

## **Position Statement On Common Interest Developments**

My Name is Robert Metcalf. I currently reside in, and serve on the Board Of Directors for a Common Interest Development (CID) known as Concord Crossing, located in Chadds Ford, PA. When I began my term in May of 2006, I decided to educate myself concerning CIDs to enhance my performance as a board member. Frankly, what I learned shocked and scared me. The purpose of this paper is to illustrate and provide some possible remedies to what I perceive as the greatest injustice perpetrated upon the American citizen in history.

### **The Root Problem**

There are two basic issues concerning CIDs:

- The basic legal framework in which they operate.
- The lack disclosure required by law for perspective buyers.

As American citizens most of us take for granted the responsibilities and protections provided for us in our laws. It is unfortunate however that a sizable part of us have had these rights and protections stripped away without being afforded the opportunity to really understand what it means to purchase a property in a CID.

Approximately 60,000,000 United States citizens now live in what are loosely defined as CIDs. While the earliest mention of an "Association of Property Owners" goes back to 1826 in Boston, these types of developments really started to propagate in the 1970s. Real estate developers faced a problem, especially in the urban and suburban areas surrounding large cities. Land was becoming scarce. In addition, most local governments had very strict zoning requirements with regard to lot sizes, setbacks, etc. In order to get around these problems, the developers turned to the CID. By creating a Not-For-Profit Corporation, the "Homeowners Association" (HOA), not only did they find a way around the zoning issues, but they also created a framework, which would let them exercise total control over a project until it was finished. Furthermore, they discovered a very seductive tool to entice the local governments to give their approval. That tool is this. The developers, through the HOA, would provide basic services such as snow removal and trash collection for a fee charged to the homeowners. The local governments for their part would get to tax the residents at the full rate, without providing any services. A true "Quid Pro Quo".

The developer's main interest is profit. In order to maximize that profit it is in their interest to control every aspect of the development during the construction and sales phase. They do this through the three main documents, which define the HOA:

- The Declaration, which describes the property and its basic legal foundation.
- The Bylaws, which describe the day-to-day operating constraints.
- The Rules and Regulations, which control the resident's behavior.

What most people fail to understand is that when they sign off on these documents at settlement (I will have more to say about this later) they have subjugated themselves to an "adhesion" contract. They have agreed to live in a corporation, and live under corporate governance. While operating under the "Business Judgment Rule" is appropriate and necessary in the working world, it has no place in one's personal life.

## The Private Government

While one can make the argument that the developers have a right to run their business as they please, the real issue is what happens when they leave. At some point the project is completed and the developers perform the "Dedication". That civic sounding term is really just a euphemism to describe the legal act of absolving themselves of any further responsibility for the community. What they leave behind is a heretofore-unknown form of government; domestic life structured as a corporation. In addition, the dictatorial powers that are provided to the developer via Pennsylvania's Uniform Condominium Act (UCA) and Uniform Planned Community Act (UPCA) continue on, unabated. Some examples:

- The monthly assessment or fee is a lien on the unit owner's property by definition (Section 5315 UPCA and Section 3315 UCA). Not even the real government has that kind of power. If a citizen fails to pay his or her taxes the governing authority has to place a lien on the property with proper judicial oversight.
- Through "easements" included in the governing documents, the HOA has the authority, through the board of directors, to demand access to the owner's home for "inspection". Not even law enforcement, save for a few very well defined situations, has that power. Again, they must have the outside supervision of the courts, through the issuance of a search warrant. There are cases in some communities where the police, instead of attempting to procure a warrant, now call the HOA's board to get the authority to demand access.
- If the HOA and a resident find themselves parties in a legal dispute, the HOA has the right, by statute, to assess the unit owner to recover its attorney fees. Furthermore the directors are indemnified against any personal responsibilities for their acts as well as being covered by large insurance policies to cover any liability, which no matter how unlikely, might occur. An attorney, whom my own association has engaged on occasion, was awarded over \$46,000.00 in legal fees over a \$500.00 dispute. At my first board meeting, the newly elected president wanted to turn a \$2.00 late assessment over to an attorney for collection.

These kinds of draconian remedies are simply not right, and are the result of a law created by, and in the interest of, the real estate developers and the real estate developers alone. The foundation of good governance is the idea of checks and balances. An HOA is devoid of this. Even though the governing documents state that the unit owner may appeal a board decision, whom does he or she appeal that decision to? the board. The end result of this is that a small number of people, a majority of the board (in my case 3), can rule arbitrarily and absolutely, with little or no fear of consequences. Rules can be created, modified, or revoked without considering the community's desires at all, in effect changing the "terms of the contract" at will. In most communities there are no term limits for the directors. This allows boards to become "entrenched", and since they operate under the principles of corporate law, they can manipulate the HOA's operation to virtually insure the continuation of their terms in office.

If the actions of a board are especially egregious, the unit owner can get satisfaction through the courts. However, the cost to that owner in time, money, and their quality of life can be disastrous, particularly when compared to the board, which are essentially held harmless, regardless of the outcome.

The CID Industry claims that first and foremost a HOA is a corporation, and therefore should conduct itself as one. But what does that really mean? Virtually every local government is a corporation. Is there any legal difference between the two, or any other corporation for that manner? Not really, save the distinction between profit, and non-profit, and even that is primarily for tax purposes. A corporation is a creature of the law, created to limit the personal liability of those who control it. In Concord Crossing's case the Articles Of Incorporation do not specify any particular reason for its existence at all, and I suspect the same is true of any corporation. In fact, in the eyes of the law a corporation's lawful behavior is determined by what it does, how it acts. This is why the legal standard of proper corporate behavior is different for IBM as opposed to Concord Township. The determination of that standard is a work in process that started in the early days of this country and continues on to this day, as was demonstrated in the "Twin Rivers" decision handed down from the Superior Court Of New Jersey. While the details of this case exceed the limitations of this paper, the significance of the decision lies in the fact that for the first time a court held that because a HOA acts as a government, wielding governmental powers, it is in fact and function, a government and therefore is a "constitutional actor", and thus subject to the Constitution. This decision is so antithetical to the concept of corporate governance that it caused the president of the CAI (explained below) to state, "Everything changed today". The courts are starting to recognize that HOAs are governments and should be held to the same standards of behavior.

### **The CID "Industry"**

One of the side effects of the huge growth in CIDs has been the spawning of various types of support industries. These would include the developers, legal firms specializing in CID law, property management companies, and loosely knit member based associations. At the top of the list would be the "Community Associations Institute". Founded in 1973, the CAI was created to represent the interests of HOAs and the property owners who lived in them. This however turned out to be less than successful, so in 1992 they transformed themselves into a 501c, a trade organization that does advocacy on behalf of its members. According to the latest information I am able to obtain the CAI has approximately 16,000 members, nearly all of them some form of service provider that targets HOAs as potential customers. As a result, all of these organizations have "public policy" positions. Why? What possible reason could these entities have for adopting such a posture? The answer, and there can only be one, is control. The CAI doesn't even try to disguise it. Their mantra, and this is verbatim, is "The HOA is a business, run it like one". At every turn they resist any effort to amend the laws, and return control and oversight to the residents. Here are some examples

According to "The Alliance Messenger – July 2003", a HOA industry newsletter, trumpeted the following legislative victory in Texas by defeating HB 2646/SB949 – Property Owners Association Restrictions. Here is what the bill provided:

- Allowed owners access to POA (Property Owner Associations) records for any reason whatsoever.
- Required payment plans for any owner who was delinquent.
- A mandatory 2-year waiting period on "significant collection actions, including foreclosure".

This next one is particularly interesting considering the current law. They defeated HB 844; HB 1279 – American Flags And Flagpoles. Here is what the bill provided:

- Provided that residents could display the American Flag in any way they chose.

HB 1641 – Property Owners Association Restrictions. This bill would have mandated the following:

- Required POAs to send violation notices in English and Spanish. Remember this is in Texas.
- Would have prohibited non-judicial foreclosures.
- Would have made POAs subject to the “Open Meetings Act”, a set of rules concerning the how a meeting is to be conducted to insure openness.

This and other volumes are available online at [www.allianceonline.net](http://www.allianceonline.net).

While I realize that the above deals with Texas, I still think that it illustrates the mentality that prevails within these organizations.

For its part the CAI has produced a remarkable 65-page document titled, “Public Policies”, which is available in total at <http://www.caionline.org/govt/position.cfm>. While it is beyond the scope of this document to provide an analysis in detail, there is one overriding theme in all of CAI’s positions; **They do not, and will not, support any policy or legislation that in any way places greater limits on HOA’s authority to control developments then now exists.**

The “value” of all this, according to the CID industry is the preservation of property values. Surprisingly, there is very little concrete information with regard to this. In fact I have been able to find only one study, Homeowner Association Foreclosures and Property Values in Harris County, 1985-2001, by Christopher Adolph from Harvard University. He concluded, and I quote,

“Although HOA foreclosures are ostensibly motivated by efforts to improve property values, neither foreclosure activity **nor HOAs** appear linked with the above average home price growth.”

According to this study the linking of HOAs and property values is a myth. I doubt the “CID Industry” will be publishing the above any time soon.

In my state, Pennsylvania, there was HB 1903 – Amendments to Pennsylvania’s Uniform Planned Community Act. The response from Steven Sugarman (an attorney that Concord Crossing is considering for representation), Chairman of the Community Associations Institute Pennsylvania Legislative Action Committee, was one of resistance, taking a stance against such things as notice of meetings, dispersing of power through committees, availability of minutes, etc.

I challenge the notion and stated purpose of these groups. In my opinion their goal is simply the retention of power. George Orwell in his greatest of works, 1984, stated as much in the final confrontation between Winston and The State. It turns out that The State wants power and control simply for the sake of power and control. **Power in and of itself becomes the goal. Any fleeting benefit to the community is simply the by-product of acquiring and maintaining control.** Anything that in

any way threatens this control must be stopped dead in it's tracks, thus avoiding the disclosure of the unfortunate truth; **These organizations, associations, and institutes serve no one but themselves, in order to perpetuate their mythology, and their existence, at the expense of the property owners.**

### **The "Big Lie" – Lack of Disclosure and Disillusionment**

Another issue that needs to be addressed is the lack of disclosure provided by the developers during the sales phase of a project. The average person simply has no idea of what they are getting involved in. In my case the HOA's activity was described as "they mow the grass and plow the snow, you'll love it". I did not know, **nor was I told**, the degree to which the Association would control almost every aspect of my living in Concord Crossing. This deception is executed exquisitely in an environment almost devoid of any meaningful disclosure.

If you pick up a pack of cigarettes, apply for a loan, watch a television ad for a pharmaceutical, or any number of other things, one thing is instantly, crystal clear; the law has **forced** the manufacturers or providers to disclose information about the product or service, that left to their own devices, they would suppress. Furthermore, that information is prominently displayed, so there can no misunderstanding as to what the possible outcome from using that product or service may be. Why shouldn't those standards be applied to CIDs as well? After all, the acquisition of a home is for most people the largest purchase they will ever make. In addition, it is an action that is not easily undone. Everyone who has ever gone through the settlement process realizes the notion of reading every document that you must sign is unrealistic, therefore the standard CID industry defense, "you signed the contract so live with it", is as disingenuous as it is hollow.

My neighbors are intelligent, educated people, yet out of approximately fifteen residents I have spoken to about this only two were aware how invasive and ubiquitous the Association could be. How is this possible? How could such a large percentage of the unit owners be so completely ignorant about something that could potentially bankrupt them and perpetrate the losing of their property? Again, there is only one possible answer, **the lack of proper disclosure.**

### **"The Fatal Flaw"**

In the end, as horrendous and as sinister the above may be it, in my opinion, pales in comparison with what I call "The Fatal Flaw".

One could make the case that the concept of civilization at the atomic level, is the idea of law. The phrase "the law of the jungle" (i.e. no law) is the polar opposite to societal living. The cornerstone on which the efficacy of the law resides is in the citizens being treated fairly and impartially, which in turn generate the acceptance and support necessary for society to function in an orderly manner, hence the phrase "justice is blind". The reason any person who sits in judgment, who happens to find themselves in the situation of having to judge someone with which he or she has had any personnel involvement whatsoever, will recuse themselves is to preserve that sense of impartialness. The same is true of juries. One only has to look at the great lengths that are taken to insure that a jury is unbiased to understand how paramount this concept is to the law.

In a HOA this principle can never be applied. **It is simply impossible for residents to make impartial judgments concerning other residents.** This results in the "Fatal Flaw". Every violation notice, fine, or ruling handed down by the HOA is taken as a personal slight. It cannot be avoided. The effect over time is cumulative; a corrosive force that slowly, but inexorably, destroys the fabric of the neighborhood, setting neighbor against neighbor, raising pettiness to a high art form, and creating deep-seated resentments that never dissipate. Unfortunately impartialness and fairness are diametrically opposed to personal involvement and friendship. Ultimately this fact, and this fact alone will force an end to this style of living, at least as it exists in its present state.

### **Are There Any Solutions?**

I think the first thing one has to realize is how widespread this problem is. The number of complaints about HOA abuse has become so great that even the AARP has issued "**A BILL of RIGHTS for HOMEOWNERS in ASSOCIATIONS**". This document, which can be downloaded from [http://www.aarp.org/research/legal/legalrights/inb128\\_homeowner.html](http://www.aarp.org/research/legal/legalrights/inb128_homeowner.html), addresses many of the issues I have stated in this paper, as well as offering its interpretation of what must be done to protect homeowners. I strongly suggest that this document be studied. On the other hand the CAI will tout its Zogby poll (<http://www.caionline.org/about/survey.cfm>), which consisted of interviewing 800 CID residents about their HOA experience. Mind you, that's 800 out of 60,000,000. I'll leave judgment of the statistical validity of a sample that size, and hence the conclusions drawn from it, to the reader.

For my part, I believe there are three distinct levels of remedy that could be enacted to provide relief for unit owners.

#### **Provide perspective homeowners with adequate disclosure.**

This, in my opinion, is the very least that should be done. While it doesn't change the lot of people already involved with HOAs, it would serve to educate the population at large about exactly what they would be signing off on. At a minimum it should provide the following:

- Be the first item in any sales information as well as the settlement documents.
- At settlement it should be notarized as a separate action.
- It should be one page only, written in large bold type, stating the following:
  1. The buyer is entering into a binding contract with the HOA and agrees to live under the rules of corporate governance.
  2. Corporate governance provides for the Board Of Directors to control every aspect of life in the HOA as provided for in the declaration, bylaws, and rules and regulations.
  3. The monthly assessment is in fact a lien on the buyer's property, and failure to pay will result in foreclosure.
  4. The "business judgment" rule allows the BOD wide latitude in creating and enforcing rules and regulations, without seeking the approval of the unit owners.
  5. The BOD will hear any appeal of a decision by the BOD.

6. Any decision by the BOD that is in conflict with the buyer's constitutional rights will take precedent and by agreeing to this contract the buyer acknowledges that fact.

This may sound dramatic, but the fact is that this represents exactly what the buyer is agreeing to. It would be interesting to see how the marketplace would react to this type of disclosure.

### **Adopt a "Homeowner's Bill of Rights" similar to AARP's**

While this approach has several appealing attributes, in my opinion it still falls short. The reason being that it is still an attempt to make what is a fundamentally flawed idea work. I do believe however that it could bring substantial improvements providing it included the following:

- First and foremost, it should subjugate the HOA to the law of the land, and provide for the upholding of all the rights of citizens as provided for in The US Constitution, Federal law, State law, and local law.
- It should mandate that HOAs provide for outside oversight, either in the form of an ombudsman, or preferably the courts through an administrative judge. If either of those two solutions proves insufficient any litigation that may result should operate in the same legal framework as any process.
- It should mandate that the burden of proof fall on the accuser and not the defender.
- It should require that any change to any rule or regulation be approved by a majority of the unit owners.
- It should require that the annual budget be approved by a majority of the unit owners.
- It should define the monthly assessment as a debt, and not a lien on the unit owner's property.
- It should disperse the powers now concentrated in the BOD among independent committees.
- It should allow any deed restriction to be modified and eliminate deed restrictions that "run with the land" in perpetuity.
- It should force local governments to rebate the taxes collected for services not rendered.

Obviously this approach has many legal issues to contend with, however, one way around all of them would be to make each unit owner a director by definition. This would then allow the "Board Of Directors" (i.e. the entire community) to set up individual committees, including an executive committee, which would be responsible for the day-to-day operation of the HOA, as well as other bodies to handle other issues.

### **Complete abolition of the present CID structure**

In my opinion because of the "Fatal Flaw" the only true cure for the HOA epidemic is to completely abolish them. While this is certainly the most radical approach, actions like this are not unheard of. The Civil Rights movement of the 1950s and 1960s comes to mind. Along with the more visible public transportation and right to vote issues, seventy-five years ago it was common for deed restrictions to forbid the sale of properties based on the prospective buyer's race. Today the idea of such a practice is abhorrent to virtually everyone, so much so that the elimination of such

restrictions attained the lofty legal status of becoming public policy. It is my firm belief that someday, after enough people have lost their homes to over zealous and unscrupulous law firms, after enough people have been forced to suffer the indignity of a self-righteous, self-absorbed, BOD spouting endless edicts of minutia about "rules and regs" and "fiduciary responsibility", all wrapped up in the mythology of "maintaining property values", this fraud will be seen for exactly what it is; **a systematic infusion of corporate culture and governance into the domestic lives of an ever larger share of the American population.** Who wants to live at work?

In my view what is needed is a new class of government. A form of government that functions in much the same way as a CID but with one fundamental difference; **it would be a public, not private, entity.** That would mean that the actions it took and the behavior of the office holders within it would be held to the same standard as any other form of government. The election of officers would be under state oversight. Most important this form of government would be a constitutional actor by definition, thus insuring the civil rights of all who would be governed by it.

### Conclusion

One might ask; "If you dislike it so much why don't you move?" My answer is simple; "I don't want to." Care must be taken not to confuse the neighborhood with the HOA. The two things really have very little to do with one another. My neighbors are some of the nicest people I have ever known, and I do not want to lose those relationships, in fact, I will not lose those relationships. 60,000,000 people live in CIDs, that's 20 percent of the American population, and I'm sure that most of those people feel the same way I do about their neighborhood and neighbors. Just as the brave people who were instrumental in the civil rights movement started as a small group of discontents, so it is with the anti CID movement. All one has to do is peruse the Internet to find an ever growing population of citizens who are tired of being subjected to this fraud. Make no mistake; **this is as much a battle for civil rights as what occurred in the 1950s and 1960s.**

Most likely, events will occur in much the same manner, with relief initially coming primarily from the courts, as illustrated by the Twin Rivers decision. Ultimately however, legislation is the final solution, as it always has been. This is an important issue, affecting the quality of life for many on a day-to-day basis. Professor Evan McKenzie author of "*Privatopia: Homeowner Associations and the Rise of Residential Private Government*" stated: "All Homeowners Associations are one election away from disaster". Don't you think it's time we rid the country of these patently un-American institutions and replace them with a true democratic system, one designed to preserve the resident's rights as opposed to denying the same?

Robert Metcalf, Treasurer,  
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## Appendix A – How Has The “Fatal Flaw” Gone Unnoticed

In the early to mid part of the last century an architect known as **Le Corbusier** ( you can find a biography at [http://en.wikipedia.org/wiki/Le\\_Corbusier](http://en.wikipedia.org/wiki/Le_Corbusier) ) founded what is now known as the **Modernist** movement in design. His vision is what is responsible for the skylines of most cities throughout the world today. Gleaming skyscrapers, dozens of stories tall, surrounded by park-like expanses of well manicured landscaping were the basic components of his concept of utopia. The social scientists, urban planners, and other architects of the time bought into the concept completely. Immediately after the Great Depression the federal government decided to correct the appalling conditions that existed in the slums of our cities through the erection of public housing. The main problem to be solved was how to deliver a suffering population density footprint while at the same time significantly improve the quality of life for the poor. Their answer was to employ the concepts and design goals as expressed by the Modernist Movement. In America, and all over the world during the 1950s and 1960s, high rise housing projects were created by the thousands. All the experts agreed that this was the final solution to the “housing issue”. There was a problem however. In Saint Louis the government had constructed a large project (12,000 residents in 33 11 story slabs) named Pruitt-Igoe. Apparently, for some reason the complex was being systematically destroyed. No one understood why. Soon the same phenomenon started to happen in other projects. Later on, by the late 1970s, it was happening in **All** the high rise projects. In 1972 they blew up Pruitt-Igoe. It was the first recognition that something had gone very wrong. In subsequent years more and more of these “vertical ghettos” have been raised, until now they have virtually disappeared. At the same time however they noticed another phenomenon. In the “low-rise” or townhouse style dwelling the problems were nowhere near as severe. Why? The residents were the same. The level of poverty was just as great. How could the outcome be so different. What they discovered, and this is the main point, was that a fundamental element of human behavior had been overlooked, completely missed. **They realized that high rise projects eliminated the “defensible space” surrounding the residents. That is; the more pairs of eyes on a particular space, the less responsibility each of those pair of eyes felt for that space.** This is why that all the high rise projects are now being replaced with low rise units. **The real issue here is that it took an entire generation to isolate and identify this as the root cause for the failure of Le Corbusier's ideas.**

I believe that we are in the midst of a similar situation with regard to CIDs. At the time this concept of housing was being created and molded into its current configuration, none of the “experts” were aware of, or had even conceived of the problems that would inevitably result from having residents exercising control over other residents. They failed to realize that the personal acrimony which would result from such a structure would be cumulative and inexorable. They failed to realize, that over time, this phenomenon would bring community participation to such a meager level that for all intents and purposes it would be non-existent. When I first moved into Concord Crossing in 2000 the general meetings had a very high level of support, with unit owner attendance over 80%. At our last meeting we barely had enough to meet the quorum of 20%, which had already been reduced from the original requirement. Several of my neighbors, who I know personally, that once were active community volunteers have now withdrawn completely because of the hubristic and petty behavior of the Board and the management company. Has the community benefited from this? The fact is **the people responsible for the creation of CIDs, just like the “experts” mentioned in the previous**

paragraph simply missed the most basic characteristic of human behavior; peers must treat each other as equals if there is going to be a collegial society. And as stated above, it will take at least a generation for the public as a whole to realize and act on what in my view is the most egregious failure of social engineering in history – the CID.