by the municipality); are subject to fines (equivalent to community crimes for violations of said “ordinances”); and liens are granted for the fines; are governed by a corporate form of a board of directors, with less protections for fair and open elections; with a disenfranchisement if late in any payments to the HOA, including inability to use the “public” amenities; and there are other features of the control and regulation of the people within the territorial community.

These CC&Rs are not the result of a bargain and exchange process resulting in a meeting of the minds and a mutual consent of the homebuyer to be governed by the HOA. The CC&Rs can easily be interpreted and viewed as meeting the criteria for an unconscionable adhesion contract under current statutory and case law.¹⁰³ The CC&Rs have not been subjected to a vote of the affected community nor approval by a state or other government entity as to conformity with the general requirements to establish an incorporated town or village. No, not at all, and one wonders why not? Why has our government permitted, supported and protected a private contract that creates a corporate form of community government that is outside the laws governing all other government bodies? Why has our government permitted constructive notice to meet the necessary and sufficient conditions to deny constitutional rights? Since “all legitimate authority among men must be based on covenants” and “might does not make

¹⁰³ See generally, *Harrington v. Pulte Home Corp.*, CA-CV 04-0576, Ariz. App. Div. 1 (2005); *Maxwell v. Fidelity Fin. Svcs. Inc.*, 907 P.2d 51 (Ariz. 2005); Restatement (Second) of Contracts, § 211 (1981).

right, and that the duty of obedience is owed only to legitimate powers¹⁰⁴, do the CC&Rs create a legitimate government?

Do existing laws create a duty and obligation to obey the CC&Rs, or do they represent the might and force of civil government to coerce homeowners into compliance and obedience to the CC&Rs? Does the existing legal doctrine of constructive notice, as outlined above, meet the necessary and sufficient conditions for proper due process protections of a citizen's rights, freedoms, property and home under the US Constitution?

Rousseau's opening words, "*Man is born free, but everywhere he is in chains. Those who think themselves the masters of others are indeed greater slaves than they*"¹⁰⁵, emphatically applies to this present day social contract for private communities known as the CC&Rs. These covenants, this new social contract, have created a new social order that has been referred to as "a quiet innovation in housing" by its promoters, avoiding any connection with an undemocratic, authoritarian form of government right here in the US of A. A social order where property values dominate all other objectives, and where the Bill of Rights is relegated to an inferior position as to the protections and guarantees of these fundamental rights.

Application of the Social Contract

First, an important diversion. It may be insisted by the real estate special interests that the social contract view of planned communities and common interest properties does not apply since these organizations are not governments and that they do not govern the community. Well, who then governs the community? Is it the municipality? The county? Or are planned communities stateless entities without a government? Isn't it really the HOA? This fact has been well accepted and become widespread case law: the HOA governs the community. But, somehow it's not a government entity; they are not part of the political body of the

¹⁰⁴ Rousseau, supra n. 100, Book 1, ch. 4.

¹⁰⁵ Supra n. 100.

state and country. Therefore, they must be de facto governments¹⁰⁶ or principalities, political bodies unto themselves with their own laws and sovereign law-making bodies, dependent on a greater political entity for support and protection, like the Principality of Monaco in France.

The basis for this state of affairs has been the effective use of the public functions test dating back to a 1946 Supreme Court opinion¹⁰⁷ relating not to planned communities, but to company towns, those employer built and operated towns used to provide a place to live for their employees, usually miners. The result has been to apply these “public functions” to determine whether or not a planned community functioned as a government. This is the most egregious example of the blindness of the stare decisis, or precedent, doctrine of the American legal system. Currently, and for many, many years, towns and villages were incorporated under state laws that did not specify any of the functions used in the Marsh decision, yet no one held that these towns and villages did not meet the criteria of a public government.

We can now safely and confidently bypass this blindness by the Supreme Court, and the pugnacious insistence that Marsh is the law and must apply to planned communities. We can no follow the path of overzealous special interest attorneys who make a living from mincing words and playing word games in their efforts to micro-analyze every aspect of legal concepts and rulings, ignoring the need for generality and some vagueness in the laws so judges can apply the intent of the laws to specific case instances. To define what a government is, it is quite appropriate to adopt the rational approach of Justice Potter Stewart: “*I shall not today attempt further to define the kinds of material I understand to be embraced . . . [b]ut I know it when I see it . . .*”¹⁰⁸ And HOAs are equivalent to civil governments and must be so recognized by the legal system.

¹⁰⁶ “An independent government established and exercised by a group of a country’s inhabitants who have separated themselves from the parent state”, Black’s Law Dictionary (Seventh ed. 2003).

¹⁰⁷ *Marsh V. Alabama*, 326 US 501 (1946).

¹⁰⁸ *Jacobellis v. Ohio*, 378 US 184 (1964) (relating to a definition of hard-core pornography).

Second, the most immediate question to be resolved is that of the legitimacy of the CC&Rs and, consequently, that of the HOA private government. Since the legal basis of CC&Rs reside not in constitutional law or politics, but in real estate and commercial laws, the explicit and mutual consent of the people to be governed by any government¹⁰⁹, including the HOA form of government, has been relegated to the simple posting at the county clerks office. And as such, constitutes the lowest level of legal notice for it does not require a fully informed and voluntary consent that can only result from knowledge of all the material facts.

It has been argued by homeowner advocates that the various state disclosure laws pertaining to simply providing copies of the governing documents – CC&Rs or the Declaration (the only document required to be posted at the county clerks office, the bylaws and any written rules and regulations – are totally inadequate in serving to fully inform home buyers as to the undemocratic, private government HOA governance of the subdivision to which the Bill of Rights do not apply.

In spite of the above, supporters and proponents of HOA governance repeatedly use the simplistic argument: If you don't like it or can't accept the HOA, move out. That's equivalent to saying, "If you don't like the President, then move out of the country". This argument by the proponents was addressed quite intelligently and with sound reasoning, more than 250 years ago in *The Social Contract*, where Rousseau states, "*After the state is instituted, residence implies consent: to inhabit the territory is to submit to the sovereign*", but cautions in his footnote that,

This should always be understood as . . . [not referring to conditions affecting] family, property, lack of [housing], necessity or violence [that] may keep an inhabitant in the country unwillingly, and then his mere residence no longer implies consent either to the contract or to the violation of the contract.¹¹⁰

¹⁰⁹ See generally, *The Declaration of Independence; The Second Treatise*, supra n. 44; *The Social Contract*, supra n. 43; Randy E. Barnett, *Restoring the Lost Constitution: The Presumption of Liberty*, Chs. 1, 2, (Princeton Univ. Press 2004).

¹¹⁰ Rousseau, supra n. 100, Book 4, ch. 2.

It is quite evident that CC&Rs are not a legitimate social contract binding on the residents of the community, as used in the generally accepted political beliefs upon which this country was founded? If CC&Rs are not legitimate, then homeowners have no duty or obligation to accept the authority of the HOA, and the state is grossly remiss when it attempts to legislate compliance with these illegitimate governments.

Legitimacy of board actions

Given this state of affairs, an examination of the actions of the HOA can now be conducted to determine whether the actions of the board under the CC&R social contract, offensive as it is to the individual interests of the members, truly reflect the views of the majority -- the general will of the community. This statement goes to the heart of HOA problems: the difference between what the sovereign may view as the majority view, and its obligations to the fictitious person, the state (the HOA in our instance). However, the goals of the HOA, as contained in the CC&Rs, cannot be anything other than the general will of the people. If it is not, then, the contract is without force or authority.

But this has been the state of affairs over the years: the conflicts between the board (sovereign) and the will of the people with legal contractual enforcement of the CC&Rs against individual interests in the name of the general will to maintain property values. **Or is there more to a community than just maintaining property values that is not reflected in the CC&Rs, but is indeed in the best interests of the common good?** For example, is the lack of any enforcement and penalties for board violations, while the board can take a homeowner's home, in the best overall interest of the community, or of any community?

In the chapter, "The Limits of Sovereign Power", Rousseau points out the very weakness of the HOA government and the oppressive CC&Rs when he speaks of the limits of powers and rights retained by the people. **It is because the promoters and supporters of HOAs do not admit to any allegiance to the US and state constitutions or Bill of Rights that the HOA model of governance is defective and decidedly un-American.**

The nation is nothing other than an artificial person the life of which consists in the union of its members Hence we have to distinguish clearly the respective rights of the citizen and of the sovereign [the HOA], and distinguish those duties which the citizens owe as subjects from the natural rights which they ought to enjoy as men.¹¹¹

Rousseau further informs the reader of additional issues of difference within society: the basis of the general will, how that can differ from the will of a group of individuals, and the obligation and duty of the sovereign (the HOA board in our instance) under the contract:

The general will alone can direct the forces of the state in accordance with that end which the state has been established to achieve – the common good. . . . And it is the basis of this common interest that society must be governed. . . . Sovereignty, being nothing other than the exercise of the general will . . .

There is often a great difference between the will of all [what all individuals want] and the general will; the general will [focuses] on the common interest while the will of all [focuses] on private interest . . .¹¹²

And when factions or cliques form within the community,

We might say, that there are no longer as many votes as there are men but only as many votes as there are groups. . . . When one of these groups becomes so large [or so powerful as the board in HOAs] that it can outweigh the rest . . . then there ceases to be a general will, and the opinion which prevails is no more than a private opinion.”¹¹³

And this has been the general experience with HOA governance: the division between the interests of the board, management, and those of the owner-members of the HOA who are treated as if they were mere

¹¹¹ Id, Book 2, ch. 4.

¹¹² Id, Book 2, ch. 3.

¹¹³ Id.

employees of the HOAs. This division, this opposing interest, is not surprising given the legal sanction of constructive notice as sufficient due process notice for the surrender of fundamental rights and liberties; given the failure of the state to hold HOA boards accountable for violations of the governing documents and state laws; and given the failure of the state to regulate and approve these private constitutions, these new community social contracts, and to declare them to be unconscionable adhesion contracts, unenforceable as any other such contract.

It must not be forgotten that the Uniform Common Interest Ownership Act, UCIOA, is nothing more than a state imposed constitution designed and promoted by the real estate and land planning special interests, and the national lobbyist, CAI, totally ignoring any input from political scientists. There are no concerns for guaranteeing 14th Amendment protections; no concerns about complete and open dissemination of information that a corporate form of private government will be imposed on the homeowner; no Homeowner Bill of Rights; and just obligations to obey the rules and pay the assessments regardless of any dispute relating to the payment of these assessments. UCIOA is a state imposed social contract sanctifying the CC&Rs. It, like the CC&Rs cannot be accepted as a legitimate social contract requiring the obedience of homeowners. It is for this reason that the state must impose these UCIOA laws to coerce the obedience to the illegitimate political authority of the HOA.

Conclusions

Across the country, for years now, a pattern has evolved with respect to solving the problems with planned community governance and its homeowner association form of authoritarian government. Local residents in each state, seeking justice and the vibrant communities advertised to them in regard to HOAs, present to their state legislatures the same grievances with respect to oppressive, unaccountable HOA governance; and CAI, at the national and state levels, argues the same rebuffs and opposition to reforms. CAI has been actively seeking to protect, through an intense national and statewide lobbying organization, the defective HOA model of community governance that for over 33

years has failed to reach those ideals of “harmonious, vibrant, responsive” communities.

Nowhere in the Preamble to the US Constitution¹¹⁴ can the goal of protecting private property values be found. “Justice”, “domestic tranquility” (harmonious and peaceful society), “general welfare” (orderly and functional society for the people as a whole), and “liberty” are there, but not “maintaining property values”. While many CC&Rs may refer to “promoting the general welfare”, there are no Bill of Rights to protect homeowners and neither is there any effective enforcement of state laws designed to protect homeowner rights. Homeowners associations cannot be viewed in any manner whatsoever as a government “of the people, by the people, for the people.” CAI would have one believe that the protection of planned communities is so vital to the national security that it warrants restrictions on the rights and freedoms of Americans.

The evidence is unmistakable that the Community Associations Institute has mislead and dominated state legislatures with respect to its true purpose, and that has been the quiet, insidious subversion of the American system of government by means of undemocratic, authoritarian community governments whose purpose is not to uphold those fundamental rights and freedoms cherished by Americans, but, first and foremost, the Progressive economic goal of “better property values make a better America.”

In short, CAI has been setting itself up as the national private authority, a sort of Board of National HOA Governors, on local community governance through the adoption of uniform planned community acts that perpetuate the current anti-American HOA governments. In effect, the super, privatized agency to replace the US Constitutional system of government.

¹¹⁴ “We, the people of the United States, in order . . . to establish justice, insure domestic tranquility . . . promote the general welfare, and secure the blessings of liberty”

APPENDIX

Appendix A.

About Government & Public Affairs

Working for You

CAI is your link to legislatures, regulatory bodies, and the courts. CAI's Government & Public Affairs Department promotes the organizations' public policies and represents the interests of community association residents and professionals before the United States Congress, federal agencies, and a multitude of other policy setting bodies.

Additionally, as state and local governments grow more active, your staff works in close coordination with CAI's state Legislative Action Committees (LACs) and local chapters to protect members' interests before law and regulation makers closer to home.

CAI is also very active in preparing *amicus curiae* (friend of the court) briefs (see Legal Activity below) in federal and state cases that pose questions of significant importance in community association law. This aspect of CAI's overall government and public affairs program is vital to preserve the legal rights of community associations and their homeowners.

SELECT TRENDS --- 2005 LEGISLATION & 2006 PREVIEW (page 1 of 16)

*CAI Government & Public Affairs Department
October 17, 2005*

Looking back to the beginning of 2005, pre-Hurricanes Katrina and Rita, changes in the Supreme Court composition, and increasing gas prices, state legislatures began the year considering how the 2004 elections and the re-election of President Bush would impact state agendas. By year's end, with most state legislatures adjourned and/or in recess, state lawmakers can only be hopeful for a better 2006.

50-STATE SESSION SUMMARY (from State Net tracking service) Week of 10/17/2005

IN SESSION

There are 5 states and DC in Regular Session; there is 1 state in Special Session.

In Regular Session: DC, MA, MI, OH, PA, WI

In Special Session: PA "a"

CONVENING:

No Regular Sessions are scheduled to convene this week.

LA "a" regarding Hurricane Recovery Measures convenes 11/06/2005. ME "c" regarding Budget Tax and Revenue Issues is projected to convene 10/24/2005.

MN "c" regarding Pensions/Maple Grove Hospital is projected to convene 10/24/2005.

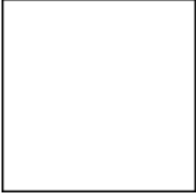
IN RECESS: PREFILING:

IL until 10/19/2005 DE - Prefiling began: 07/02/2005 OK "a" until 10/24/2005
FL - Prefiling began: 06/24/2005 DE "a" until 11/08/2005 KS - Prefiling began:
09/19/2005 NY until 11/09/2005 KY - Prefiling began: 04/14/2005 NJ until
11/10/2005 NH - LSR filing began: 09/12/2005 CA until 01/04/2006 OK -
Prefiling began: 09/23/2005 CA "a" until 01/04/2006 TN - Prefiling began:
06/29/2005

ADJOURNMENTS: No sessions are scheduled to adjourn in the next 30 days

Appendix B

What is CLAC?



The California Legislative Action Committee (CLAC) is a committee of the Community Associations Institute (CAI). It is the largest advocacy organization in America dedicated to monitoring legislation, educating elected state lawmakers, and protecting the interests of those living in community associations in California. CLAC also...

- Is a non-profit committee comprised of 28 Delegates from ten CAI California chapters and elsewhere around the state.
- Represents six million homeowners residing in 30,000 associations throughout California.
 - Is comprised of association homeowners, directors, and professionals.

What does CLAC Do?

- CLAC reviews proposed legislation monthly and takes positions on all bills affecting homeowners associations (HOAs).
- CLAC lobbies lawmakers, key staff, other trade groups, and testifies in committee.

Appendix C.

HOANET email list post excerpt

*From: Michael lxxx
Date: 04/04/06 14:23:33
To: CAI
Subject: CALL TO ACTION!*

CALL TO ACTION

*Community Associations Institute
Arizona Legislative Action Committee
We need your help!*

*First let me thank the many of you who called, emailed and came down to the Legislature to help defeat HB2352 (homestead exemption) and **HB2824 (administrative law judge)**. We were successful in defeating HB2352 by a 4 to 2 vote, but unfortunately HB2824 passed.*

Today, we discovered that Senator Barbara Leff has agreed to release one of her bills for a Striker Amendment in the House Appropriations Committee which will bring back HB2352 (homestead exemption). This bill has been defeated several times, most recently last Thursday, but the sponsors keep finding ways to keep it alive.

WE NEED YOUR HELP AGAIN!

Please contact the members of the House Appropriations Committee and ask them to

VOTE NO on SB1158

....

Click here for the latest fact sheet for SB1158 (formerly HB2352)

PLEASE ACT NOW!

*Executive Director
Community Associations Institute
Central Arizona Chapter
2702 N. 3rd St. Ste. 2040
Phoenix, AZ 85004*

Appendix C cont'd

From: [Michael Lerch](#)

To: [CAI](#)

Sent: Monday, June 05, 2006 11:34 AM

Subject: Arizona Legislative Action Committee - CALL TO ACTION!

CALL TO ACTION

Community Associations Institute

Arizona Legislative Action Committee

We need your help!

It has been a long and difficult Legislative session, and our grassroots efforts have been very successful. We need your help one more time!

HB 2824 (the administrative law judge bill) is currently awaiting House adoption and a final vote in both chambers. There is a possibility that the Senate President, Ken Bennett at kbennett@azleg.gov, may be willing to hold this bill if

enough senators ask him to do so.

We need your help in contacting President Bennett to request that he hold HB 2824. We also need your help in contacting the senators to request their assistance in asking President Bennett to hold the bill or to vote no if it does come to a vote. Below are the reasons why this is a bad bill:

This bill will cause:

1. More disputes in which associations and board members get dragged into a judicial proceeding;
2. An extra layer of litigation since many decisions of the administrative law judge (ALJ) will be appealed to Superior Court;
3. More expense in the form of attorneys' fees;
4. More time spent by managers preparing for and appearing at hearings;
5. More time spent by board members preparing for and appearing at hearings;
6. Increased and open-ended liability for associations because the ALJ will have the ability to fine with no limits;
7. Increase and open-ended liability for board members;
8. Increased and open-ended liability to managers;
9. More insurance claims which will result in higher premiums;
10. Disputes about the timing of the ALJ process and the ALJ's authority.

Appendix D.

.....

SB 137 Ducheny -- Collections and Lien Process: This bill is here to stay. HOAs will be prevented from foreclosing on assessment debts that are less than \$1,800 (counting assessments only) or one year of delinquency, whichever comes first. And the lien process is not impaired, meaning that when an owner is delinquent in paying assessments, a lien can be recorded according to the Association's collection schedule; however there is a new caveat. Prior to recording a lien for delinquent assessments, an association must offer the owner and, if so requested by the owner, participate in "internal" dispute resolution pursuant to the association's "meet and confer" program required by Civil Code Section 1363.810.

.....

This bill provides you with another illustration of how HOAs could be adversely affected without the watch dogging and efforts of CLAC. The original proposal for limits was \$2,500 delinquent assessments and three years (yes, AND), and would have required the minimum bid for a sale to be at 65% of the appraised value of a unit. This was a "kicker" as it would have chilled most if not all Association sales for assessments.

CLAC Corner

"CLAC CORNER"
NOVEMBER 2005
By xxx, PR Chair

2006 is coming and what's in store? More than you know. More than we know. But we are ready. Are you?

CLAC is the only legislative organization in California that has delegates from all over the State and caters to (meaning battling the powers that be in Sacramento to engender less or better legislation) HOAs all over the State of California.

Appendix E.

Twin Rivers, Twin Rivers

by Tom Skiba at 02:51PM (EST) on February 15, 2006

Well, the NJ Court of Appeals has handed down its long-awaited decision in the Twin Rivers case - although it is far from the final act in this long-running drama. For those of you who have not been following this case as it has wound its way through the NJ court system, the basic contention is that the Twin Rivers Community Association is not a corporation, but a government, and is thus subject to the limitations on governmental action defined in the NJ State Constitution related to freedom of expression, voting, rule-making, etc.

In its decision, the Appeals Court found for the plaintiffs on several issues, particularly related to freedom of expression, and for the association on several issues, including voting rights and rule-making. For a quick summary of the decision, a copy of the full appellate court opinion, and some additional analysis by CAI members in NJ, you can check out: http://www.caionline.org/govt/news/twin_rivers.cfm.

Why is this important to those who live and work in associations? First and foremost, associations are corporations just like Google and the local hardware store. No court would ever find that Google is a governmental entity and subject to such constitutional restrictions. Why should associations be treated any differently? Second, treating an association as a government is not the path to efficiency and effectiveness. The reality is that corporations are inherently more efficient than governments. The law of unintended consequences would seem to indicate that making associations comply with governmental restrictions will raise costs, decrease efficiency, and lead to even more complaints about rising assessments and how funds are allocated. Finally, how far should this go? Will board members have to make their personal finances and backgrounds public, as do many elected officials? Will we have the nation's partisan political atmosphere infect our associations? Let's hope not.

Appendix F.

OPEN EMAIL QUESTIONNAIRE TO CAI

Dear Mr. Durso,

As I wrote to the legislators, I now address these questions to CAI, as a public interest organization that repeatedly lobbies every state legislature, and ask that it respond to these important issues in its upcoming article

HOA reforms needed to guarantee U.S. Constitutional protections

Replacing democratic local governments with authoritarian private governments: Is this good public policy?

At the heart of the matter is the continued replacement of democratic local government, governments subject to the U.S. Constitution and 14th Amendment prohibitions, with contractual, authoritarian private governments that are not subject to the prohibitions of the 14th Amendment.

The two broad prohibitions within this amendment are the equal application of the law and the due process clauses that are not applicable to private agreements. Or are they?

I ask the legislators, the public interest organizations and policy makers to consider the following questions:

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 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?

George K. Staropoli, Pres.
Citizens for Constitutional Local Government
March 16, 2006

THE FOUNDATIONS of HOMEOWNERS ASSOCIATIONS
and
THE NEW AMERICA

George K. Staropoli

(In July 2009, the original 2006 document has been revised and divided into 2 volumes: Part I and Part II. A Part III, American Governments: HOAs under servitude law & public government under the Constitution)

Part III American Political Governments

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**American political governments:¹¹⁵
private under servitudes law and public under
constitutional law**

**Is the restatement of law for servitudes establishing a parallel
form of local private government, not subject to constitutional
restraints and the protections of individual rights and freedoms?**

This lengthy paper, by internet posting standards, explores the dual forms of political government that currently exist here in the United States¹¹⁶. These two forms of governance, which can be found in our history since medieval times, are clearly distinct and incompatible, having come to present times from two paths, one concerned with the control of real property interests by groups or associations of persons, and the other concerned with the democratic governance of a people. The former path has evolved into what is known today as the law of servitudes that govern homeowners associations, and the latter is known as constitutional law that governs all other American government entities.

¹¹⁵ Private governments, namely the homeowners association (HOA), are the governing body of a subdivision that is subject to CC&Rs under servitudes law. And, as nonprofit corporations, are further subject to corporation laws and any special real property laws referred to as state HOA acts or laws. They are not subject to state and US constitutions and municipality laws, as are public government entities. It is estimated that there are just under 19% of Americans living in HOAs today, which is more than either the Black or Hispanic minority percentages.

¹¹⁶ See *Establishing the New America of independent HOA principalities*, George K. Staropoli, StarMan Publishing (2007). See author's interview video at the HOAGOV Channel, <http://www.youtube.com/watch?v=o3I9v64JZ6o>.

Today, and for the past 44 years, these differing views of governance here in America have come together in conflict.¹¹⁷ The government of our Founding Fathers, an experiment in democratic representative government, having endured some 220 years is under attack from the real property legal-academic aristocrats who, having commented in their establishment of rules for HOAs, advocate in the servitudes restatement of law: *"The question whether a servitude unreasonably burdens a fundamental constitutional right is determined as a matter of property law, and not constitutional law."*¹¹⁸

This comment, serving to clarify the common law servitude "rules" for court usage, support the views of the Reporter/chief editor in the Foreword (emphasis added),

Professor Susan French [Reporter (chief editor/contributor) for this Restatement] begins with the assumption . . . that **we are willing to pay for private government** because we believe it is more efficient than [public] government Therefore **this Restatement¹¹⁹ is enabling toward private government, so long as there is full disclosure**¹²⁰

¹¹⁷ See [The Foundations of Homeowners Associations and the New America](#), George K. Staropoli, HOA Constitutional Government (http://pvtgov.org/pvtgov/downloads/hoa_history.pdf webpage) June 2009. (This report follows the history of the current HOA legal scheme from 1964).

¹¹⁸ *Restatement Third, Property (Servitudes)*, Susan F. French, Reporter (American Law Institute 2000), § 3.1, cmt h.

¹¹⁹ What are Restatements? (University of Texas School of Law, <http://tarlton.law.utexas.edu/vlibrary/outlines/restatements.html>). Restatements are secondary sources that seek to "restate" the legal rules that constitute the common law in a particular area into a series of principles or rules. They are prepared by the [American Legal Institute](#) (ALI), an organization formed in 1923 consisting of prominent judges, lawyers and teachers. **The ALI's purpose is to distill the "black letter law" from cases, to indicate a trend in common law and, occasionally, to recommend what a rule of law should be.**

The legal rule is printed in boldface type. Following the Restatement rule is a section labeled "Comments." Comments are written by the drafters of the Restatement to explain the provision and identify its limitations. The "Illustrations" sections of the Restatement provide examples of how a particular Restatement provision would apply in specific factual situations. Most Restatement provisions conclude with "Reporter's Notes," which give the history of the provision and cite to the authority from which the rule was derived. Restatements are not primary law. They are, however, considered American political governments

What was the basis for the assumption? Did it include concerns that individual property rights would be surrendered to an authoritarian corporate form of government? And who was the "we"? And, the reader can see for himself, in the Reporter's own words and view point, that the Restatement is pro-HOA, and silent on protecting individual rights and freedoms. The courts, making use of this Restatement, will be making pro-HOA rulings that exclude concerns for the American values and principles of democratic government, which will be explored further in this paper.

In the Introduction (emphasis added), *"This Restatement presents a comprehensive **modern treatment** of the law of servitudes . . ."* and then claims that *"it preserves the judiciary's traditional role **of protecting the public interest in maintaining the social utility of land resources.**"*¹²¹

What does "modern treatment" mean? Does it mean the acceptance, promotion and support of HOAs, as we shall discover in Chapter 6 of the Restatement? What does "social utility of land resources" mean? Social utility?? Under servitudes (the Restatement has redefined this term as "covenants running with the land") posterity is locked into what amounts to a developer's idea of a governing "constitution" that is geared to protect his financial, as well as the mortgagor's financial interests, and supposedly maintain property values under what can be viewed as an adhesion contract, with very little homeowner protections, as we shall also discover in Chapter 6. And where does the public enter into this private arrangement? Does it include preserving the individual property rights and constitutional restraints on government? No, adherence to the Bill of Rights is not mentioned at all in either the Foreword or Introduction, just creating a "private government."

persuasive authority by many courts, especially as support for legal arguments that have not been addressed by the courts in a particular jurisdiction. Restatements are heavily annotated with case citations and thus can also be an excellent case-finding tool.

Summaries of cases which have adopted or interpreted the Restatement rules can be found in the Appendix volumes which accompany a set of topical volumes or, in later Restatements, in the Reporter's Notes (e.g., Restatement (Third) of Agency). In addition, West topic and key numbers and A.L.R. Annotations will be cross-referenced in the Appendix for the more recent Restatements.

¹²⁰ Id, Foreword, third paragraph.

¹²¹ Id, Introduction, first sentence.

Does the judge who makes use of this persuasive authority understand these terms? Can he answer the questions posed above? Are these legal-academic aristocrats making new laws outside the judicial system? Or, outside the legislative process, which the courts themselves are very hesitant to violate? The description of what the Restatements are all about, footnote 4, clearly reveals that the Restatements are not simply a summary of case law. The introductory remarks clearly show personal, unsupported views of a preferred direction for real property law that trespasses upon, but ignores, constitutional law and state constitutions as well. (Sec. 3.1 of the Restatement, Validity of Covenants, and the "rules" regarding constitutionality will be addressed later).

The most recent state supreme court challenge to the constitutionality of the HOA regime took place in NJ¹²², and reflects the influence of the new world order of private governments as promoted by the Restatement.

The Association argues that . . . it was error to impose constitutional obligations on its private property. The Association urges this Court to follow the vast majority of other jurisdictions that have refused to impose constitutional obligations on the internal membership rules of private homeowners' associations.¹²³

The homeowner plaintiffs argued *"that political speech is entitled to heightened protection and that they should have the right to post political signs beyond the Association's restricted sign policy."*¹²⁴ The court saw the issue as (emphasis added),

Here, we must determine whether this case presents **one of those limited circumstances where, in the setting of a private community**, the Association's rules and

¹²² Committee for a Better Twin Rivers v. Twin Rivers, 2007 N.J. LEXIS 911, 929 A.2d 1060 (NJ 2007).

¹²³ Supra n. 8, p.20.

¹²⁴ Id.

regulations are limited by the constitutional rights of plaintiffs.

And the court, hinting at where its holding will go, comments on case law where,

Those courts recognize either explicitly or implicitly the principle that “the fundamental nature of a constitution is to govern the relationship between the people and their government, not to control the rights of the people vis-a-vis each other.”¹²⁵

Both the US Constitution and the NJ constitution, under which this case was brought, were found to be incapable of interfering with privately contracted governments, because of the disjointed clause in Art. 1, sec. 10 of the US Constitution, and repeated in similar form in state Declarations of Rights¹²⁶ articles within their constitutions. It seems that when it comes to private contracts, the constitutions are viewed as permitting private parties to contract to do what ever they so desire, ignoring, or placing in a lower level of importance, all of the other objectives, purposes, prohibitions, restrictions and citizen protections stated throughout these constitutions. The state police powers, under the Preamble¹²⁷ objective of "promoting the general welfare", which is used to regulate activities for the benefit of the general public, the public good, do not seem to be applicable to HOAs, leading to the conclusion the contracting parties are, by virtue of the contract, unquestionably acting in a manner for the benefit of the public, for the good of greater society. In many, many other areas, such is not the case!

¹²⁵ Supra, n. 8, p.37.

¹²⁶ For example, the Arizona Constitution, Art. 2, Declaration of Rights, Section 25. No bill of attainder, ex-post-facto law, or law impairing the obligation of a contract, shall ever be enacted.

¹²⁷ *"We the people, in order to . . . establish justice, insure domestic tranquility, provide for the common defense, promote the general welfare and to secure the blessings of liberty . . ."* Note that here is no mention of promoting or establishing homeowners associations, or to beautify the American landscape by authoritarian enforcement, or *"maintaining the social utility of land resources"* (see Supra, n. 7).

The Twin Rivers case illustrates additional, serious aspects of how government by private "contracts" that are subject to servitudes law, the CC&Rs or declaration, has been accepted by the courts as a legitimate form of political government in these United States, even being held superior to the supreme law of the land, the Constitution. Both the Twin Rivers opinion and the Restatement of servitudes law endorse the "business judgment rule" which is a corporate business doctrine designed to protect boards of directors from legal liability.

The heart of the BRJ, as stated in the Restatement, lies in its design to *"encourage entrepreneurial [business] risk taking by protecting directors from personal liability for losses due to **erroneous business judgments**"*¹²⁸ (emphasis added), and *"is intended to reduce the ease with which disgruntled members can obtain judicial review [court decisions] of association decisions and to discourage judges from substituting their judgment for that of the association."*¹²⁹ Admitting that the courts prefer the BJR, servitudes law in the Restatement advises that directors should be liable *"only where **no reasonable person** would have taken the same course"*¹³⁰ (emphasis added), which is equivalent to the strict requirement for a murder case of *"beyond a reasonable doubt"* (interpreted as there is no other reasonable alternative).

It is interesting to note that the rules in sections, §§6.13 and 6.14, were formulated with the intent of balancing the relationships between directors and the HOA, and the members and the community. *"They provide advantages of the business judgment rule"*, which protects directors, and *"protect individual community members from careless and risky management practices,"* which seems contract the first quote.¹³¹ While rule § 6.13(1)(c) requires the board to act reasonably, rule §6.13(2) places the burden on the homeowner. Rule §6.14 recites the "good faith", "deal fairly" and prudent man obligations, without a requirement for reasonableness, and "comment b" recites the purpose of

¹²⁸ Supra n. 4, §6.13, p. 237. (This section is titled, Duties of a Common-Interest Communities to its members).

¹²⁹ Supra n. 4, §6.13, p.236.

¹³⁰ Supra n. 4, §6.14, p. 270. (This section is titled, Duties of Directors and Officers to the Association).

¹³¹ Supra n. 15.

the HOA: "*to protect property values and quality of life by managing the common property.*"¹³² It appears that "*quality of life*" follows from managing the common property alone, and not from a much broader "promoting the general welfare" concern.

In rejecting the homeowners' argument of a violation of their constitutional free speech rights, the NJ justices declared,

Moreover, common interest residents have other protections. First, the business judgment rule protects common interest community residents from arbitrary decision-making. . . . Pursuant to the business judgment rule, a homeowners' association's rules and regulations will be invalidated (1) if they are not authorized by statute or by the bylaws or master deed, or (2) if the association's actions are fraudulent, self-dealing or unconscionable.¹³³

What has happened to the Constitution, which clearly states,

This Constitution, and the laws of the United States . . . shall be the supreme law of the land; and that Judges in every State shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding. Art. VI, paragraph 2.

In its amicus curiae brief to the NJ appellate court, CAI urged,

In the context of community associations, the unwise extension of constitutional rights to the use of private property by members (as opposed to the public) raises the likelihood that judicial intervention will become the norm, and serve as the preferred mechanism for decision-making, rather than members effectuating change through the democratic process.¹³⁴

¹³² Supra n. 4, §6.14, p.269.

¹³³ Supra n. 8, p. 45-46.

¹³⁴ Community Associations Institute amicus curiae brief to the NJ Superior Court, Appellate Division, *Committee for a Better Twin Rivers v. Twin Rivers*, A-4047-03T2, American political governments

What is being said here about constitutional protections? Perhaps, Prof. McKenzie can clarify this, when he wrote in 1994,

Residents in CIDs commonly fail to understand the difference between a regime based formally on rights, such as American civil governments, and the CID regime, which is based on restrictions. This often leads to people becoming angry at board meetings and claiming that their “rights” have been violated – rights that they wrongly believe they have in the CID. This absence of rights has important consequences because the balance of power between individual and private government is reversed.¹³⁵

When the discussion turns to homeowner rights, advocates are speaking of a restoration of those rights claimed to have been surrendered to the HOA by virtue of the servitudes law of constructive notice, or simply by a "posting" of the CC&Rs to the county clerk's office as being necessary and sufficient for legally binding all lot owners. This doctrine is contrary to the strict requirements for a bona fide surrender of one's rights, namely, a fully knowledgeable party, not under any pressure or stress to agree to the surrender, and by means of an explicit written instrument. What CAI is saying in its brief above is not to open HOAs to the same restrictions and prohibitions that *de jure* (legal) government entities are subject, and to the same protections that all Americans are entitled under the laws of the land. In other words, CAI argued for independent "principality" status where the CC&Rs are the "laws" of the land.

Why are we seeing all this deference to private contractual arrangements that are allowed to deny constitutional protections to homeowners? Why are business interests allowed to subject homeowners and their posterity to these authoritarian regimes, not

Feb. 7, 2006. The common theme, as reflected by this statement, is that CAI and other pro-HOA supporters consider the so-called servitudes contract "holier than thou", sacrosanct, and that regulation by unaccountable HOA regimes is to be preferred over constitutional restrictions on government that also provide for homeowner protections.

¹³⁵ *Infra*, n. 34, p. 148.

permitted to terminated until some 20 - 30 years have past? Why did the national special interest trade group, CAI, vehemently oppose the application of constitutional protections to homeowners in HOAs?

A critique of the NJ supreme court's opinion can be found in the Rutgers Law Review article,¹³⁶ co-authored by an author of the AARP amicus brief¹³⁷ supporting the homeowners, that provides a rationale behind the support for HOAs,

The *laissez-faire* approach to CIC regulation is reflected in the statutory law, which affords exceedingly few rights and protections to homeowners association residents, and in the common-law principles applied by New Jersey courts when resolving disputes arising over CIC governance.¹³⁸

CAI knows better than to argue that HOAs are democratic. The Restatement §6.14, Representative Government (emphasis added), provides a blatant reversal of a government of the people, by the people, for the people: "*Except as otherwise provided by . . . an association . . . is governed by a board The board is entitled to exercise all powers of the community except those reserved to the members.*" Under Art. 9 and 10 of the Constitution, all rights that are not grants of authority or restrictions of authority, belong to the people, the homeowners.

* * * *

And why are the legal-academic aristocrats arguing for the supremacy of servitude law over constitutional law?¹³⁹ And why are the courts hearing no evil, seeing no evil, and speaking no evil about these

¹³⁶ *The Twin Rivers Case: Of Homeowners Associations, Free Speech Rights, and Privatized Mini-Governments*, Paula A. Franzese and Steven Siegel, Rutgers Journal of Law and Public Policy, vol. 5:4, p. 729, Spring 2008.

¹³⁷ BRIEF OF AMICUS CURIAE AARP, Steven Siegel, Franco A. Munoz, and Ann Silverstein, Supreme Court of NJ, Docket # 59,230, Committee for a Better Twin Rivers v. Twin Rivers.

¹³⁸ *Supra* n. 22, at 731.

¹³⁹ *Supra* n. 4.

private governments unanswerable under the Constitution? HOAs are not just another nonprofit corporation concerning itself with social relationships, charitable concerns, or providing services to members who can freely enter and exit without the harsh penalties of financial liens or threats of having their homes taken away. HOAs regulate and control the people within a subdivision with the objective of maintaining property values as the “state’s” objective, without concern for the Bill of Rights, namely the First and Fourteenth Amendment protections. Yet, we repeatedly see our government continually side with the collective ownership of property in a communal setting that is free to ignore the Constitution, allowing it to be subservient to these private communities. They are de facto governments functioning independently of the constitutional protections and restrictions to which our government is held.

The Constitution is not entirely ignored in servitude law, just those protections and restraints are ignored. What servitude law says, in §3.1, Validity of Covenants, of the Restatement is that they must not be illegal (which is an explicit recognition of the applicability of police powers to regulate!), unconstitutional, or not violate public policy. Under "public policy", the reader is advised that it includes, a servitude that

1. is arbitrary or capricious,
2. *"unreasonably burdens a fundamental constitutional right"*, which grants, as valid, any reasonable burden, or restriction or restraint on a constitutional right. The Twin Rivers opinion reflects the extent to which the courts are quick to subordinate the constitution to private property concerns and to servitude law.
3. is unconscionable, as further set forth in §3.7, Unconscionability [sic]. (The discussion in §3.7 touches on contract law and the UCC, but avoids any explicit mention of unconscionable adhesion contracts, to which a neutral party would have devoted serious analysis).

Here is where one would expect to find allegiance to this country and to its democratic system of government, but §3.1 is silent. Its silence causes one to believe that was it an intentional omission, because the creation of independent private governments was an objective in

subjecting HOAs to servitude law, and constitutional law made subservient.

This silence, this broader unspoken alliance, can be traced back to the modern incarnation of utopian communities as promulgated by the Urban Land Institute's *The Homes Association Handbook*¹⁴⁰ of 1964. This guide to the creation and promotion of planned communities, with stated requirements for HOAs to be tied to servitudes and covenants running with the land, promised something for everyone as an inducement to climb aboard the bandwagon. It, too, was silent on allegiance to the Constitution. It had to, in order to be able to coerce homeowners into compliance.

We have taken the position that no organization is a homes association unless provided for, in some manner, in the covenants, deeds, or other recorded legal documents which affect title to the land within the development. (p. 15) . . . The right to membership in such an association is automatic [mandatory in today's jargon] for every home owner because it cannot be withheld from an owner whose land is charged with the obligation to pay its assessments. (p. 16) . . . Fundamental to the legal arrangement for a homes association is the covenant for assessments which must be made to run with the land so that the association can be assured of a continuing, legally enforceable source of maintenance funds. (p. 314).¹⁴¹

In considering the above, several extremely important questions can be raised:

1. Can a legislature delegate its functions, not government services but functions, to private entities without oversight or compliance with the Constitution, as required of all government entities?

¹⁴⁰ *THE HOMES ASSOCIATION HANDBOOK*, Urban Land Institute Technical Bulletin #50, 1964.

¹⁴¹ *Id.*

2. Can private parties enter into contractual arrangements using adhesion contracts and a constructive notice consent, which serve to regulate and control the people within a territory (an HOA), within the state, to circumvent the application of the Constitution?

3. In 2009, should HOAs, as a sui generis private government, be held as state actors under the US Supreme Court criteria as a result of state protective statutes reflecting a cooperation, support or coercion; a symbiotic relationship; a close nexus; or an entwinement between state and HOA?¹⁴²

Clouding the concepts of a business, a private government and public government

There are numerous legal arguments regarding HOAs as quasi- or mini-business, or is equivalent to a business, none of which are addressed by the real property legal-academic aristocrats in the Restatement. The NJ trial court in Twin Rivers quickly dismisses the issue of HOAs as a quasi-government with a strict legal view, saying.

Private organizations, even when they perform municipal functions, do not become quasi-municipal agents. . . . A quasi-municipal agency is "a corporation, created by the Legislature, that is a public agency endowed with the attributes of a municipality that may be necessary in the performance of a limited objective," or "a public agency created by authority of the legislature to aid the state in some public or state work for the general welfare." . . . Twin Rivers was not created by East Windsor Township

¹⁴² The Twin Rivers case discussed state actors and the 1946 "public functions" company town test in *Marsh v. Alabama*, often cited by the national lobbying group for HOAs, Community Associations Institute (CAI), who had filed an amicus brief in support of the association. A summary of the indicated US Supreme Court criteria can be found in *Brentwood Academy v. Tennessee Secondary School Athletic Ass'n*, 531 U.S. 288 296 (2001). These criteria did not enter into this case.

and none of its authority to regulate within the community is delegated to it by the municipality.¹⁴³

Another strict legal view of a government subdivision can be found by examining your state statutes on the requirements for forming legitimate incorporated and unincorporated towns/villages. (The requirements are varied and much less stringent than those imposed by the "public functions" test from the 1946 *Marsh v. Alabama*¹⁴⁴ opinion regarding free speech in a company town. The NJ justices cited this antiquated test, and never raised the more current US Supreme Court criteria for state actors/action.) Simply stated, HOAs are chartered under corporation laws, and not under municipality laws or by legislative decree through a designation of powers.

The reader should understand that references to "mini-government", "quasi-government", or "equivalent to a government" can only have meaning outside the strict legal creation or formation statutes, and only in terms of the broader concept of a government as a person or body that controls and regulates the people within a territory, which may be a simple subdivision. This is the view that has been debated by many legal scholars and HOA authorities, that should have been addressed long ago, in the name of justice, and as required under the Constitution.

Former CAI president Wayne Hyatt, and co-author Susan French, (also the Reporter for this Restatement) devote chapter 4 of their book on homeowner associations law to the topic of mini-governments, and saw into the future with,

The third theory, 'symbiotic relationship' or the 'sufficiently close nexus', [both are part of the Supreme Court criteria] are less relevant to the common interest community setting of today [1998] but may have more relevance in the future. State action is found¹⁴⁵

¹⁴³ *CBTR v. Twin Rivers Homeowners' Association*, p. 6-7, Docket C-121-00, Superior Court, Mercer County, Feb. 17, 2004.

¹⁴⁴ *Marsh V. Alabama*, 326 US 501 (1946).

¹⁴⁵ *Community Associations Law*, Wayne S. Hyatt and Susan F. French, Ch. 4, p. (Carolina Academic Press 1998). Ch 4 consists of some 89 pages of discussion of American political governments

In a more recent presentation of an earlier article by Hyatt, the reader is presented with the constitutional implications of HOA private governments and their impact on the public at large, the greater community.

These issues [the sui generis nature of HOAs, and predominantly judge-made laws that become common law precedent] are significant far beyond the real estate industry and the legal community that supports the real estate industry. As community associations reach beyond their geographic boundaries to become more involved in the broader community, as they perform more community services for their own members, and as they build public and private alliances to provide many different services that were formerly public services, the legal, political, social, and economic consequences and effects increase and implicate corporate, municipal, constitutional, and other areas of law as well as social and public policy concerns.¹⁴⁶

A search of the literature reveals attacks on the HOA form of governance by political scientists, not real estate lawyers:

1. **In 1992**, Dilger wrote,

Other scholars view RCAs [HOAs in today's terminology] more critically. [HOAs] . . . have governance procedures that violate the constitutional standards applied to government. They want government to regulate [HOAs] to insure that they are run in a democratic fashion and are in full accord with constitutional guarantees embodied in the First and Fourteenth Amendments.... Moreover, [HOAs'] critics

numerous cases pertaining to constitutional issues. Hyatt seems to be having second thoughts on the benefits, values and problems after 44 years of public existence. See ¹⁴⁶ *COMMON INTEREST COMMUNITIES: EVOLUTION AND REINVENTION*, p. 307-308, Wayne S. Hyatt, 31 J. Marshall L. Rev. 303, Winter 1998. Re-published by The John Marshall Law Review on 9/9/2008 as part of Symposium proceedings.
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question the assertion that homeowners are freely and knowingly consenting to restrictions on their property rights in exchange for enhanced property values ¹⁴⁷

2. **In 1994**, McKenzie wrote on the violations of rights and freedoms and the fact that HOAs could get away with actions that would be prohibited under public government.

HOAs currently engage in many activities that would be prohibited if they were viewed by the courts as the equivalent of local governments. . . . The balance of power between the individual and the private government is reversed in HOAs. ... The property rights of the developer, and later the board of directors, swallow up the rights of the people, and public government is left as a bystander.¹⁴⁸

3. In 2000, the author of a partisan history of HOAs, which was funded by CAI, wrote,

[HOAs are] a consumer product sold by a profit-seeking firm, a legal device, a corporation reliant on both coercive powers and voluntary cooperation, a democracy, and a lifestyle. . . . The innovators of CAs were entrepreneurs . . . The dilemma [as far back as the 1930s] was how to ensure their widespread acceptance among government agencies, builders and developers, and prospective home buyers.¹⁴⁹

¹⁴⁷ *Neighborhood Politics: Residential Community Associations in American Governance*, p. 37-38, Robert Jay Dilger, New York Univ. Press, 1992.

¹⁴⁸ *Privatopia: Homeowners Associations and the Rise of residential Private Government*, Evan McKenzie (Yale Univ. Press 1994);

¹⁴⁹ *Community Associations: The Emergence and Acceptance of a Quiet Innovation in Housing*, p. 68, Donald R. Stabile (Greenwood Press 2000). (A book partially funded by ULI and CAI).

4. In 2007, Franzese and Siegel analyzed HOA issues, holding that,

For too long, conventional wisdom has been that CICs are nothing more or less than the product of market forces, and that the elaborate CIC servitude regime is nothing more or less than a market response to consumer demand. This received wisdom ignores the realities of several distinctly non-market phenomena, including the pervasive privatization policies of local governments and the self-interested motives of CIC developers, that are at variance with the best interests of CIC homeowners.¹⁵⁰

5. In 2008, Franzese and Siegel team up again and criticized the Twin Rivers opinion,

The Twin Rivers decision is unsatisfactory in many respects, because it lacks clarity and a firm underpinning in settled constitutional doctrine. The Court's failure to anchor its decision in established constitutional doctrine is particularly unfortunate, because there is substantial precedent available and adaptable to the homeowners association paradigm [legal concept or model].¹⁵¹

At this time, it should be quite apparent that CAI and other promoters of HOAs have had a personal agenda: control over planned communities for profiteering purposes. And that the popular political vision of America with its "no government is good for America" faulty ideology has only served to concentrate legal power into the hands of HOAs. And these private government regimes have strong legal precedents in support as a result of the vicious cycle of many years of HOA favorable

¹⁵⁰ *Trust and Community: The Common Interest Community as Metaphor and Paradox*, Paula A. Franzese and Steven Siegel, Vol 72, Missouri L. Rev., 1111, 2007.

¹⁵¹ *Supra* n. 22, p 250.

case law, which have been compiled into an almost complete rewrite of servitudes law under the direction of pro-HOA persons -- the common law Restatement of Servitude -- which only serves to further increase pro-HOA decisions. And when the courts resort to extensive reliance on precedent and the Restatement, without stepping back to look at the ugly forest through the trees, justice is not served, and a new America is being established.

* * * *

Returning to the questions posed earlier, under constitutional law, the answer to question #1 is a well settled, resounding no! First, the Art. 1 of the Constitution is quite emphatic that *"All legislative powers herein granted shall be vested in a Congress of the United States," "To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers and all other Powers necessary"* (Art.1, sec.8), and under the Tenth Amendment, *"The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States, or to the people."* And state constitutions contain wording similar to, *"The legislative authority of the state shall be vested in the legislature."* Research into case law produced only one case on point, where a planning board issued a regulation that, upon petition of two-thirds of affected property owners [private persons], the board would modify property boundaries, and the other affected one-third would be so bound by law. The court opinion found the ordinance to be unconstitutional as *"an unreasonable exercise of police power."*¹⁵²

Case law does abound with issues pertaining to delegation of legislative powers to the Executive or his agencies. Delegation of legislative powers to government agencies is permitted, but subject to restraints, such as, the delegated authority is subject to and limited by the declared legislative policy relating to such delegation. Even with respect to the delegation to the President of the US such is a limiting factor on his authority, and one cannot reasonably expect that delegation to lesser persons or to private persons would be less restrictive.

¹⁵² *Eubank v. City of Richmond*, 226 U.S. 137 (1912).
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When the President is invested with legislative authority as the delegate of Congress in carrying out a declared policy, he necessarily acts under the constitutional restriction applicable to such a delegation.¹⁵³

With respect to homeowners associations, there is no delegation from the state legislature, just a series of statutes. Furthermore, the Restatement ignores constitutional law in general, but comments that servitudes law should control in the event of a conflict between constitutional law and servitudes law.¹⁵⁴

The pro-HOA supporters would strongly argue that the HOA is not exercising legislative powers, or for that matter, any public executive or judicial powers since it is not a government. These supporters describe HOAs as privately contracted associations of homeowners who have willingly consented to be governed, and who have openly and willingly surrendered their rights and freedoms that all other non-HOA members enjoy. "Consent to be governed"¹⁵⁵ is a public government doctrine, and cannot be found within the CC&Rs "contract."

* * * *

The major alternative description of the HOA legal structure is that it is a business, and therefore, not a government. In fact, the CEO of CAI, the national pro-HOA lobbying trade organization has argued that *"Community associations are not governments Yet they are clearly democratic in their operations, electing their leadership from among the homeowners on a periodic basis. In fact, associations operate much more democratically than almost any other form of corporate entity."*¹⁵⁶ (Emphasis added).

¹⁵³ *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935).

¹⁵⁴ *Supra*, n. 4.

¹⁵⁵ See generally my discussion of CC&Rs as the new social contract, [*CC&Rs: The Non-legitimate Social Contract*](#), in which Rousseau is quoted: , "After the state is instituted, residence implies consent: to inhabit the territory is to submit to the sovereign".

¹⁵⁶ *Democracy In Our Communities?*, Tom Skiba, We The mutual benefit and reciprocal nature of those rules and regulations, and their enforcement, is essential to the fundamental nature of the communal living arrangement that Twin Rivers [*43] residents enjoy. Welcome to American political governments

From the point of view of the developer and the pro-HOA service vendors, namely the HOA lawyers and HOA management firms, the answer to question #1 would be "Yes". It is doubtful that any unbiased homeowner -- one not pro-HOA or having suffered injustice under an HOA regime -- would admit that making a business investment was a material consideration when buying his HOA controlled home. Yes, they would probably agree to the benefits of the HOA -- property maintenance, amenities, and enforcement against violators, to name a few -- but not to a conscious belief that they were entering into a business relationship. They thought that they were buying a home.

Now, while the Restatement of servitude law completely ignores constitutional law, it is replete with rules, analysis and points of view reflecting the position that the HOA is essentially a nonprofit business having the objective of maintaining property values, and *"having substantial power to affect both the quality of life and financial health of their member."*¹⁵⁷

But then, what is government?

This paper has shown that an HOA, in strict legal terms, is neither delegated authority by the legislature, nor is chartered under the state's municipality laws. The HOA, itself, the private nonprofit corporation and governing body of a subdivision, is subject to CC&Rs, which has been identified as the HOA's "constitutional" contract between the HOA and its members. They are therefore subject to servitudes law. The Restatement subjects HOAs to a collective, a communal,¹⁵⁸ agreement between the subdivision (territorial) developer of a residential community, which can be identified as equivalent to a small village or to a large town on the one hand, and each lot or unit owner member,

Ungated, April 2, 2008 (http://cai.blogware.com/blog/_archives/2008/4/2/3616608.html).

¹⁵⁷ Supra n. 4, Vol. 2, p. 68.

¹⁵⁸ Supra, n. 8 p. 42. The concluding opinion held: *"The mutual benefit and reciprocal nature of those rules and regulations, and their enforcement, is essential to the fundamental nature of the communal living arrangement that Twin Rivers residents enjoy."*

separately, on the other hand. And when those covenants run with the land, then servitude law has trespassed and infringed upon the American system of political government, and upon the supreme law of the land.

Servitudes had their origins long ago in the feudalism of medieval times¹⁵⁹. It all began with the victory of William the Conqueror who seized all lands in his name, and awarded parts to his knights, "tenants in chief", for services. In time, they subdivided their lands to subtenants for services to the knight himself, which led to the start of tenants in perpetuity. These grants were originally for the life of the parties only, but then were permitted to pass to the heirs of the owners. These English laws passed on to the new discoveries here in America, and American real property evolved in time to fee simple ownership. Land ownership was then transferred with conditions under the complex laws now referred to as servitudes.¹⁶⁰

The ownership of land was originally tied to the governance of the people by the King and his vassals governing the land owned by the king. It has evolved over the centuries as governance took on a republican, democratic nature to where real property ownership was no longer tied to the king, but to simply property owners. But, with the third edition (2000) of the Restatement of servitudes, we have come full cycle to where the servitudes have trespassed and infringed upon political government, rejecting our democratic form of governance.

The HOA proponents strenuously argue that many organizations levy fines, require the payment of dues or assessments, make "laws", and regulate the conduct of their members, etc. and they are not considered a government. (Remember, the argument being made is not of a *de jure* government, which is well accepted, but that HOAs are the equivalent to a public government were it not for the legality of their creation). They continually evoke the 1946 "company town" test of public functions, and ignore state statutes on the creation of local governments that do not, themselves, meet the public functions test, but are otherwise legitimate *de jure* towns. And these promoters, these special interest groups, also

¹⁵⁹ See generally, *The Law of Property*, Third Edition, §§ 1.6 - 1.8, Feudal Tenure to Ownership, William B. Stoebuck and Dale A. Whitman, (Hornbook Series, West Group 2000). See also

¹⁶⁰ *Id.*, Ch. 8, Servitudes.

conveniently ignore those highly applicable US Supreme Court test criteria of state actors/actions, which would indeed make HOAs the equivalent of a government entity.

* * * *

Perhaps a refresher course in the fundamental philosophy and principles of government, and of democratic representative government, will help us today to better understand what a government is all about. I shall be referring to Blackstone's Commentaries¹⁶¹ and Locke's Second Treatise.¹⁶²

By the constitution of the United States, the solemn and original compact here referred to, being the act of the people, and by them declared to be the supreme law of the land, the legislative powers thereby granted, are vested in a congress, to consist of a senate and house of representatives. As these powers, on the one hand, are extended to certain objects [areas], as to lay and collect taxes, duties, &c. so on the other they are clearly limited and restrained These, and several others, are objects [areas] to which the power of the legislature does not extend; and should congress be so unwise as to pass an act contrary to these restrictions, the other powers of the state are not bound to obey the legislative power in the execution of their several functions . . . but the very reverse is their duty, being sworn to support the constitution, which unless they do in opposition to such

¹⁶¹ *Blackstone's Commentaries on the Laws of England* (lectures at Oxford University, 1753) contain Appendices with Notes that were written by St George Tucker, Professor of Law, William & Mary University, in 1803. The value of *Blackstone*, and *Tucker's Blackstone* lies in their contemporaneous commentary on English laws that influenced the Founding Fathers. See The Constitution Society website at <http://www.constitution.org/tb/tb-0000.htm>.

¹⁶² *Second Treatise of Civil Government*, John Locke, 1690, can be found at the Constitution Society website, <http://www.constitution.org/jl/2ndtreat.htm>.

encroachments, the constitution would indeed be at an end.¹⁶³

The GOVERNMENT or administrative authority of the state, is that portion, only of the sovereignty, which is by the constitution entrusted to the public functionaries: these are the agents and servants of the people. . . . Legitimate government can therefore be derived only from the voluntary grant of the people, and exercised for their benefit.¹⁶⁴

But, as it is necessary to the preservation of a free government, established upon the principles of a representative democracy, that every man should know his own rights, it is also indispensably necessary that he should be able, on all occasions, to refer to them. In those countries where the people have been deprived of the sovereignty, and have no share, even in the government, it may perhaps be happy for them, so long as they remain in a state of subjection, to be ignorant of their just rights. But where the sovereignty is, confessedly, vested in the people, government becomes a subordinate power, and is the mere creature of the people's will: it ought therefore to be so constructed, that its operations may be the subject of constant observation, and scrutiny. There should be no hidden machinery, nor secret spring about it.¹⁶⁵

And much earlier, John Locke wrote about people uniting in a common purpose for their mutual benefit, as we are mistakenly told is the broad purpose of the HOA.

Those who are united into one body, and have a common established law and judicature to appeal to, with authority to decide controversies between them, and punish

¹⁶³ Supra, n. 47, Editor's Appendix, Book First, Part First, Note A.

¹⁶⁴ Id, Note B.

¹⁶⁵ Id, Note D, ¶ 2.

offenders, are in civil society one with another [§ 87] Where-ever therefore any number of men are so united into one society, as to quit every one his executive power of the law of nature, and to resign it to the public, there and there only is a political, or civil society [§ 89] [The HOA subdivision that is subject to CC&Rs is a form of civil society] For he that thinks absolute power purifies men's blood, and corrects the baseness of human nature, need read but the history of this, or any other age, to be convinced of the contrary. [§ 92] [The failure of the state to hold HOAs accountable to them, and their failure to enforce the laws against violations by HOAs, is a grant of absolute power].¹⁶⁶

While Locke seems to agree with the objectives of the HOA, "*The great and chief end, therefore, of men's uniting into commonwealths, and putting themselves under government, is the preservation of their property*"¹⁶⁷, he cautions,

There wants an established, settled, known law, received and allowed by common consent to be the standard of right and wrong, and the common measure to decide all controversies between them . . . yet men being biassed [sic] by their interest, as well as ignorant for want of study of it, are not apt to allow of it as a law binding to them in the application of it to their particular cases.¹⁶⁸

Locke is clearly saying that the preservation of property itself, alone, is not the entire end of government, as we see with the HOA "constitutions." He adds,

The legislative, or supreme authority, cannot assume to its self a power to rule by extemporary arbitrary decrees, but is bound to dispense justice, and decide the rights of the

¹⁶⁶ Supra, n. 48.

¹⁶⁷ Supra, n. 48, Ch. IX, Of the Ends of Political Society and Government, § 124.

¹⁶⁸ Id.

subject by promulgated standing laws, and known authorized judges; 169

. . . .

The legislative cannot transfer the power of making laws to any other hands: for it being but a delegated power from the people, they who have it cannot pass it over to others. The people alone can appoint the form of the common-wealth, which is by constituting the legislative, and appointing in whose hands that shall be. And when the people have said, We will submit to rules, and be governed by laws made by such men, and in such forms, no body else can say other men shall make laws for them; nor can the people be bound by any laws, but such as are enacted by those whom they have chosen, and authorized to make laws for them.¹⁷⁰

And, as we have made clear, this private government has not been delegated authority by the legislature to so govern subdivisions. Surely, allowing the unfettered voice of a few people to stand in place of our elected representatives cannot be tolerated.

Government is defined by a "social contract", and CC&Rs define the new social contract

The current view of the controversy that HOAs are governments make use of these similarities of purpose and functions between other legal entities and HOAs to argue that the homeowners association is not a government. However, since the "evidence" presented clearly demonstrates that governments and HOAs share these attributes, this comparison also serves the argument that a government is a business. This comparison argument, promoted by the pro-HOA special interests, places credence on the much quoted, yet archaic and misplaced 1946 Supreme Court holding (*Marsh v. Alabama*)¹⁷¹, "public functions" test

¹⁶⁹ Id, § 137.

¹⁷⁰ Id, § 141.

¹⁷¹ Supra, n. 30.

that compared functions, services, and public access territories (the issue in this case was not about whether or not HOAs are governments, but on the application of free speech to company towns). It fails in face of the stark reality that state laws do not impose any such requirements on the incorporation of a town or village.

Given the prevalence of this misguided public functions test, I've repeatedly made use of a basic definition of government: a government is: *"the person or group that controls and regulates the people within a territory."* While the functions and provided services of a government are shared with many other entities, both businesses per se and nonprofit organizations, this definition "separates the chaff from the wheat." What has been absent from any debate on this controversial topic has been the subject of purpose: what is the purpose of the organization? Businesses per se, have a profit motive. Nonprofit entities have a multitude of purposes ranging from a purely educational focus to providing a united support group for a particular trade or industry or to providing some form of charitable assistance to the public.

The question to be addressed, and that has not been addressed, is: What is the purpose of government that distinguishes it from all these other organizational forms? If none can be found, then what is the point of a government? Can we really say that American government is a business like any other business? But, before we proceed any further, an examination of the loosely used term "government" or more precisely, "public government" is in order. After all, all organizations, if viable, have a form of government or governing body. Keeping it simple, a number of related definitions from *Black's Law Dictionary* will clarify my definition of a government.

Under "government", Black's simple definition says: *"The structure of principles and rules determining how a state or organization is regulated."* And, to clarify by what is meant by a "state", Black's speaks in the same terms of the differences in function that distinguishes an association from that of the state, and of the need to determine the "essential and characteristic" activities and purposes of a state. A state is a community of people established for "securing certain objectives . . . a system of order to carry out its objectives." Nothing new here, but Black's then goes on to say: *"Modern states are territorial; their*

governments exercise control over persons and things within their frontiers." And cautions not to confuse the "state" with other communities of people in other forms of organizations designed to accomplish other objectives.

With this understanding, we can now move forward to examine the distinguishing essentials and characteristics of public, or state government. And the answer to the question raised above can be uncovered in the political and democratic philosophies and fundamental principles written centuries ago, in the writings of Rousseau, Voltaire, Locke, Montesquieu, Thomas Jefferson, James Madison and the other Founding Fathers. In short, and stated simply, they are the surrender of the rights and freedoms possessed by man living in "the state of nature" (which is a long forgotten condition and environment, yet, unrecognized, is still a condition actively desired in today's society), under a "social contract" that establishes the quid pro quo for this surrender.¹⁷²

In his *Social Contract*, Jean Jacques Rousseau wrote,

But the social order is a sacred right which serves as a basis for all other rights. And as it is not a natural right, it must be founded on covenants. The problem is to determine what those covenants are.¹⁷³

And throughout Locke's Second treatise the reader discovers those concepts of "in the state of nature" (not subject to any political entity) and those "natural laws" (those that every person possesses), and those "unalienable rights" of the Declaration of Independence that are not and cannot be surrendered to a political government by a social contract or "compact" (emphasis added):

Political power is that power which every man having in the state of Nature has given into the hands of the society . . . with this express or tacit trust, that it shall be employed for their good And this power has its original only from [is based on] compact and agreement

¹⁷² See generally, CC&Rs: The Non-legitimate Social Contract, George K. Staropoli, internet paper, 2006 (http://pvtgov.org/pvtgov/downloads/new_social.pdf).

¹⁷³ Jean-Jacques Rousseau, *The Social Contract*, Book 1, Ch. 1 (1762).

and the mutual consent of those who make up the community.”¹⁷⁴

The nation is nothing other than an artificial person the life of which consists in the union of its members Hence we have to distinguish clearly the respective rights of the citizen and of the sovereign [the HOA], and distinguish those duties which the citizens owe as subjects from the natural rights which they ought to enjoy as men.¹⁷⁵

And when factions or cliques form within the community,

We might say, that there are no longer as many votes as there are men but only as many votes as there are groups. . . . When one of these groups becomes so large [or so powerful as the board in HOAs] that it can outweigh the rest . . . then there ceases to be a general will, and the opinion which prevails is no more than a private opinion.”¹⁷⁶

Even the national lobbying organization, Community Associations Institute (CAI), joins in this social contract philosophy when it promotes planned communities with their HOA governance as the means to better communities and community governance. It’s promotional brochure, *Rights and Responsibilities for Better Communities*³ clearly reflects the position that the CC&Rs are seen as a social community, not a business, regulating and controlling the homeowners:

More than a destination at the end of the day, a community is a place you want to call home and where you feel at home. There is a difference between living in a community and being part of that community. Being part

¹⁷⁴ John Locke, *The Second Treatise of Government*, § 171 (1690).

¹⁷⁵ *Id.*, Book 2, Ch. 4.

¹⁷⁶ *Id.*, Ch. 3.

of a community means sharing with your neighbors a common desire to promote harmony and contentment.¹⁷⁷

It should be understood, then, that government is essentially a quid pro quo surrender of certain freedoms and liberties in order to regulate and control the interactions between the members of the society, for the benefit of the society. And, all other rights and freedoms that belong to Man -- the members of the society -- that are not derived from government, shall be protected from infringement by either government itself or from infringement by some more powerful faction within the society.

It should be also be understood that government pervades almost every area of society, the community of people, living within a designated territory, and cannot be equated with the very limited scope of the surrender of one's rights in a business organization, or while a member of a social, sports or charitable club or organization, which benefits the limited purposes of the organization and not society as whole. Our US Constitution is the American social contract between the government and the people. HOA CC&RS are also a social contract, but between the HOA government and its people, the members of the subdivision.

Public governments and homeowners associations share this one distinguishable feature that establishes the HOA as a bona fide political government, although the aims of the contract, the purpose of the society, are so dissimilar. A government may be democratic or autocratic, but, regardless of structure, is still a political government. Or, a government can be established to support "state" monetary or business objectives, as, for example, a fascist government or an HOA government. And if we, if our government officials, legislators and judges, are to be true to our democratic origins, then HOAs must be accountable to the US Constitution as are all other forms of government. The continued failure to correct this "separatist" movement serves to continue the establishment of the United HOAs of America, the *New America*.

¹⁷⁷ *Rights and Responsibilities*, Community Associations Institute, <http://caonline.org/rightsandresponsibilities/index.cfm> (July 2, 2006).

Conclusions

The essential point is that HOAs are more equivalent to local government than to a business or any other nonprofit organization. Don't be fooled by the necessary use of non-governmental terminology to distinguish de jure public government status from private HOA government status. HOAs are governments true and true and must be brought back under the umbrella of the US Constitution. Otherwise, what is the purpose of the Constitution? What is the purpose of having a written contract between the government and the people, if the people can unilaterally deny and violate the contract? Have our enlightened generation of political and judicial leadership found the promised land where the will of the people shall prevail? Or have they become another example of: *"Those who cannot remember the past are condemned to repeat it."*¹⁷⁸

The conclusion that we live today in a New America consisting of private government HOAs subject to servitudes law, and of democratic public government subject to the US Constitution, cannot be denied. HOAs have been allowed to secede from state government, with the "sovereign's" blessings. If the Southern States only had recourse to servitudes law in 1861, our Civil War could have been avoided.

* * * *

A few words are in order that serve to summarize the conditions and problems confronting democracy in HOA-land caused and abetted by the abdication of state legislatures and courts to uphold the Constitution.

- First, with respect to the abdication of the state's duties and obligations to protect its citizens: *If men were angels, then no government would be necessary. If angels were to govern men, then neither external nor internal controls on government would be necessary.* (James Madison, Federalist #51).

¹⁷⁸ George Santayana, *Life of Reason, Reason in Common Sense*, Scribner's, 1905, page 284.

- Second, with respect to the protecting the public from those who seek to flaunt the laws, *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).
- Third, in spite of the historical reality of the above two quotes, state governments have buried themselves in ideological dogma that the people are free to do as they please, and have adopted this erroneous application of a parallel legality to the Kings of yesteryear: *"The sovereign of the subdivision, the HOA, can do no wrong."*

George K. Staropoli

Mr. Staropoli is a nationally recognized homeowner rights advocate. Since 2000, he has appeared before a Nevada Legislative committee, the Arizona HOA Study Committee, and testified many times before several Arizona Legislative committees; has been active in submitting homeowner rights issues to the legislators, the media and the public. His opinions and views have appeared in the national media: *Kiplinger's Personal Finance* magazine, *CNN/MoneyOnline* and in the *New York Times*, *L.A. Times*, *Palm Beach Post*, as well as on local TV news and in the *Arizona Capitol Times*. Mr. Staropoli has been quoted in *Private Neighborhoods and the Transformation of Local Government* (2005), AARP Policy Institute *Homeowners Bill of Rights* proposal (2006), and acknowledged in the Thomson – West legal treatise, *California Common Interest Developments – Homeowner's Guide* (2006).



In 2000 he founded and is president of the nonprofit **Citizens for Constitutional Local Government, Inc.**, Scottsdale, AZ, a nonprofit organization seeking to inform the legislators and public about common interest property issues and to expose the prevalent myths and propaganda about carefree living in an HOA. *Citizens* believes in supporting principles of American democracy.

George is author of *"Establishing the New America of independent HOA principalities"* (2008), and has published several books and videos on reforming planned communities and their HOA form of government. He is editor of *Buyer's Guide to Living in a Community Association* (2001), and he is author of *The Case Against State Protection of Homeowner Associations* (2003), reaching a growing audience of concerned people. The author, a veteran homeowner rights activist,

makes his case against state government protection of homeowner associations. He documents, using his appearances before the Arizona Legislature, state legislative hostility toward upholding the civil liberties of homeowners with their broad, misguided interpretation of “private contract” prohibitions, and the use of statutes that favor the HOA.

His StarMan Publishing, LLC produced a 42 minute DVD, *Somewhere Over the Rainbow* (2004), of the Arizona Legislative session documenting the loss of homestead protections and the right of the HOA to foreclose, and a 2 volume, 4 disk DVD series, *Homeowner Rights Advocacy 2006* (2006), documenting homeowner rights advocates at legislative sessions in Arizona and Texas.

Mr. Staropoli was a member of the CEO Club, NY, NY; served as Treasurer and board member of a Penn. HOA; and was a board member of the Valley Citizens League, Phoenix, AZ. He holds a MS in Management from Polytechnic University, Brooklyn, NY.

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