

**Establishing  
the  
New America**

*of independent HOA principalities*

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*George K. Staropoli*





# **Establishing the New America**



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**George K. Staropoli**

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**Publisher's Cataloging-in-Publication data**

Staropoli, George K.

Establishing the new America of independent HOA  
principalities / George K. Staropoli.  
p. cm.

ISBN 978-0-974488-3-1

Includes bibliographical references and index.

1. Right of property --United States. 2. Homeowners' associations -  
-Law and legislation --United States. 3. Homeowners --Legal  
status, laws, etc. --United States. 4. Homeowners' associations --  
United States. I. Establishing the new America of independent  
homeowners' association principalities. II. Title.

KF562 .D4 .S73 2008  
323.40973--dc22

2008934236

Published by  
StarMan Publishing, LLC  
5419 E. Piping Rock Rd  
Scottsdale, AZ 85254

**Printed in the United States of America**

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## Preface

Bill Moyers wrote about history and journalism (*Moyers On Democracy*, Bill Moyers, Doubleday, 2008), saying that “*Bad history can have consequences as devastating as bad journalism . . . history is also what people think, and wish and imagine.*” He asked, “*What happens if the vivid representation of particular characters and people impress on the mind not ‘general truths’ but persistent lies?*”

First, let me say that I’m not a lawyer, and this is not a book on the law although it draws heavily on the political and legal systems. This little volume consists of a selection of my writings, mainly my Commentaries on my HOA Local Government web page, and from my numerous emails over the past eight years. During that time I was actively involved as an advocate for homeowners living in planned communities – HOAs or condos – in an attempt to clarify the history and to inform the public, the media, the various state legislatures, and anyone who would listen.

In 2003, I attempted to inform the public with my book, *The Case Against State Protection of Homeowners Associations*. Today, five years later, very little has changed.

My involvement has been primarily in two areas: constitutional reforms, and justice for homeowners living in these authoritarian regimes “sanctioned” by their state legislatures. Materials and incidents reflecting the fact that homebuyers are not told the whole truth about the loss of their rights and protections are provided in support of my arguments. When homeowners took possession of their restricted deeds, believing that the HOA was just like a social club, or that they were part of this country under the laws of the land, the courts held them bound to the HOA-land constitution, the CC&Rs. Any onerous provisions were not given too much thought, because the buyers

believed that the laws would protect them or would not allow such onerous provisions. After all, the HOA takes care of everything, and this is America, the land of the free and of individual rights.

Without the protections of a bill of rights, homeowners live under the suffrage of their board. All usually goes fairly well until the homeowner disagrees with the board, or offends the “powers that be”, whereupon he quickly discovers that he has very, very little legal protections. And those that he still retains, requires digging into his own pocketbook to get the HOA to obey the laws, because the state doesn’t care. This could be within months, within a year or after 5 – 10 years. Your government considers it to be a private contractual matter – just between the parties without any affect on the interests of the public in general, or on public policy.

The chapters and topics need not be read in sequence. The reader is free to follow his own interests and concerns. The Commentaries are documented and supported by materials from case law, legal authorities and the writings and statements of the parties involved. The opinions are mine.

Further information can be found on my websites:

<http://pvtgov.org> — Constitutional Local Government  
<http://pvtgov.wordpress.com> — my Commentaries  
<http://azhoaoah.wordpress.com> — Arizona OAH cases  
<http://YouTube.com/hoagov> — HOA videos

*The Case Against State Protection of Homeowners Associations*, George K. Staropoli, Infinity Press, 2003.  
ISBN 0-7414-1620-4.

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June 18, 2008

## **1. Establishing the New America of HOA principalities**

*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.<sup>1</sup>*

### **1.1 The fall of the American Experiment**

Historians have referred to the American Revolution as the “American Experiment”,<sup>2</sup> because it introduced a modern, as of that time, form of a democratic republic. Would such a government based on the principles, beliefs and values of our Founding fathers survive the passage of time?

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The new constitutional government met for the first time in 1789, the same year that saw another experiment in democracy, this time in Europe: the French Revolution. Unlike its American foray into a government of the people, the French Revolution contained too sharp a contrast of views between the King and the common people. Tremendous bloodshed ensued for many years under the Committee for Public Safety, and as a result of civil disorder. It ended with the establishment of the Napoleonic Empire in 1804, and further bloodshed for over 11 more years during the Napoleonic Wars. In contrast, the American Experiment has endured for some 219 years and has proven to be quite successful.

However, over the past century there has been a slow but steady erosion of the American Experiment. We have witnessed the Supreme Court view the Constitution, that contract between the people and the federal government, as a “living document” subject to its interpretations, such as adding “privacy” as a new fundamental right<sup>3</sup>, ignoring the Ninth Amendment,<sup>4</sup> and redefining the meaning of “public use” to mean “public purpose”.<sup>5</sup> This slippery slope is creating a land not of law, but of men. Witness the many battles to place the “right” men as Supreme Court Justices.

And, behind these changes has been the ever-increasing power of the two dominant political parties in America, where the aims and objectives of the party dominate public policy decisions rather than a concern for

the overall benefit of people. And these changes can also be seen at the state level.

Former White House Press Secretary Scott McClellan describes the environment and culture of white house politics over the past two administrations functioning based on “the permanent campaign, the perpetual scandal culture, and politics-as-war.”<sup>6</sup> He writes,

Washington has become the home of the permanent campaign, a game of endless politicking based on the manipulation of the shades of truth, partial truths, twisting of the truth, and spin.<sup>7</sup>

I am referring to the “political campaign”, a shorthand term for the way political leaders today work 365 days a year, in and out, to shape and manipulate sources of public approval as the primary means for governing<sup>8</sup> . . . . The permanent campaign is a concept that would have baffled our nation’s founders. [They created] an ideal system of governance in which disinterested legislators and high-minded executives would determine policy free from government pressure groups and partisan loyalties. . . . They considered parties pernicious and hoped they would never

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become a feature of the American system (the term “party” doesn’t even appear in the Constitution).<sup>9</sup>

The above allegations of political party intrusions upon public policy decisions does not come as a surprise to this homeowner rights advocate, who witnessed activities that can only be ascribed to as “being a good team player”. In my eight years of advocacy I have always believed that the Constitution would be upheld over the power plays of the homeowner association special interests. However, I discovered that the American people are being held subject to the aims and goals of the political parties over justice and the defense of individual liberties.

In California, a rewrite of its HOA laws contains an empty chapter for a homeowners’ bill of rights. In New Jersey, its Supreme Court believes that the business judgment rule is sufficient to protect homeowners’ fundamental rights. In Arizona, the only two important HOA reform bills that would provide substantive due process protections were either killed or delayed by the actions of the Rules Committee chairmen. One bill was never released from the Rules Committee, and the overwhelming majorities of both the House and the Senate passed other bill. Holding these bills in Rules could not have taken place without the consent and approval of the leadership of the majority political party. As in the corporate world, where a vice president in the exercise of his duties would not ignore the



views of the board of directors, so, too, in the legislature. (See Chapter 6, State Legislatures, for details of these events).

**1.2 NJ Supreme Court grants HOAs restrictions on homeowner rights. (July 2007).**

In an October Commentary I raised the following questions ("Homeowner Associations: ex post facto amendments, consent to be governed, contracts to avoid the Constitution", HOA Constitutional Government, October 23, 2007):

Can we enter into a private contract to avoid the application of constitutional protections?

Can individuals contract to establish a governing body that controls and regulates the people within a territory, and avoid adherence to the US Constitution, by means of a contract that is contrary to and ignores the state municipality laws?

The NJ Supreme Court answered these questions with a resounding YES in its Twin Rivers HOA decision, giving support to the establishment of the New America, the United HOAs of America. Property laws and the business judgment rule are sufficient protections for homeowners in HOAs, and Constitutional protections need not intrude into these privately contracted governments. In its rather scant

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reassurance that constitutional protections are available to homeowners, the Court said,

“Our holding does not suggest, however, that residents of a homeowners’ association may never successfully seek constitutional redress against a governing association that unreasonably infringes their free speech rights. Moreover, common interest residents have other protections. First, the business judgment rule protects common interest community residents from arbitrary decision-making.”<sup>10</sup>

View the video clips of the oral arguments made by the industry successfully arguing that HOAs should be left alone since they are the will of the people; and the homeowner arguments relating to the need for constitutional protections and oversight.

The three 7 minute videos, and supplemental materials, including the complete Court decision, can be found at Twin Rivers<sup>11</sup> under the Establishing New America NJSC links.

**1.3 American soldiers are defending a New America, one without democratic protections. (May 2007).**

Our brave men and women, our sons and daughters, are sent to Iraq and elsewhere to promote and establish a form of democracy that is rapidly eroding in America, being replaced by independent principalities and city-states across this country. They are more commonly known as HOAs. The future foretells that these brave soldiers, and their children, will live in an authoritarian local government lacking in the protection of their fundamental rights and freedoms. Some will die for this New America.

Let’s look at the astonishing population statistics (in millions).

**Population statistics (millions)**

<b><u>Year</u></b>	<b><u>US</u></b>	<b><u>HOA</u></b>	<b><u>Pct</u></b>
1970	205	2.1	1.0
1980	227	9.6	4.2
1990	249	29.6	11.9
<b>2000</b>	<b>281</b>	<b>45.6</b>	<b>16.1</b>

If we add on half the 1990 – 2000 HOA resident growth rate, 25%, that makes the 2005 HOA population about 56.5

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million, or **18.8%**. It was announced in 2006 that our largest minorities accounted for:

Hispanics: 14.8% of population;    Blacks:            13.8%

Yet, state legislators have continued to oppose constitutional reforms while mandating more and more of these private governments, these independent city-states, these principalities, operating outside the US Constitution. The popular defense of HOAs is the argument that homebuyers voluntarily agreed to this loss of their rights, and that they were fully informed of all material factors affecting their decisions, rings hollow when such information is not part of any promotional advertising.

Furthermore, there are no government web pages in any state informing buyers of all the consequences of HOA living and their loss of their “guaranteed” rights. An example of the failure to warn and advise homebuyers – much as is required when people seek to buy IPO stocks, those RED Herring prospectuses with capitalized, bold, red lettering — can be found on the Constitutional Local Government website under “10 myths About HOAs”<sup>12</sup>.

Why is this “see no evil, hear no evil, speak no evil” allowed to happen? What are our state governments afraid of? Let there be freedom of choice, not suppression! This unspoken agreement, this conspiracy of silence, remains the policy of our supposedly democratic state governments where individual liberties and freedoms are expected to come first.

Yet, our brave men and women go forth in defense of this New America, this United HOAs of America.<sup>13</sup> Our federal government should look to ending this spread of undemocratic governments within America! All the 2008 candidates ought to have the immediate reform of HOA governance on their agendas.

#### **1.4 HOA demographics (January 2008)**

In late 2007, CAI announced another of its “satisfaction polls”,<sup>14</sup> one conducted by Zogby International. The sponsor of the survey was a CAI division, Foundation for Community Association Research. *“The Foundation supports Community Association Institute (CAI), a national organization dedicated to fostering vibrant, competent, harmonious community associations.”* CAI PR VP Frank Rathbun is also a VP of the Foundation.

The survey was not sponsored by an independent organization that one would hope was seeking the facts, such as a public interest or civics group, a university study group, or even an information-seeking state legislature.

The selected sample of some 709 telephone calls, which came from, *“Samples are randomly drawn from telephone CDs of national listed sample.”* I’m not sure what “national list sample” really means. You can buy telephone directory CDs, but this national sample tag is questionable.

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An analysis of the methodology and response sample revealed the following deviations of HOA populations as compared to the US population as a whole.

- ❖ About 61% were 50+ reflecting increasing potential problems with retired people dealing with compulsory fees. (There are no “tax” breaks for medical or old age; inadequate reserves.) US Census data for 2000 shows 27.3% of the total population are 50 and over.
  
- ❖ College and post-grad made up 68% of the survey. (US Census shows 24.4% or, if “some college is included, 86% in HOAs vs. 51.8% in US).
  
- ❖ Minority groups were only 11% of the sample. The 2000 US Census shows a total 24.8% for Black/African American and Hispanic/Latino.
  
- ❖ Incomes of over \$50,000 comprised 79% of the respondents. US Census shows 41.9% with incomes over \$50,000).

### **1.5 The supremacy of covenant laws (November 2007)**

The NJ Supreme Court rationale and holding in the Twin Rivers HOA constitutionality question is not an isolated, singular event.

**1. Texas Supreme Court chooses covenants over Constiution**

In another state supreme court case, the 1987 Texas court held that the homestead exemption didn't apply to homes in homeowners associations<sup>15</sup>:

It is unquestioned that an owner of land may contract with respect to their property as they see fit, provided the contracts do not contravene public policy. Therefore, the developer of the subdivision, as owner of all land subject to the declaration, is entitled to create liens on his land to secure the payment of assessments.

A Declaration of Covenants evidences the intent of the original parties that the covenant run with the land, and the covenant specifically binds the parties, their successors and assigns.

We recognize the harshness of the remedy of foreclosure, particularly when such a small sum is compared with the immeasurable value of a homestead. Under the laws of this state, however, we are bound to enforce the agreements into which the homeowners entered concerning the payment of assessments.

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Inwood, P. 634 - 637.

Justices Mauzy & Gonzalez dissented (p. 637 - 639)  
(emphasis added) .

I respectfully dissent. The court herein has created a remedy in the name of “public policy” in direct contravention of the Constitution of this State.

A review of the history of the homestead exemption in Texas makes the matter as clear and bright as the Texas sky at night; the public policy of this State has been and is to protect homestead property from creditors’ claims.

TEX. CONST. Art. XVI, § 50 (1845, amended 1973) (emphasis added). “All debts,” as used in the foregoing passage of the Constitution, means precisely that; i.e., homestead property is exempt from forced sale for the payment of all debts except in the three constitutionally enumerated instances. The exceptions are: (1) for the payment of the homestead’s purchase money; (2) for unpaid taxes; and (3) for labor and materials utilized in the improvement of homestead property. **The Constitution specifies the types of indebtedness for which there may be a**



**valid lien; liens for any other purpose are invalid.**

Applying the exceptions to the instant cause, maintenance assessments do not constitute part of the property's purchase [\*\*16] money; are not taxes, and are not monies for labor and materials for the construction of improvements on the land. **Thus, pursuant to the Constitution, homestead property may not be the subject of a forced sale for sums owing for maintenance assessments.**

## **2. The Restatement Third: Property (Servitudes) § 3.1, Comment(h)**

The emphasis on constitutional rights in this Comment is not intended to limit the general principle that a servitude that creates a risk of societal harm outweighing the benefits of validating the servitude violates public policy. [This legalese simple says that if the servitude harms more than benefits society it will be invalidated]. **The question whether a servitude unreasonably burdens a fundamental constitutional right is determined as a matter of property law, not of constitutional law.** [emphasis added].

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The obvious conclusion to be made is that CC&Rs are not harmful to the public and do not violate public policy. Those CC&Rs include, among others, the exclusion of homestead exemption protections, the right to foreclose as excessive punishments, lack of due process by an independent tribunal, and the acceptance of ex post facto amendments rendering the original CC&Rs “contract” a worthless piece of paper

### **1.6 Community Associations Institute argues HOAs are democratic, yet not a government (May 2008).**

My first reaction to this unbelievable attempt to distort reality is: “***Beware the Jabberwock, my son!***”<sup>16</sup> In his April 2, 2008 *Ungated* blog entry, CEO Skiba faithfully follows the *Alice in Wonderland* perception of homeowners associations, namely, as I’ve written earlier, of “what you see is not what you get”.

Skiba writes:

Community associations are not governments — many years of legislation and court rulings have established that fact beyond a reasonable doubt. Yet they are clearly democratic in their operations, electing their leadership from among the homeowners on a periodic basis. . . .

. . . .

I for one prefer the democratic principles that have served this country for more than 230 years, as frustrating as the process can sometimes be, rather than the various failed alternatives washed up on history's shores.

***“Beware the Jabberwock, my son!”***

First, yes HOAs are indeed de facto governments and are authoritarian regimes that rest upon adhesion contracts and state protective statutes, depriving the people, the homeowners, of their freedoms and liberties under the Constitution. Any treatise on constitutional law will provide the Supreme Court criteria for state actors (entities that function as if a state entity), which apply to HOAs. CAI loves to direct readers to that one archaic test of state actors, that of “public functions” from a 1946 case about company towns.

Just because you can vote does not make a territory or community a democracy. Ask any who have live under Communist Russia, China, or Cuba where voting is allowed, or those in America who lived under Mayor Daly, Boss Tweed or Huey Long, to name a few. And I guess Mr. Skiba is not familiar with Robert Dahl's look into democratic performance. The author sets 5 criteria to measure democratic performance: 1) maintaining a democratic system, 2) protecting fundamental democratic rights, 3) insuring fairness among the citizens, 4) encouraging a

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democratic consensus, and 5) a democratic system that solves problems.<sup>17</sup>

Second, Mr. Skiba also seems to be short on the principles of the Founding Fathers and the contents of the Constitution, reflecting their distrust of government, that contain checks and balances, a separation of powers, an independent judiciary, and a Bill of Rights to ensure that the people's rights and freedoms are protected. All are absent in the so-called democratic, corporate form of authoritarian governance called the HOA.

Mr. Skiba continues further with,

The solution to that problem is not to replace democracy with tyranny, royalty, or some other form of government, but to work to make the democratic process better and to hold those elected accountable. . .

. . . .

I don't think government should dictate in detail how associations should be run from some far off state capital or even Washington, DC. That would be taking away an associations democratic rights and responsibilities.

This statement is truly unbelievable! CAI is a strong proponent of UCIOA, that uniform, top-down statutory model to regulate HOAs being promoted in many state legislatures. UCIOA imposes statutes that permit, among other things, foreclosure; due process before your HOA, biased government without the right to present and question witnesses as required under the Constitution, but absent from private contracts; and the absence of enforcement against HOA violations with appropriate penalties to serve as a deterrent, as is the purpose of criminal laws. Is this the voice of the local community? The members of your community?

And finally, Mr. Skiba must resort to patriotic imagery and sentiment in order to gather support for his lost cause, identifying the author of the following as an attorney and Vietnam vet,

Democracy is built on the simplest premise that has ever supported a political system, that a majority of the voters will be right more often than they are wrong. The inevitable errors will be corrected by the voters—when they perceive those errors.

The statement is a belief in the system, yet fails to address the important foundations and concerns of the Founding Fathers with respect to those unalienable rights, you know, the ones that no government can take away, and the rule of

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the majority. The dangers of one faction, a clique in today's terms, dominating another was well known to the Founding Fathers.<sup>18</sup> The Founding Fathers addressed the serious abuse majority rule, that of the tyranny of the majority leading to the tyranny of the legislature.

Yet, end result is the trampling of those unalienable rights that no government can take away, those rights protected under the first 8 amendments as well as the 9th and 10th amendments.

And this is one of the most serious defects in the HOA legal scheme as applied to the proper exercise of democratic functions to protect the rights of the minority. The members of the HOA have no such equivalent rights under the HOA "constitution". HOAs are a business form of authoritarian governance, as Skiba and other CAI stalwarts have repeatedly pronounced. Mr. Skiba seems to be "small talking", oversimplifying the issues, and distorting them and the reality behind HOA governments. They are not democratic at all! Don't believe it!

***"Beware the Jabberwock, my son!"***

## Endnotes

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<sup>1</sup> Evan McKenzie, *Privatopia: Homeowners Associations and the Rise of Residential Private Government*, p. 148, Yale University Press, 1994.

<sup>2</sup> James McGregor Burns, *The American Experiment*, vol. 1 –3, Alfred A. Knopf, 1982 –1989.

<sup>3</sup> *Planned Parenthood v. Casey* 505 US 833 (1992).

<sup>4</sup> Leonard W. Levy, *The Origins of the Bill of Rights*, Chapter Twelve, Yale University, 1999; Randy E. Barnett, *Restoring the Lost Constitution*, Chapter Nine, Princeton University Press, 2004.

<sup>5</sup> *Kelo v. City of New London*, 545 U.S. 469 (2005).

<sup>6</sup> Scott McClellan, *What Happened: Inside the Bush White House and Washington’s Culture of Deception*, p. 69, Public Affairs, 2008.

<sup>7</sup> *Id.*, p. xiii.

<sup>8</sup> *Id.*, p. 62.

<sup>9</sup> *Id.*, p. 63.

<sup>10</sup> *Committee for a Better Twin Rivers v. Twin Rivers Homeowners’ Association* (A-118-122-05), p.32.

<sup>11</sup> <http://starman.com/starpub/hoa-videos.htm>.

<sup>12</sup> <http://pvtgov.wordpress.com/2007/03/21/10-myths-about-hoas/>.

<sup>13</sup> Robert H. Nelson, *Private Neighborhoods and the Transformation of Local Government*, chapter 20, Urban Institute Press, 2005 (speaks of HOAs eventually seceding from local municipalities; see section 5.2 herein).

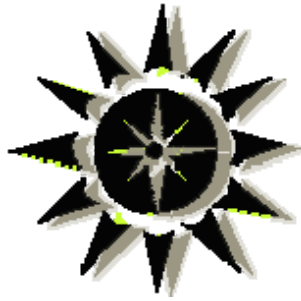
<sup>14</sup> *2007 National Survey*, Community Associations Institute web site (<http://www.caionline.org/about/survey.cfm>).

<sup>15</sup> *Inwood v. Harris*, 736 S.W.2d 632 (1987).

<sup>16</sup> “Jabberwocky” is a poem of nonsense verse written by Lewis Carroll, originally featured as a part of his novel *Through the Looking-Glass, and What Alice Found There* (1871). Read the poem at <http://www.math.luc.edu/~vande/jabtext.html>. Lewis Carroll also wrote *Alice in Wonderland*.

<sup>17</sup> Robert A. Dahl, *How Democratic is the American Constitution?*, p. 92-93, Yale University 2002.

<sup>18</sup> The Federalist papers, No. 10, 78.





## 2. Homeowner Bill of Rights

*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.<sup>1</sup>*

### 2.1. Why the need for a homeowners bill of rights? (Oct. 2006)

Over the years, several homeowners “bill of rights” have been proposed by David A. Kahne and published by the AARP Policy Institute. Homeowner rights advocates debate the provisions of these homeowner's bill of rights, and the industry supporters — the lawyers, CAI trade group, and HOA management groups — have proposed their own version of a bill of rights. In the midst of all these proposals, one advocate wrote, "There is only one Bill of Rights, the US Bill of Rights". I ask, "What is the real bill of rights?"

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The US Bill of Rights only pertains to that document called the US Constitution. These Rights are AMENDMENTS to the Constitution, period. The Constitution applies to the federal government, and to state entities only by virtue of the 14th Amendment to the US Constitution. They do not apply to private organizations, such as HOAs, unless the US Supreme Court has declared them so.

As for HOAs, we have no bill of rights, no amendments, attached to these private constitutions, called CC&Rs, as we have with the US Constitution. However, most states have laws and some version of a Uniform Common Interest Ownership Act (UCIOA), but there are no laws that specifically apply to the UCIOAs or statutes declaring planned communities, as private organizations, subject to the due process and equal application provisions of the 14th Amendment, as it applies to all public governments.

Given this understanding, there are only two courses of action to bring homeowners living in HOAs under the laws of the land:

1.      declare HOAs as government entities or state actors, and thereby subject to the US Constitution;
2.      or mandate a Homeowner's Bill of Rights that protects the people, the homeowners, and that holds HOAs accountable under the laws of the land. If advocates fight for declaring HOAs as

state actors, or government entities, then they can argue for the "real" bill of rights and forget about all these other versions. In the absence of advocate support for declaring HOAs as state actors, we must settle for one of these other versions as a step toward our objective of protecting homeowner rights. The alternative is the status quo — nothing done.

The UCIOA bill in NJ and the TUPCA (Texas Uniform Planned Community Act) bill in Texas continue to perpetuate the authoritarian, privately stated chartered HOA governments controlling subdivisions that lack a bill of rights. Industry special interests rallied to address my arguments for and the AARP for proposal a bill of rights (see AARP Policy Institute), and said at the Texas hearing, "We put in a bill of rights". Yet, a reader of the TUPCA bill (<http://tupca.org>) will only come across a subchapter on homeowner rights (TUPCA, SUBCHAPTER D. PROTECTION OF OWNERS Sec. 83.151. RIGHTS GUARANTEED) that avoids the political issue of constitutionally guaranteed rights. A proper bill of rights would state just what rights homeowners have and a statement that no board can remove these rights, as, following the format of the US Bill of Rights:

"No amendment to the CC&Rs, bylaws, rules and regulations, or board resolutions shall be passed abridging these rights without a

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2/3 vote of all homeowners after notice has been given to all homeowners. Such notice shall contain a Pro/Con section where any member may submit his opinion on the issue at hand. At the meeting called for a vote on the issue, any member shall have the right to speak freely and openly without harassment, interruption or any other attempt to prevent the member from speaking freely."

And, furthermore, Sec 83.151 of the proposed TUPCA bill should read,

"The Planned Community is, by its nature of regulating and controlling the people within the territory of the planned community subdivision in the same manner as a municipality with its assessments (taxes), rules and regulations (ordinances), enforcement that deprives a person of his due process rights (liens and foreclosure), elections of a governing council (the directors), a state actor and subject to the restrictions of the 14th Amendment to the US Constitution."

Given the complete absence of a bona fide bill of rights protection of homeowners against abuse by the HOA

government, why are our legislators supporting private organizations being promoted by business trade groups for their own income streams. As stated earlier, no UCIOA or state statutes for planned communities or condominium associations since 1982, when the UCIOA model act was first proposed, has any such protections for homeowners.

And over this long period of time, the special interests have fought to oppose the inclusion of such protections for homeowners. In fact, just this year the Community Associations Institute, that national lobbying organization that promotes these authoritarian forms of government filed an amicus curiae brief warning the NJ appellate court about the unwise extension of constitutional protections to homeowners associations (See *CBTR v. Twin Rivers HOA*, Docket No. C-121-00, (N.J. Super. App. Div. 2006).

Consequently, advocates must ask: What is the legitimate government interest in protecting HOAs that deny homeowners their fundamental rights? And advocates must demand that planned communities be placed under the restrictions of the 14th Amendment, as are all other government entities. The most appealing approach is to declare them to be governmental entities and therefore directly subject the US Bill of Rights and 14th Amendment. Or, that all Declarations incorporate a state imposed bill of rights that duplicates the 14th Amendment protections.

**2.2 AARP Homeowners Bill of Rights (August 2006).**

David Kahne, a Houston ACLU attorney, who won the notable *Brooks v. Northglen*<sup>2</sup> HOA case, has written on a HOA Bill of Rights for homeowners for AARP<sup>3</sup>. Such a document has been absent from all CC&Rs going back to the *Homes Association Handbook*, TB #50<sup>4</sup>, for the mass merchandising of planned communities, published in 1964 by ULI with the help of federal agencies.

Kahne writes in his Introduction:

The bill of rights proposed in this paper distills crucial principles needed to balance the interests of an association and individual residents, and to foster equitable procedures in case of a dispute.

From a consumer protection standpoint, the core issues revolve around the fact that the governing documents of an association are generally non-negotiable, were originally drafted by the developer's attorney, and can be lengthy (sometimes hundreds of pages) and frequently incomprehensible to a nonprofessional.

When conflicts do occur, residents have few practical options. This is because

associations have the power to make rules (like a legislature), enforce rules (like an executive), and resolve disputes over rules (like a judge)—all through a board of volunteer directors, who may vary substantially in their knowledge, experience, and sometimes intent. In the absence of a separation of powers, homeowners lack vital checks and balances.

A very good first source and one directly on point with the development of a homeowner's bill of rights is the 2006 David Kahne study for the AARP Research Policy Institute<sup>5</sup>. Kahne proposes a 10-point Homeowner's Bill of Rights and offers a model statute for consideration by others, such as CLRC. There is a "need to protect rights of homeowners as individuals, and the governmental aspects of associations, suggest consideration of a bill of rights." And, to the very heart of the CID legal model,

Associations differ significantly from other nonprofit corporations. Homeowners cannot quit the association without moving, a choice often precluded by practicalities. Moreover, members typically make small economic commitments to nonprofits, whereas the commitment to an association can be

substantial, even without considering home equity. (p. 10).

From a consumer protection standpoint, the core issues revolve around the fact that the governing documents of an association are generally non-negotiable, were originally drafted by the developer's attorney, and can be lengthy (sometimes hundreds of pages) and frequently incomprehensible to a nonprofessional. (p.1)

**2.3 California's CLRC rejects need for Bill of Rights as it seeks revised CID statutes (April 2008).**

*All people are by nature free and independent and have inalienable rights. Among these are enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety, happiness, and privacy.*<sup>6</sup>

After several years of study, the California Law Review Commission, CLRC, has recommended a rewrite of the HOA/condo laws, the Davis-Stirling Act, SB1921. While it has moved forward with this proposed rewrite, CLRC felt it not sufficiently important to also include a Member Bill of



Rights (Chapter 2), and can add a bill of rights at some later time.

Read the CLRC memorandum in regard to the severe criticism of proceeding in an illogical manner, in a manner opposed to its constitutional obligations to protect the individual and private property rights of the people. It is an approach not followed in the adoption of our US Constitution.

George Staropoli objects to the lack of any substantive extension of homeowner rights. In particular he objects to the lack of any provision addressing the relationship of CID law to the state and federal constitutions. See Exhibit p. 1. As indicated at Exhibit p. 2, Mr. Staropoli first raised these issues in 2005 and was informed at that time that they were beyond the scope of the recodification project.<sup>7</sup>

My letter to CLRC is follows.

**Summary of recommendations for Member Bill of Rights**

1. Withdraw AB 1921 until Chapter 2, Member Bill of Rights, has been defined, and condition the approval of any proposed rewrite of the Davis-Stirling Act law on the approval of a homeowners' bill of rights.

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2. Explicitly state that the California Constitution is the supreme law of the land and any conflict between the Constitution and the law of servitudes shall be decided in favor of the Constitution.
3. Include a statement that CIDs and all governing documents are subject to Article 1, Declaration of Rights, of the California Constitution, and in particular sections 1, 3(b)(4), 7, 17, 19 and 24.
4. Include a statement that the judicial scrutiny of any covenant, bylaw or rule be the same as would be required according the nature of the constitutional question, and not that blanket rule of reasonableness.
5. Include a statement that, as a matter of good public policy, the state has a compelling legitimate interest in the enforcement of violations by the governing bodies of CIDs, and shall provide appropriate penalties against such violators as both a punishment and a deterrent to future violations.
6. CLRC must include as part of its approach to the revision of Davis-Stirling the non-existent, to date, perspective of protecting the individual liberties of homeowners as it seeks to regulate CIDs in a fair and just manner.
7. CLRC has a duty to examine, under its mission to rewrite Davis-Stirling, the sources given herein, in addition others, to assist its members in understanding the constitutional requirements of due process and the equal protection of the law in order to protect individual homeowner liberties and freedoms.

**Note:** As of this printing, June 23<sup>rd</sup>, apparently the voice of advocates is being heard. After being passed by the California House, the sponsor withdrew the bill “due to increasing concern about certain of its provisions”.<sup>8</sup> We are told that it will be re-introduced next year.

### **Discussion of AB 1921**

#### Protecting the individual rights and freedoms of homeowners

In its July 1, 2005 memorandum (MM05-25) for Study H-885, “Statutory Clarification and Simplification of CID Law”, CLRC proposed its first draft of changes to the CID laws. Under the “Scope of reorganization” section, only the Davis-Stirling Act and relevant parts of the Corporation Code and the Department Real Estate regulations would be considered (p.22). However, the proposed Chapter 2, “Rights and Duties of Members”, was placed on the backburner for later consideration. It is important to note that this chapter also proposed, among other things, a “Bill of Rights” under the proposed Article 1. The memorandum concluded with a comment on Chapter 2, “That material [Chapter 2] should be substantively and politically more challenging.”

In response to my letter of July 6, 2005 commenting on MM05-25, CLRC released its

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July 16, 2006 First Supplement (MM05-25s1)  
stating, in part (emphasis added),

The issue raised by Mr. Staropoli — the extent to which a CID should be subject to the sorts of constraints that apply to a governmental entity — is an important one. However, it is beyond the scope of the current project. The Commission will consider the issue in a later stage of its general study of CID law. (p. 2).

It is also important to note that Chapter 2, now renamed, “Member Bill of Rights [Reserved]”, was included in the proposed “reform” legislation of AB 1921, but as an empty placeholder without any substance. I am astonished by this action by CLRC in proposing that affects the governance of CIDs across California, that regulates and controls the property rights, privileges, freedoms and liberties of its citizens living in CIDs as a separate and distinct body of law. Under the proposed AB 1921 legislation, private governments are permitted to operate outside the restraints and prohibitions of the 14<sup>th</sup> Amendment to the US Constitution; outside Article 1, Declaration of Rights, under the California Constitution, Sections 1 (inalienable rights), §3(b)(4) and §7(a) (due process and equal protection of the laws), §7(b) (revoking any privileges and immunities granted by the legislature), §17, as pertains to CID foreclosures, (cruel and unusual

punishment), §19 as pertains to a taking of private property under this ACT, §24 (rights retained by the people); and outside the California laws governing local communities, thereby creating, in reality, independent city-states or principalities under the “charters” granted by the Davis-Stirling Act.

This action by CLRC stands in sharp contrast to the approach taken by our Founding Fathers, although they had their differences, which conditioned the approval of the constitution upon the approval of the Bill of Rights. This Commission has proposed AB 1921 without even considering, under its empty “Member Bill of Rights”, the rights and freedoms of California citizens who are subject to the Davis–Stirling Act. One could well ask, what was the basis for CLRC’s decision to proceed in this manner? Surely it could not have felt confident in the fact that the Act is already in existence, and that there is a reasonable legitimate government interest in so regulating CIDs, as evidenced by the Legislature’s statement of intent in the bill,

The Legislature further finds that covenants and restrictions, contained in the declaration, are an appropriate method for protecting the common plan of developments and to provide for a mechanism for financial support for the upkeep of common areas . . . . If

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declarations terminate prematurely, common interest developments may deteriorate and the supply of affordable housing units could be impacted adversely. The Legislature further finds and declares that it is in the public interest to provide a vehicle for extending the term of the declaration if owners . . . . § 6040(c).

**The restatement of equitable servitudes does not protect individual rights**

Perhaps, CLRC felt that the doctrine of equitable servitudes prevails, as stated in § 5125(a)

The covenants and restrictions in the declaration shall be enforceable equitable servitudes, unless unreasonable, and shall inure to the benefit of and bind all owners of separate interests in the development.

And that, under the Restatement Third, Property (Servitudes), the current expression of servitudes and common interest development common law holding that the common law of servitudes prevails of the constitutional law, see “comment h” below, CLRC need not be concerned (as to relevant parts, emphasis added). The

tremendous impact of the Restatement on the denial of homeowner rights and freedoms cannot be overstated.

## **Chapter 3, Validity of Servitude Arrangements**

### **§ 3.1 Validity of Servitudes: General Rule**

A servitude . . . is valid unless it is illegal or unconstitutional or violates public policy

Servitudes that are invalid because they violate public policy include, but are not limited to:

(1) a servitude that is arbitrary, spiteful, or capricious;

(2) a servitude that unreasonably burdens a fundamental constitutional right;

(3) a servitude imposes an unreasonable restraint on alienation under § 3.4 or § 3.5;

(4) a servitude that imposes an unreasonable restraint on trade or competition under §3.6; and

(5) a servitude that is unconscionable under § 3.7.

### **§ 3.7, Unconscionability**

A servitude is invalid if it is unconscionable.

....

[Comment c, p. 485]. Unconscionable transactions contain an element of overreaching, unfairness, surprise, or harshness that leads to the conclusion

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that the servitude should not be enforced, even though the disadvantaged party could have protected him- or herself through the exercise of proper precautions.

Unfortunately, (2) above is clarified by,

[comment h, p.359]. The question whether a servitude unreasonably burdens a fundamental constitutional right is determined as a matter of property law, and not constitutional law.

It appears that the property law of servitudes has been rewritten in this third version to supersede the Constitution. A reading from the introduction to the Restatement leaves one with the clear picture that the revisions to equitable servitude laws were designed to accommodate and promote planned communities with their mandatory homeowners associations, as they currently exist and operate under state laws.

Servitudes are extensively used to provide the underlying structure of real-estate developments that include shared amenities or facilities and services financed by assessments against individual owners. . . . (p.3).



By freeing servitudes law from some of the encrustations accumulated over the centuries, it is designed to retain and enhance their utility to meet the needs of American society in the first part of the 21<sup>st</sup> Century. (p.4).

I call the commission's attention to the warning offered in the ULI document for the creation, development and mass merchandising of planned communities, its 1964 "bible", *The Homes Association Handbook* (aka TB # 50)<sup>9</sup>. It provides a good understanding as to why equitable servitudes were required to control the laws as applied to planned communities,

12.22 FUNCTION OF A RECORDED  
DECLARATION OF COVENANTS AND  
RESTRICTIONS.

The function of a declaration of covenants and restrictions is to subject the land situated within the area described in the declaration to certain obligations which will be legally enforceable against every owner or occupier of the subject land.

This foundation in servitudes law, and especially the "tailoring" of the law to protect planned communities, may have been necessary for private, business organizations to promote the acceptance of homeowners associations, but is

entirely short on any protections of individual rights and freedoms. This lack of protection for homeowners has carried across these past 44 years to today, in California and in all other states.

Why didn't CLRC investigate these dramatic legal views expressed by the Restatement that render the US and California constitutions subject to property laws, and no longer the supreme law of the land? These citations, alone, warrant the need to include a homeowners' bill of rights as the law of servitudes does not provide for an effective level of protection of individual rights and liberties, and is more concerned with the establishment and protection of common interest properties.

I am not a lawyer, but I have discovered and questioned these views regarding the sanctity of CIDs, this state protectionism of CIDs, and I wonder why didn't CLRC recognize the impact on the California Constitution, namely its Declaration of Rights to protect the rights, liberties and freedoms of the people of California? The law of servitudes must not be allowed to dominate the California Constitution and deny the people living in CIDs the privileges and immunities granted to all the people of California. This would have been a good start to Chapter 2 for CLRC to have asserted the supremacy of constitutional law over the common law of equitable servitudes. And, furthermore, to require in Chapter 2 a compelling and necessary government interest when asserting the validity of any

covenant, servitude or state law that violates the Declaration of Rights under the California Constitution. The simple tests of reasonableness, as contained in the Restatement, or a reasonable government interest is inadequate to deny or to disparage individual rights for those living in a CID.

**The restatement of equitable servitudes justification for CC&Rs: the freedom to contract**

The Restatement, under § 3.1, Validity of Servitudes: General Rule, Comment a, adopts the presumption of constitutionality doctrine with respect to claims of invalidity. *“The party claiming invalidity of a servitude [has] the burden to establish that it is illegal or unconstitutional, or violates public policy.”* It refers to *“the modern [emphasis added] principle of freedom to contract to creation of servitudes”*, and quotes, not contract law, but the Restatement of Contracts as a defense,

In general, parties may contract as they wish, and the courts will enforce their agreements without passing on the substance.... The principle of freedom of contract is rooted in the notion that it is in the public interest to recognize that individuals have broad powers to order their own lives.

We hear this mantra almost everyday from CAI, and other supporters and protectors of CIDs – no interference with the freedom of contract. Yet, has anyone considered the fact that Davis-Stirling is itself an interference with CID “contracts” by means of California’s right to regulate for the health, safety and general welfare under its police powers? But, when it comes to holding CIDs accountable to the state, or placing restrictions on the acts and actions of CIDs and their boards, or granting the homeowner certain rights and freedoms we hear the cry of “contract interference”. This biased use of contract interference by the special interests must be put to an end, as Clint Bolick<sup>10</sup>, Director of the Goldwater Institute’s Sharf-Norton Center for Constitutional Litigation, and co-Founder of the Institute for Justice, notes,

Special-interest groups across the political spectrum engage in vicious battle with the sole operational principle that the ends justify the means (p. 19). . . . “the families realize how few rights they have and how easily those rights can be taken away by voracious governments acting on behalf of favored special interests. . . . the government is not taking their house, it’s taking their home (p. 157) [comments on a movie to illustrate his point].

Another important question that should have been addressed by CLRC is that of a claim of a freely given and fully informed contractual agreement, repeatedly heard by the CID protectors. This weak argument is susceptible to attack under numerous alternatives, including the sufficiency of constructive notice for the surrender of fundamental rights and freedoms. A “secondary” argument advanced by CID protectors, that should have also been addressed by CLRC, is that the homeowner has consented to be governed under the CID regime by the fact that he freely chose to live in a CID and has remained under CID jurisdiction. This consent to be governed is challenged by several scholars below.

### **The regulation of CIDs under AB 1921 and Davis-Stirling**

With the prerequisite restoration of a concern for the protection of individual rights and freedoms, CLRC can now proceed with an analysis of the proposed AB 1921 impact on homeowner rights, and act in accordance with the principles of American government. To fail to so act would only affirm the societal and political changes that support a New America and a New California, no longer concerned with preservation and protection of individual rights and freedoms as did the Founding Fathers.

I believe constitutional scholar Randy Barnett<sup>11</sup> makes the argument for protecting individual rights, in general, even under majority rule:

For a law is just and binding in conscience, if its restrictions are (1) necessary to protect the rights of others, and (2) proper insofar as they do not violate the preexisting rights of the persons on whom they are imposed.

Every freedom restricting law must be scrutinized to see if it is necessary to protect the rights of others without improperly violating the rights of those whose freedom is being restricted. In the absence of actual consent, a legitimate lawmaking process is one that provides adequate assurances that the laws it validates are just in this respect.

It is not my intent to detail my views of questionable constitutional statutes or those that affect the individual rights of homeowners. My intent is to have CLRC approach the revision of Davis-Stirling from the non-existent, to date, perspective of protecting the individual liberties of homeowners as it seeks to regulate CIDs under the proper exercise of California's police powers. In addition to the Declaration of Rights, and issues raise as a result of the Restatement of servitudes law, there are other works by constitutional scholars and political scientists well versed in

common interest community issues. CLRC can utilize, and should have utilized, these resources as a guide to its efforts to regulate CIDs and the people living within who are the member-owners of CIDs. They are given below.

### **AARP Homeowners Bill of Rights**

A very good first source and one directly on point with the development of a homeowner's bill of rights is the 2006 David Kahne study for the AARP Research Policy Institute<sup>12</sup>. Kahne proposes a 10-point Homeowner's Bill of Rights and offers a model statute for consideration by others, such as CLRC. There is a "need to protect rights of homeowners as individuals, and the governmental aspects of associations, suggest consideration of a bill of rights." And, to the very heart of the CID legal model,

Associations differ significantly from other nonprofit corporations. Homeowners cannot quit the association without moving, a choice often precluded by practicalities. Moreover, members typically make small economic commitments to nonprofits, whereas the commitment to an association can be substantial, even without considering home equity. (p. 10).

From a consumer protection standpoint, the core issues revolve around the fact that the governing documents of an association are generally non-negotiable, were originally drafted by the developer's attorney, and can be lengthy (sometimes hundreds of pages) and frequently incomprehensible to a nonprofessional. (p.1)

**Trust and Community**

Political scientists Steven Siegel and Paula Franzese also address the need to protect the rights of homeowners in their 2007 article in the *Missouri Law Review*<sup>13</sup>. Concerned with healthy marketplace forces, the authors write,

A well-functioning marketplace usually requires some rough equality of bargaining power between the market players, or, in the alternative, a strong governmental role in protecting the consumer. (p. 1113).

A healthy marketplace depends on some modicum of equal bargaining power between its players, or, in the alternative, a meaningful governmental role in protecting the consumer. A well-functioning marketplace finds its players sufficiently armed to make informed decisions. (p. 1124).



With respect to a consent to be governed under the CID regime, the authors are quite clear that,

This voluntary consent theory holds that residents consent to the rules and restrictions when purchasing, and that those who do not wish to subject themselves to CIC rules are free to buy elsewhere. . . . The complex CIC servitude regime that buyers ‘assent’ to is more akin to an adhesion contract than the product of informed, meaningful choice. (p. 1125).

Traditional contract theory assumes not only the ability of both parties to engage in effective bargaining, but also presupposes that both parties have reasonable access to the information that becomes the basis of the bargain. . . . empirical research suggests that even rudimentary informed consent is lacking. (p. 1126).

**“Consent to be governed” based on remaining under the CID jurisdiction**

Another pro-CID argument for homeowner consent, when the contractual argument is not accepted, is the consent to be governed theory as used with respect to political

jurisdiction. This theory rests on the decision to live and remain in the jurisdiction in which the homeowner resides, thereby giving tacit acceptance to be governed under the laws of the town or city. CID supporters apply the same reasoning to a homeowner's decision to buy and remain in his CID, making the CID equivalent to public governance while ignoring the legal reality of the private, contractual CC&R arrangement to be governed (Which is it? Is the CID equivalent to a public government or is it a private business arrangement under the CC&Rs?)

This "consent to be governed" theory is criticized with respect to public governance by constitutional scholar Randy , and applies equally well under the CID regime. Does this argument rise to the level of judicial scrutiny to permit the loss of rights and freedoms? Barnett points out that this "love it or leave it" argument is ambiguous,

Simply remaining in this country, however, is highly ambiguous. It might mean that you consent to be bound by the laws . . . or it might mean that you have a good job and could not find a better one [elsewhere] . . . or that you do not want to leave your loved ones behind. It is simply unwarranted that to conclude from the mere act of remaining . . . that one has consented to all and any of the laws thereof.<sup>14</sup>

**California Common Interest Development –  
Homeowner’s Guide**

This Thomson-West treatise<sup>15</sup> on California CID law is a first, because “*the majority of common interest development publications appear to be geared to represent ‘associations’*”, and the author, Donie Vanitzian, JD, was determined “*to protect homeowner rights in any way I could.*” While Ms. Vanitzian is an outspoken critic of the Davis-Stirling Act, her 1055-page plus treatise is another direct source of information and experience to warrant study by CLRC in its efforts to rewrite the Act, and in preparing the missing Member Bill of Rights.

**Earlier homeowner rights material**

Additionally, there are several earlier, but well-known sources of CID problems concerning homeowner rights. These include:

1. Barton and Silverman, *Common Interest Communities: Private Governments and the Public Interest*, Institute of Governmental Studies Press, Univ. of California, Berkeley, 1994.
2. Evan McKenzie, *Privatopia: Homeowners Associations and the Rise of Residential Private Government*, Yale University Press, 1994.

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3. Robert J. Dilger, *Neighborhood Politics: Residential Community Associations in American Governance*, New York University Press, 1992.
  
4. Steven Siegel, *The Constitution and Private Government: Toward the Recognition of Constitutional Rights in Private Residential Communities Fifty Years After Marsh v. Alabama*, p. 461-563, *William & Mary Bill of Rights Journal*, 461 (1998) Volume 6, Issue 2, Spring 1998.

## Endnotes

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<sup>1</sup> Preamble to the US Bill of Rights.

<sup>2</sup> *Brooks v. Northglen*, 76 S.W. 3rd 162 (Tex 2006).

<sup>3</sup> David A. Kahne, *A Bill of Rights for Homeowners in Associations: Basic Principles of Consumer Protection and Sample Model Statute* ([http://assets.aarp.org/rgcenter/consume/2006\\_15\\_homeowner.pdf](http://assets.aarp.org/rgcenter/consume/2006_15_homeowner.pdf)).

<sup>4</sup> Homes Association Handbook, TB #50, Urban Land Institute, 1964. See The Truth About the Emergence and Quiet Acceptance of Planned Communities and Homeowners Associations, George K. Staropoli, for a critical look at this document, and the role of CAI in protecting HOAs. ([http://pvtgov.org/pvtgov/downloads/HOA\\_truth.pdf](http://pvtgov.org/pvtgov/downloads/HOA_truth.pdf), 2006, viewed Dec. 10, 2007).

<sup>5</sup>Supra note 3.

<sup>6</sup> California Constitution, Article I, Declaration of Rights, Section 1.

<sup>7</sup> <http://www.clrc.ca.gov/pub/2008/MM08-12s1.pdf>.

<sup>8</sup> California Legislative Action Committee eMail Bulletin, June 23, 2008

<sup>9</sup> *The Homes Association Handbook*, Technical Bulletin 50, The Urban Land Institute, 1964. (Available from the research division of ULI).

<sup>10</sup> Clint Bolick, *David's Hammer: the case for an activist judiciary*, Cato Institute, 2007.

<sup>11</sup> Randy E. Barnett, *Restoring the Lost Constitution: The Presumption of Liberty*, Princeton University Press, 2004, p. 19.

<sup>12</sup>Supra note 3.

<sup>13</sup> Paula A Franzese and Steven Siegel, Trust and Community: The Common Interest Community as Metaphor and Paradox, p. 1111-1157, *The Missouri Law Review*, vol. 72, 2007.

<sup>14</sup> Supra, note 11, p. 44-45.

<sup>15</sup> Donie Vanitzian, *California Common Interest Development – Homeowner's Guide*, The Expert Series (Thomson-West 2006). (This writer's efforts are acknowledged in the Preface).



### **3. The Mass Merchandising of HOAs<sup>1</sup> (April 2006)**

*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.<sup>2</sup>*

An analysis of *The Homes Association Handbook*, TB#50<sup>3</sup>

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.<sup>4</sup>

Statutes are expressions of public policy. And common law is, after all, merely the

courts' notion of what best promotes public policy.<sup>5</sup>

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.<sup>6</sup>

### **3.1. 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 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.<sup>7</sup> This use of sample forms<sup>8</sup> (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].<sup>9</sup>

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 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”<sup>10</sup>. 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 liens<sup>11</sup>. However, it urges the need to insert wording to grant the mortgagor a priority lien before this “developer” lien.<sup>12</sup> 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 interests<sup>13</sup>, 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 failure to protect a segment of society from the predator marketing tactics of the real estate industry.

### **3.2. 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 are 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. Stabile<sup>14</sup>, which was partially funded by ULI and the Community Associations Institute (CAI)<sup>15</sup>, 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 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.

### **3.3. 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.”<sup>16</sup>

[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.”<sup>17</sup>

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 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.<sup>18</sup>

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

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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.*”<sup>19</sup>

### **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.<sup>20</sup>

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.<sup>21</sup>

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 . . .”*<sup>22</sup> 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”*.<sup>23</sup>

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."<sup>24</sup>

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 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,<sup>25</sup> and legally permit the HOA to foreclosure? 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 14th Amendment's due process clause and a deprivation of property.<sup>26</sup> 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.”<sup>27</sup>

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 <sup>28</sup>

### **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.<sup>29</sup>

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.”<sup>30</sup> 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.<sup>31</sup>

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.<sup>32</sup>

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.”*<sup>33</sup>

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

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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 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*”<sup>34</sup>[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.*"<sup>35</sup> 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,*"<sup>36</sup> 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 "*Although most homeowners would rather see the covenants continue, a majority to reinstate them may be difficult to muster.*"<sup>37</sup>

**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.<sup>38</sup>

The developer is warned that he “*must prevent the destruction of his plan of development and of his market by a run-away association.*”<sup>39</sup> 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.”*<sup>40</sup>

### **3.4. 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 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?<sup>41</sup> Will the state allow planned communities to succeed from America as being argued by some scholars?<sup>42</sup>

### **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].<sup>43</sup>

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.<sup>44</sup>

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.<sup>45</sup>

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.<sup>46</sup>

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.<sup>747</sup>

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.”<sup>48</sup>

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.”*<sup>49</sup>

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].<sup>50</sup>

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 (1924) Ebenezer Howard, and Eleanor Roosevelt.<sup>51</sup> 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, 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.*”<sup>52</sup> 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].<sup>53</sup> The informed public knows better.

The developer must <sup>54</sup>

- “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.”
- 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.”<sup>55</sup>

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 ...”<sup>56</sup> [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.<sup>57</sup>

### 3.5 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

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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*,<sup>58</sup> 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?

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**Endnotes**


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<sup>1</sup> *The Homes Association Handbook*, Technical Bulletin 50, The Urban Land Institute, 1964.

<sup>2</sup> *Id.*, p. 15.

<sup>3</sup> *Id.*

<sup>4</sup> Wayne R. LaFave, *Criminal Law*, p. 12 (West Group 2000).

<sup>5</sup> *Id.*, p. 15.

<sup>6</sup> James W. H. & Sandra L. McCord, *Criminal Law and Procedure for the Paralegal*, p. 12 (West Legal Studies 2001).

<sup>7</sup> Appendices F, G, H.

<sup>8</sup> Appendices K, L.

<sup>9</sup> In Chapter 16, Leadership Style, Skill and Sources, § 16.2, Bureaucratic or Democratic? It May Depend on Common Facilities.

<sup>10</sup> Term used for today's mandatory membership association.

<sup>11</sup> "We believe that the lien of assessments will, in all states, be recognized as superior to and unaffected by the homestead exemption". P. 322.

<sup>12</sup> "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.

<sup>13</sup> 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)).

<sup>14</sup> *Community Associations: The Emergence and Acceptance of a Quiet Innovation in Housing*, Donald R. Stabile (Greenwood Press 2000).

<sup>15</sup> CAI 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).

<sup>16</sup> Chapter 1, “Is it a Homes Association or Isn’t it?”, p.5,

<sup>17</sup> *Id.*, p. 6.

<sup>18</sup> Chapter 23, “Affirmative Covenants”, p. 314.

<sup>19</sup> Chapter 12, “Setting the Legal Foundation”, p. 199.

<sup>20</sup> *Supra* n. 18, p. 322.

<sup>21</sup> *Supra* n. 18, p. 321.

<sup>22</sup> Appendix F, Covenants, p.391.

<sup>23</sup> *Supra* n. 19, p. 210.

<sup>24</sup> *Supra* n. 19, p. 211.

<sup>25</sup> Appendix F, Covenants, and Appendix H, Bylaws.

<sup>26</sup> *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”).

<sup>27</sup> *Supra* n. 18, p. 314.

<sup>28</sup> *Supra* n. 19, p. 202.

<sup>29</sup> Chapter 18, “Using the Common Property”, p. 283-4.

<sup>30</sup> *Id.*, p. 285.

<sup>31</sup> *Id.*, p. 283.

<sup>32</sup> Chapter 20, “Conserving the Neighborhood”, p. 297-8.

<sup>33</sup> *Id.*, p. 298.

<sup>34</sup> *Supra* n. 19, p. 212.

<sup>35</sup> *Id.* (There is a discussion concerning amendments that increase the homeowners burden will be objected to if not approved by all the homeowners).

<sup>36</sup>Benito Mussolini Wikiquote,  
[http://en.wikiquote.org/wiki/Benito\\_Mussolini](http://en.wikiquote.org/wiki/Benito_Mussolini) (August 29, 2006).

<sup>37</sup> Supra n. 11.

<sup>38</sup> Chapter 15, ‘Creating the Association and its Facilities’,  
p. 240-1

<sup>39</sup> Id.

<sup>40</sup> Id, p. 241.

<sup>41</sup> *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).

<sup>42</sup> *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).

<sup>43</sup> Chapter 16, “Leadership Style, Skill and Sources”, § 16.2, “Bureaucratic of Democratic? It May Depend on Common Facilities”, p. 247.

<sup>44</sup> Id, p.248.

<sup>45</sup> Chapter 27, ‘Special Points in the Articles or the Covenants’, p. 347.

<sup>46</sup> Supra n.19, p. 209.

<sup>47</sup> Supra n. 38, p. 233-4.

<sup>48</sup> Supra n. 16 p.4.

<sup>49</sup> “Highlights of the Findings and Recommendations”, p. x

<sup>50</sup> Supra n. 16, p. 5.

<sup>51</sup> Sunnyside Gardens Preservation Alliance,  
<http://www.sunnysidegardens.org/history/history.html>  
(August 29, 2006).

<sup>52</sup> Supra n. 38 p. 236.

<sup>53</sup> Supra n. 38 p. 237.

<sup>54</sup> Supra n. 38, p.236-7.

<sup>55</sup> Chapter 3, “Special Viewpoints and Recommendations”,  
p.30.

<sup>56</sup> Id, p. 32.

<sup>57</sup> Id.

<sup>58</sup> Supra n. 14.



#### **4. Voluntary agreement and consent to be governed**

*That to secure these rights, governments are instituted among men, deriving their just powers from the consent of the governed, that whenever any form of government becomes destructive of these ends, it is the right of the people to alter or to abolish it, and to institute new government, laying its foundations on such principles, and organizing its powers in such form, as to them shall seem most likely to effect their safety and happiness. Declaration of Independence*

In defense of homeowner rights advocates criticism of the denial of constitutional protections and the loss of rights and freedoms enjoyed by those not living in homeowners associations, the pro-HOA supporters resort to a highly questionable claim of “voluntary agreement” by the HOA member.

#### **4.1 Upsetting the contractual understanding (Dec. 2007)**

*Why should the NJ Constitution be invited to upset the contractual understandings that the members of this community have upon purchasing their condominiums and their townhouses? These people buy-in because they don't want the . . . .*

This question was asked by a New Jersey Supreme Court Justice during Oral Arguments in the Twin Rivers HOA constitutionality case in January 2007. It is a very revealing question, reflecting the prevalent view within our society, but surprising when coming from a state supreme court justice. It accepts the false premise that whatever private parties contract together should not be subject to judicial review and the constraints of the US Constitution.

Now, in part, the statement is correct if viewed solely as a previously agreed upon contract with stated obligations, since the Constitution clearly states, “*No state . . . shall pass any . . . law impairing the obligations of contracts . . . .*” Art I, Sec. 10. Therefore, since the homeowner association Declarations are previously agreed to obligations, the state shall not “upset the apple cart”. But, it is well-established legal doctrine that the state has the

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right under its police powers to regulate contracts, and has done so in all arenas except for planned communities with an almost sanctified religious deference and hands-off recoil. Why the special treatment, also contrary to the US Constitution?

This question by the NJ Justice also reflects a broader, more serious issue that the Constitution is no longer the supreme law of the land. That, when it comes to HOA Declarations of CC&Rs, private parties may contract to anything they want. It is even more disturbing when this Justice clearly knows that the constructive notice doctrine binds the homeowner and that there is no explicit surrender of constitutional rights when it comes to the HOA supposed “contract”. Just to what “contractual understandings” this Justice is speaking of had not been presented to the court, and reflects a personal opinion of the Justice and an abuse of discretion.

Welcome to the *New America*.

### **4.2 Consent to be governed (February 2008)**

Given this voluntary consent to the legitimacy of a government, where do contractual private agreements called CC&Rs fit into our American form of government? This question raises two very important unanswered questions that are fundamental to whether or not the US Constitution remains the supreme law of the land. Are HOAs indeed a

form of governance? Do CC&RS reflect a bona fide consent to be governed?

The special interests do not want these issues addressed and debated. However, CAI has made its position on the Constitution as the supreme law of the land in its amicus brief to the NJ appellate court in the Twin Rivers HOA free speech case. It warned the court about “*the unwise extension of constitutional rights to the use of private property by members*”. It feared that judicial intervention would “*serve as the preferred mechanism for decision-making, rather than members effectuating change through the democratic process.*” Which raises a third serious issue of the unregulated behavior of a group of people unanswerable to the laws of the land, justifiable because any changes would occur under an alleged democratic process. And, of course, outside the constitutional protections of homeowner rights.

Until these issues are addressed, legislatures will continue with quick fixes to try and make these private constitutions look like the US Constitution, and they will continue to fail in their efforts. Here, I will deal with the simpler of these issues, the consent to be governed.

The validity and legitimacy of the HOA board has been advanced by the special interests on the basis that homeowners chose to live in an HOA and could have freely chosen to do otherwise, and that they are free to leave the



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HOA if they are not happy. (I will ignore, for the moment, the ever-increasing mandatory HOA requirements of planning boards). This basis is a misguided application of the arguments with respect to public governments, where residents are deemed to have freely consented to be governed by the laws of the state and municipality by living and remaining within their jurisdictions. Where there is no need for them to be given the statutes and ordinances to explicitly give their consent to be governed.

How does a person exhibit his consent to be governed? Constitutional scholar Randy Barnett explains this theory of consent,

One consents to obey the laws of the land because one has chosen to live here. Just as you are bound to obey your employer (within limits) . . . you are bound to obey the commands of the lawmaking system in place where you have chosen to live. . . . So long as you chose to remain, you have “tacitly” consented to obey the laws.” Call it the “love it or leave it” version of consent.<sup>1</sup>

While explicitly saying, “I consent” is unambiguous, Barnett argues that,

Simply remaining in this country, however, is highly ambiguous. It might mean that

you consent to be bound by the laws . . . or it might mean that you have a good job and could not find a better one [elsewhere] . . . or that you do not want to leave your loved ones behind. It is simply unwarranted that to conclude from the mere act of remaining . . . that one has consented to all and any of the laws thereof.<sup>2</sup>

As for the argument that one is bound by the outcome of the voting process in place where one lives, failing to vote is taken as a tacit agreement to be governed by the outcome of the vote. Barnett argues that is not a real choice, a real consent, if there is no opportunity to register an explicit “I do not consent” vote. The implication of allowing such an alternative is obvious in regard to consent to be governed and, in good conscience, to obey the law.

In regard to majority rule, the mantra of HOAs, Barnett writes,

For a law is just and binding in conscience, if its restrictions are (1) necessary to protect the rights of others, and (2) proper insofar as they do not violate the preexisting rights of the persons on whom they are imposed.

Every freedom restricting law must be scrutinized to see if it is necessary to

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protect the rights of others without improperly violating the rights of those whose freedom is being restricted. In the absence of actual consent, a legitimate lawmaking process is one that provides adequate assurances that the laws it validates are just in this respect.<sup>3</sup>

However, let us not forget that these theories apply to public government and not to private contractual government, as are homeowners associations. Are we to ignore the legally binding covenants that create not public government under state or municipality laws, but create corporate government? And what evidences “consent” in the contractual arena? Contract law 101, with its requirements for a meeting of the minds, a bargain and exchange process, with disclosure of the facts material to the decision-making process.<sup>4</sup> But, unfortunately, not even these laws prevail in the HOA arena. It’s the laws of equitable servitudes and its constructive notice doctrine of posting to the county recorders office, without any need to read, initial or sign one’s consent to be so bound by the CC&Rs that prevails.<sup>5</sup>

It’s an interesting side note that the word “equitable” has been stricken from the Restatement of Laws in the Third edition that contains the common laws on servitudes and covenants. Also, please note that the Arizona Realtor purchase contract is a huge nine-page document of over

500 lines, not including several addendums that may be attached to the contract, where the buyer is required to initial each page as well as adding his signature. The other “binding contract”, the Declaration, is ignored in the purchase process and left to the buyer’s due diligence under a “caveat emptor” philosophy.

What are some of the other facts that support this unjust treatment of the good people of Arizona? It’s hard to imagine a willful consent to the following:

- The CC&Rs are imposed on the homeowner by profit seeking developers in what amounts to an adhesion contract – take it or leave it – with all the powers to the HOA.
- Why is there this 25 or 30-year prohibition on terminating the declaration, amounting to indentured servitude and definitely not permitting the expression of the will of the people? Could it be as a result of the initial mass merchandising of HOAs back in 1964 in order to get builders to build planned communities? The FHA still requires this feature to protect its loans, so goes the special interest argument, but the developer is gone in 5 – 10 years. Why the 30 year requirement? The developer’s lenders were paid in full very quickly and there is no justification whatsoever for this prohibition.

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- Do you really believe that a homeowner has freely consented to have his home foreclosed on by his HOA when the HOA is not in the position of a lender that has advanced any funds to the homeowner? And, at the same time, the homeowner is not permitted to withhold funds while the HOA is permitted to continue in any dispute over payments that have not been resolved, a clear violation of the FDCPA. Did he fully agree to this?
- Do you really believe that the homeowner fully agreed to be bound by ex post facto amendments that are not allowed under the state constitution?
- Or that he has willfully granted a gift to the HOA of his homestead exemption rights that could amount to \$150,000?

If any answer to these questions were a “Yes”, it would reflect a very negative and demeaning view of the citizens. It would reflect a view of a dumb and stupid citizenry that seeks to “put one over” on the HOA and to get out of a binding agreement. It supposes a citizenry more knowledgeable and informed than many legislators or attorneys, and that they understand the consequences and impact of agreeing to the declaration. And, obviously, there would be no need to consumer protection pamphlets or

brochures to alert homebuyers to the fact that the HOA government is not at all like public government, and that the homeowner cannot look to his government for any protection of his rights.

The Legislature cannot hold that there is genuine consent to be so governed. The Legislature cannot continue to believe and to hold that this is a fair and just treatment of the people of Arizona. To use the words of Florida Representative Julio Robaina as directed to an HOA attorney before his committee,

While what you've done may be legal, it is morally and ethically wrong. And we will make changes to the law to correct it.<sup>6</sup>

I ask, "Who is protecting the rights and freedoms of the people of Arizona"? Has any homeowner come forth, who is not a director or officer of an HOA, and has wholeheartedly agreed with the special interest lobbyists who are all so willing to give the legislators a helping hand? In whose interests are do these lobbyists come before you? Surely not the HOAs, since HOAs are not permitted to be members of CAI since 2005. Whose interests, then, are they speaking for?

Legislators must decide whether homeowners associations are subject to either contract laws or to municipality laws. As the elected representatives of the people under state and

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federal constitutions, there is only one answer – a municipal government under the just laws of the state.

Allow me to paraphrase a speech by that Illinois Senator,

A house divided cannot stand. We are more than a collection of condo and homeowners associations. We are, and always will be, the United States of America. Maybe Arizona doesn't have to be run by lobbyists anymore. Maybe the voice of Arizonans can finally be heard again. Homeowners are tired of being disappointed, and tired of being let down, and tired of hearing promises being made ... and nothing changed. We have to choose between change and more of the same. (Barack Obama's Super Tuesday Speech, 2008).

Who is protecting the rights and freedoms of the homeowners?

### **4.3 Contractual interference (May 2008)**

In the *Goldwater Institute Daily* email release of May 22, 2008<sup>7</sup>, the author specifically opposes Arizona HOA reform bill SB1162<sup>8</sup> on the basis of contractual interference, stating,

If freedom of contract means anything in this state, it means that we shouldn't all suffer together when the state overreaches in deciding what's best for us.<sup>9</sup>

Is the Goldwater Institute saying that private contracts supersede all other considerations, like the equal application of the law? The author argues that,

Because the relationship between homeowner associations and their members is a voluntary contract, any law that overrides that relationship violates this principle.<sup>10</sup>

without establishing any basis to support the claim of a fully informed and explicit voluntary consent to be governed.

In a dogmatic defense of preferred principles, the author elevates the disjointed clause in Art. I, section 10 of the Constitution above and beyond the other fundamental rights, especially those enumerated in the Preamble that defines the purpose and intent of the Constitution: "*to establish justice, insure domestic tranquility . . . promote the general welfare, and to secure the blessings of liberty . . . .*" In fact, the contract clause does not even mention the words "interference" or "private" ("No state shall . . . pass



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any . . . law impairing the obligation of contracts . . . .”) These words are found in the earlier Northwest Treaty Ordinance of 1787<sup>11</sup> (adopted on July 13th while the Constitution was finalized on September 17th of 1787), which explicitly stated certain reasonable assumptions that are ignored in any qualification of the sanctification of contracts in the Goldwater email release.

The Northwest Treaty states (emphasis added),

“Art 2nd. . . . And in the just preservation of rights and property, it is understood and declared, that no law ought ever be made . . . that shall, in any manner whatever, interfere or affect private contracts or engagements, bona fide, and without fraud, previously formed.”

Notice that the simple words “bona fide” and “without fraud” always go unmentioned by the public interest firms proclaiming the sanctity of contracts. And this is precisely the argument being made not only by this writer and other advocates, but also by other recognized constitutional scholars and attorneys.

In response to a request for assistance from the Institute for Justice in 2002, it’s VP at the time, now the Director of the Goldwater Center for Constitutional Law, Clint Bolick, replied (emphasis added),

If people decide to form a voluntary community - to use your term, a private government -they should have wide latitude to establish governing rules.

You are of course correct that members of homeowner associations have fewer rights than others-but only because they exercised essential rights in the first place, namely freedom of contract and voluntary association. To the extent that individuals entered into such contracts without full disclosure or appreciation of the consequences, that is a matter of contract law, not constitutional law.

And, in regard to this “wide latitude”, what level of due process notice should be required to surrender one rights, privileges and immunities under the Constitution? Surely not vague and imprecise covenants, or “agreements to agree”, all of which would invalidate an otherwise bona fide contract? Or, the filing of the “agreement” at the county clerk’s office? While there are numerous laws restricting the right to agree, in the name of good public policy to protect the general welfare, such as truth in advertising, truth in lending, equal employment, fair housing, etc, it appears that the Goldwater Institute opposes any protections when people are implicitly agreeing to surrender

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their rights to a homeowners association form of government.

Today, some 6 years later, Bolick argues for judicial activism based on doing justice<sup>12</sup> and comments on an instructional movie on eminent domain, *The Castle*, that applies equally well to the HOA problem. He speaks about the plot,

Only then do the families realize how few rights they have and how easily those rights can be taken away by voracious governments acting on behalf of favored interests<sup>13</sup> . . . . Too often real people when faced with government oppression have no idea how to fight back. They lack the time, the resources, or the experience to organize the community toward political action. They do not have the money to hire lawyers.<sup>14</sup>

Is it good public policy and in the best interests of the people not to provide protections for persons unwittingly succeeding from the state and becoming subject to a separate body of laws inconsistent with state municipality statutes? The court reminds us that the “legislature may not do indirectly what it cannot do directly.”<sup>15</sup>

Does the Institute believe in the Constitution, or does it interpret the Constitution so as to hold the freedom of unrestrained contract, with respect to homeowners associations, superior to all other rights and freedoms granted by the Constitution?

Richard A. Epstein, writing in the *Harvard Law Review*, believes that there are constraints.

Where the “state has absolute discretion to grant or deny a privilege or benefit, it cannot grant the privilege subject to conditions that improperly ‘coerce,’ ‘pressure,’ or ‘induce’ the waiver of constitutional rights.”<sup>16</sup>

And when there is no mandating of HOAs, the question of limiting government police powers with respect to voluntary consent can still be addressed.

Why should there be any limitation at all on a system of government power that rests on the actual consent of the individuals whose rights are thereby abridged? To be sure, even the system of free markets recognizes some limitations upon the principle of consent in ordinary contracts between private individuals. Duress, force, misrepresentation, undue influence, and

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incompetence may be used to set aside contracts that otherwise meet the normal requirements of offer, acceptance, consideration, and consent. But none of these conventional grounds accounts for the doctrine of unconstitutional conditions, which comes into play only after all these conventional hurdles to consensual union have been overcome.<sup>17</sup>

### **Ex Post Facto Amendments**

Is the CC&R contract really sacred, or is it just a meaningless piece of paper given that the law currently enforces ex post facto CC&Rs amendments? Can a bona fide, valid contract be found in "an agreement to agree", which best characterizes the open-ended CC&R amendment process, permitted and supported by the courts? Which is it? A sacred contract or a meaningless piece of paper? Or, does Goldwater believe in separate Constitutions for private governments?

How much "wide latitude", to use Bolick's words again, should the people be permitted in order to form their own private governments that stand in stark contrast to the US Constitution? These private constitutions create authoritarian governments with a single fixed objective to maintain property values, reflecting a single-minded

concern for financial returns. They offer no protection of those rights and freedoms that the Goldwater Institute, and other public policy organizations, cherish, defend and protect.

The Institute's position seems to do an about-face when it allows the individual rights of homeowners to be so readily surrendered by implicit consent and unjust property, not constitutional, laws. And if there's a conflict between property and constitutional laws, does the Institute also support the property law comment that,

The question whether a servitude unreasonably burdens a fundamental constitutional right is determined as a matter of property law, and not constitutional law?

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As for implicit consent, does living and remaining in an HOA, as defenders of the "implicit consent" argument often use, rise to the level of necessary and sufficient consent to be governed by these authoritarian private governments? First, the pro-HOA defenders are once more using public government attributes and ascribing them to the private, contractual HOA government, where there is no basis in the agreement to support this "living amongst" argument. HOAs are not de jure public governments.

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Second, constitutional scholar Randy Barnett doesn't think so either. He explains this "consent to be governed" theory,

One consents to obey the laws of the land because one has chosen to live here. Just as you are bound to obey your employer (within limits) . . . you are bound to obey the commands of the lawmaking system in place where you have chosen to live. . . . So long as you chose to remain, you have "tacitly" consented to obey the laws." Call it the "love it or leave it" version of consent.<sup>19</sup>

While explicitly saying, "I consent" is unambiguous, Barnett argues that,

Simply remaining in this country, however, is highly ambiguous. It might mean that you consent to be bound by the laws . . . or it might mean that you have a good job and could not find a better one [elsewhere] . . . or that you do not want to leave your loved ones behind. It is simply unwarranted that to conclude from the mere act of remaining . . . that one has consented to all and any of the laws thereof.<sup>20</sup>

Those rights being surrendered include such fundamental rights as due process protections and the equal protection

of the law. Section 1 of Article 2, Declaration of Rights, of the Arizona Constitution states that “*frequent recurrence to fundamental principles is essential to the security of individual rights and the perpetuity of free government.*” Article 2 contains more rights than just the right to contract freely from government interference.

This dogmatic defense of freedom to contract by the public interest groups and pro-HOA supporters, such as the national lobbying organization, Community Associations Institute (CAI)<sup>21</sup>, has played a major role in the establishment and acceptance of the ***New America*** of HOAs. These authoritarian contractual governments exist pursuant to their “constitutions” with their “state” objective of maintaining property values. These constitutions exclude, omit, and are devoid of a concern for the protection of individual and property rights so staunchly defended by the Goldwater Institute and other public interest groups. Constitutions that are quite opposed to and foreign to the America of our Founding Fathers.

### **A quest for “equal justice under the law”**

My argument, to make my position clear, is not against “freedom to contract”, but the “freedom from contract”<sup>22</sup>, as imposed by statutes that ignore the bona fide consent to be governed by the homeowners. It is against the special laws and the granting of special immunities and privileges that



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the state has either explicitly granted to homeowners associations, or has refused to protect the public from unforeseen and unwanted consequences, such as the loss of rights and privileges enjoyed by those not living in HOAs.

I ask, whose job is it to protect one faction of the population from another faction? To protect the homeowner against the powerful special interests? If not the government, then who? A major concern by the Founding Fathers for the proper functioning of a democracy was their concern for the tyranny of the majority and the tyranny of the legislature that fails to ignore the rights of the minority.<sup>23</sup> In our current times this quest for equal justice for all was well expressed by the President of the American Bar Association,

It is important that from time to time we pause to consider whether our system of justice is truly available. Nothing is more essential to the health and sanctity of our democracy than the accessibility by all Americans to the judiciary. A nation with the finest judges, most capable counsel, most enlightened laws, and most far-reaching civil rights is nevertheless flawed if access to that country's court system is limited to just a very few.<sup>24</sup>

Appendix A is a copy of an email containing a sample of court opinions in regard to CC&Rs, membership in HOAs,

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and how CC&R amendments are binding on all homeowners, even without a homeowner's explicit consent. It is hard to image that a homeowner under a true bargain give-and-take agreement would accept such an arrangement. One's immediate response is that "sacred" CC&R contract in effect when a homeowner purchased his home becomes a meaningless piece of paper since it can be subsequently altered without his explicit consent.

### **Appendix A. Court Opinions**

Here are a few cases on this important issue of HOA "takings" without consent.

Understand that what has happened here, and continues to happen. The courts are making new law by there opinions. And when there are so many "surprise" opinions, how can anyone accept that the homeowner has agreed to a full and voluntary consent to be governed?

1. *Shamrock v. Wagon Wheel Park Homeowners Association*, No. 1 CA-CV 02-0403 (**Ariz.App.Div.1 08/26/2003**) (imposing mandatory HOA on existing subdivision).

This case involved the imposition of a mandatory HOA on a declaration with voluntary HOA membership. One issue was the validity of an

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amendment making the association a mandatory membership HOA.

For the reasons that follow, we hold that mandatory membership in a new homeowners' association can only be imposed on owners of lots within an existing subdivision by recording deed restrictions to that effect".

As a general rule, the acceptance by the grantee of a deed containing covenants to perform is binding upon him.

Do deeds "contain" covenants, or just a reference? Do they say "the CC&Rs are incorporated into the deed"? Does the purchase contract say, "the CC&Rs are hereby incorporated into and are a part of this purchase contract"?

2. *Maatta v. Dead River*, 689 N.W.2d 491(MI App 2004)

Non-uniform amending CC&Rs without unanimous consent. Reversed because the amendment did not apply uniformly to all lots.

[W]here a deed restriction properly allows a majority, or a greater percentage, of owners

within a particular subdivision to change, modify or alter given restrictions, other owners are bound by properly passed and recorded changes in the same manner as those contained in any original grant and restriction. . . . Because we find that the trial court erred by holding that defendant could, by supermajority vote, revoke a restrictive covenant regarding one particular lot, we reverse.

Historically, restrictive covenants have been used to assure uniformity of development and use of a residential area to give the owners of lots within such an area some degree of environmental stability. To permit individual lots within an area to be relieved of the burden of such covenants, in the absence of a clear expression in the instrument so providing, would destroy the right to rely on restrictive covenants which has traditionally been upheld by our law of real property.

There goes private property rights in this socialistic land. Property rights supersede constitutional rights regarding consent to surrender one's rights.

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3. In *Nahrstedt*, (*Nahrstedt v. Lakeside Village Condominium Association*, 878 P.2d 1275 (1994).

The California court spoke of public policy and the enforcement of covenants,

Indeed, giving deference to use restrictions contained in a condominium project's originating documents protects the general expectations of condominium owners "**that restrictions in place at the time they purchase their units will be enforceable.**" [emphasis added] . . . Ellickson, *Cities and Homeowners' Associations* (1982) 130 U.Pa. L.Rev. 1519, 1526-1527 [stating that association members "unanimously consent to the provisions in the association's original documents" and courts therefore should not scrutinize such documents for "reasonableness."].) **This in turn encourages the development of shared ownership housing** [emphasis added] — generally a less costly alternative to single-dwelling ownership—by attracting buyers who prefer a stable, planned environment. It also protects buyers who have paid a premium for condominium units in reliance on a particular restrictive scheme.

With the above background on the validity of CC&Rs, there remains the question of the validity of CC&R amendments (as Nahrstedt touches upon, but avoids), their application to all non-consenting members, and the argument that there must be only one controlling CC&R document. The Nahrstedt opinion appears to place the original CC&Rs as a binding contract, to be enforced forever. This is the heart of the ex post facto amendment fallacy that is contrary to our values of fairness and legality, and resorts to a strict contractual nature of HOA-land governance. In short, what was illegal for our governments to do is acceptable within HOA governments, in spite of the issues raised earlier of legitimate consent to surrender fundamental and civil rights.

4. *Villa de Las Palmas v. Terifaj* Cal. SC S109123 (2004). In this subsequent 2004 opinion, the question of subsequent amendments to the “binding” CC&Rs is addressed by the California court, which seems to be doing an about face.

We conclude that under the plain and unambiguous language of [the California Davis-Stirling Act], use restrictions in amended declarations recorded subsequent to a challenging homeowner’s purchase of a

condominium unit are binding on that homeowner, are enforceable via injunctive relief under section 1354, subdivision (a), and are entitled to the same judicial deference given use restrictions recorded prior to the homeowner's purchase. [the amended CC&Rs prevail] [emphasis added]

**To allow a declaration to be amended but limit its applicability to subsequent purchasers would make little sense** [emphasis added]. A requirement for upholding covenants and restrictions in common interest developments is that they be uniformly applied and burden or benefit all interests evenly. (See, e.g., Nahrstedt, supra, 8 Cal.4th at p. 368 [restrictions must be "uniformly enforced"]; Rest.3d Property, Servitudes, § 6.10, com. f, p. 200.) This requirement would be severely undermined if only one segment of the condominium development were bound by the restriction. It would also, in effect, delay the benefit of the restriction or the amelioration of the harm addressed by the restriction until every current homeowner opposed to the restriction sold his or her interest. **This would undermine the stability of the community, rather than promote stability**

**as covenants and restrictions are intended to do.** [emphasis added].

The court attempts to justify its rationale with,

One reason for this is because amendment provisions are designed to “prevent a small number of holdouts from blocking changes regarded by the majority to be necessary to adapt to changing circumstances and thereby permit the community to retain its vitality over time.” (Rest.3d Property, Servitudes, § 6.10, com. a, p. 196.) **Subjecting owners to use restrictions in amended declarations promotes stability within common interest developments.** [emphasis added].

5. *Everygreen Highlands Association v. West*, 73 P.3d 1 (Colo. 2003) (amendment to require mandatory HOA). Living dangerously in HOA-land.

In 1995, a majority of the members of the Evergreen Highlands homeowners association voted to amend the subdivision's protective covenants. The



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amendment added a new article to the covenants which: (1) required all lot owners to be members of the association; (2) allowed the association to assess mandatory dues against all lot owners to pay for the maintenance of common areas of the subdivision; and (3) granted the association the power to impose liens on those lots whose owners failed to pay their assessments. . . .

The court holds that the addition of the new article to the covenants falls within the permissible scope of the modification clause of the original Evergreen Highlands covenants. The court also holds that, even in the absence of an express covenant, the declarations for Evergreen Highlands were sufficient to create a common interest community by implication with the concomitant power to impose mandatory dues on lot owners to pay for the maintenance of common areas of the subdivision.

6. *OSCA Development v. Blehm*, E032843, Cal. App 4<sup>th</sup>, DIV 2 (2003)

This is the Desert Crest case pertaining to the validity of CC&R amendments with non-unanimous approval. Read how homeowners can be liable for consequences not reasonably anticipated or expected at the time of purchase — anything goes.

The homeowners voted on an amendment to pay mandatory assessments for a country club, operated for profit, open to the public, and not owner by the HOA. Retired owners of mobile homes filed suit.

In resolving this question, we conclude that the association adopted the amendment in accordance with the governing documents. The amendment, which required club membership and the payment of fees, benefited the homeowners by increasing their property values and providing access to the recreational facilities. Because we conclude that article 19 was a covenant running with the land, OSCA was entitled to enforce its Lien for unpaid assessments.

## Endnotes

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<sup>1</sup> Randy E. Barnett, *Restoring the Lost Constitution: The Presumption of Liberty*, p. 17, Princeton University Press, 2004.

<sup>2</sup> *Id.*, p. 19.

<sup>3</sup> *Id.*, p. 44-45.

<sup>4</sup> It is interesting to note that the Contracts Clause of the US Constitution contains neither the word “private” nor “interference”. However, it does carry with it the presumption explicitly expressed in an Act passed by the Continental Congress at about the same time as the Constitution was written, The Northwest Ordinance of 1787. This Act dealt with the governance of the territories northwest of the Ohio River that were not part of the then existing colonies. In Art. 2<sup>nd</sup>, its version of the contract clause reads: “And in the just preservation of rights and property . . . no law ought to be made . . . that shall . . . interfere with or effect private contracts or engagements, *bona fide*, and without fraud, previously made.”

<sup>5</sup> See generally, *Restatement Third, Property (Servitudes)*, and in particular Sec. 3.1, Validity of Servitudes, General Rule, and Chapter 6, Common-Interest Communities.

<sup>6</sup> Florida House Select Condo/HOA Committee hearing of February 23, 2008, Tampa, FL.

<sup>7</sup> *Regulating HOAs Violates Freedom of Contract*, Nick Dranias, The Goldwater Daily Report, May 28, 2008, (<http://goldwaterinstitute.org/AboutUs/ArticleView.aspx?id=2204>).

<sup>8</sup> SB1162 was a strike Everything amendment sponsored by Rep. Farnsworth, after an earlier bill was held by the House Rules Chairman where it died.

<sup>9</sup> *Supra* note 7.

<sup>10</sup> *Supra* note 7.

<sup>11</sup> *Supra*, note 4.

<sup>11</sup> *David's Hammer: The Case for an Activist Judiciary*, Clint Bolick, Cato Institute 2007.

<sup>12</sup> *Id.*, p. 157.

<sup>13</sup> *Id.*, p. 158.

<sup>14</sup> *Cain v. Horne*, CA-CV 2007-0143, Ariz. App. Div.2, May 15, 2008), citing *Crozier v. Frohmiller*, 179 P.2d 445, 447 (Ariz. 1947) (constitutionality of school vouchers).

<sup>15</sup> *The Supreme Court 1987 Term: Unconstitutional Conditions, State Power, and the Limits of Consent*, Richard A. Epstein, Harvard Law Review, November 1988.

<sup>16</sup> *Id.*

<sup>17</sup> *Restoring the Lost Constitution: The Presumption of Liberty*, Randy E. Barnett, p. 17, Princeton University Press, 2004.

<sup>18</sup> *The Restatement Third, Property: Servitudes*, § 3.1, Comment h, p. 359.

<sup>19</sup> *Supra* note 17, p. 19.

<sup>20</sup> *The Structure of Liberty: Justice and the Rule of Law*, Randy Barnett, p. 92, Oxford University Press 1998.

<sup>21</sup> CAI took a boader stance on the interference of the courts in regard to homeowners associations: "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.", *Committee For A Better Twin Rivers v. Twin Rivers Homeowners Association (TRHA)*, Docket No. C-121-00, NJ Appellate Div. of the Superior Court, 2004. In regard to "the democratic process", CAI argues that the right to vote is the sole requirement for a democracy, "Community associations are not governments — many years of legislation and court rulings have established that fact beyond a reasonable doubt. Yet they are clearly democratic in their operations, electing their leadership from among the homeowners on a periodic basis. . . ." See CAI Ungated blog entry of April 2, 2008 ([http://cai.blogware.com/blog/\\_archives/2008/4/2/3616608.html](http://cai.blogware.com/blog/_archives/2008/4/2/3616608.html)). Ignored are the other "ingredients" of a true democracy: separation of powers, checks and balances, and a concern for individual rights, all absent from HOA "constitutions".

<sup>22</sup> "Freedom of contract" is explained as having two components: "the right of freedom *to* contract and the right of freedom *from* contract. Freedom to contract holds that persons may consent to legally enforceable [contracts]; freedom from contract holds transfers of property rights should not be imposed upon them without their consent."

<sup>23</sup> See generally, *The Federalist Papers*, No. 10 and 78.

<sup>24</sup>Robert E. Hirshon, *Equal Justice as an American Quest*, Law Day Chair's Message, Law Day Planning Guide, May 1, 2002 (<http://www.abanet.org/publiced/lawday/guide2002.pdf> May 25, 2008).



## 5. On Governance

*We, the Trustees of the members of the uniform Community Associations, having been duly elected as the representative of our individual association by the majority vote of the Association's Board, under the powers and authority of the Association so granted to the Board, in order to attain a more perfect conformity to the objectives and mission of UCATA, to wit: the maintenance of property values and the compliance with the governing documents of the Association; under a freely given voluntary agreement and consent to be governed, and an acknowledgement and acceptance of the Restatement of Servitudes and UCIOA as the supreme law of the land, do hereby ordain and establish the **Uniform Community Association Trust of America.***

. . . a future development

### 5.1 The non-legitimate Social Contract (July 2006)

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 Jean-Jacques Rousseau, *The Social Contract* (1762)<sup>1</sup>, and of John Locke, *The Second Treatise of Government* (1690)<sup>2</sup>. 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 that 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.<sup>3</sup>

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."<sup>4</sup>

The national lobbying organization, Community Associations Institute (CAI), promotes planned communities with their HOA governance as the means to better communities and community governance. Its promotional brochure, *Rights and Responsibilities for Better Communities*<sup>5</sup> clearly reflects the position that the CC&Rs are a community social contract regulating and controlling the homeowners, and not a business arrangement:

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;
- that must comply with rules and regulations (community ordinances with less protections for homeowners than provided by the municipality);

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- that is subject to fines (equivalent to community crimes for violations of said “ordinances”) and liens are granted for the fines;
  
- that is governed by a corporate form of a board of directors, with less protections for fair and open elections; and
  
- with a disenfranchisement if late in any payments to the HOA, including inability to use the “public” amenities; and.

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.<sup>6</sup> 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

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legitimate authority among men must be based on covenants” and “might does not make right, and that the duty of obedience is owed only to legitimate powers<sup>7</sup>, 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?

### **HOAs and the Social Contract**

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*”<sup>8</sup>, 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

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relegated to an inferior position as to the protections and guarantees of these fundamental rights.

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 state and country. Therefore, they must be de facto governments<sup>9</sup> 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 opinion<sup>10</sup> 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 . . . .”*<sup>11</sup> And HOAs are equivalent to civil governments and must be so recognized by the legal system.

### **Legitimacy of HOA social contract**

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

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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 government<sup>12</sup>, 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.<sup>13</sup>

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.

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,



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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.<sup>14</sup>

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 . . .<sup>15</sup>

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.”<sup>16</sup>

**HOA boards do not represent the membership**

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 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 14<sup>th</sup> 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.

## **5.2 On The Second Treatise of Civil Government<sup>17</sup> (June 2005)**

### **CHAP. IX. Of the Ends of Political Society and Government.**

Sec. 123. If man in the state of nature be so free, as has been said; if he be absolute lord of his own person and possessions, equal to the greatest, and subject to no body, why will he part with his freedom? Why will he give up this empire, and subject himself to the dominion and controul of

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any other power? To which it is obvious to answer, that though in the state of nature he hath such a right, yet the enjoyment of it is very uncertain, and constantly exposed to the invasion of others: . . . the enjoyment of the property he has in this state is very unsafe, very unsecure.

This makes him willing to quit a condition, which, however free, is full of fears and continual dangers: and it is not without reason, that he seeks out, and is willing to join in society with others, who are already united, or have a mind to unite, for the mutual preservation of their lives, liberties and estates, which I call by the general name, property.

Sec. 124. The great and chief end, therefore, of men's uniting into commonwealths, and putting themselves under government, is the preservation of their property. To which in the state of nature there are many things wanting.

### **CHAP. XI. Of the Extent of the Legislative Power.**

Sec. 138. Thirdly, The supreme power cannot take from any man any part of his property without his own consent: for the preservation of property being the end of government, and that for which men enter into society, . . . Men therefore in society having property, they have such a right to the goods, which by the law of the community are their's, that no body hath a right to take their substance or any part of it from them, without their own consent: without this they have no property at all . . . Hence it is a mistake to think, that the supreme or legislative power of any

commonwealth, can do what it will, and dispose of the estates of the subject arbitrarily, or take any part of them at pleasure. . . . and so will be apt to increase their own riches and power, by taking what they think fit from the people.

### **5.3 Seceding from local government (September 2005)**

In Chapter. 20, Neighborhood Secession,<sup>18</sup> Robert Nelson speaks of what some would call treason, and over which this country fought a Civil War and many Americans died. In this chapter, the author addresses the question of seceding, as he calls it, from the local government and creating your own local private government as any community is able to do under their state's incorporation statutes. Without providing the citation, Nelson makes the assertion that "The evidence in Montgomery County [where the author lives] suggests that, where a small municipality and a private neighborhood are alternative governmental forms, many people now prefer the private regime."<sup>19</sup> Yet he admits that the special interest and HOA proponent platitude of moving, "likely involves considerable costs . . . [and] When confronted with the high costs of moving, most homeowners are likely to raise the volume of their complaints."<sup>20</sup>

Nelson again resorts to a constitutional revolution to solve this problem with local government dissatisfaction and the adversity to moving out, but fails to equate civil government with private neighborhood government – a government is a

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government — giving private neighborhood government, the HOA, the allure of utopian perfection. Using James Buchanan as his voice,

“This might be accomplished by a constitutional revolution [devolving government authority]. . . . [B]y providing an option of secession, a useful means of pressuring the larger government when the option is not actually exercised. . . . If no major problems or obstacles are found, a new legal option of local ‘free secession’ might be provided by law.”<sup>21</sup>

Noting the work of Sheryll D. Cashin, the author addresses private secession by the creation of private neighborhoods – the HOA, pointing out that using blighted areas as justification, the local government can create private neighborhoods (planned communities) easier than incorporating a community. Nelson looks to the future, commenting on the quasi-secession of today’s planned communities that still rely on many local government services,

“[I]n the future, more complete forms of private secession may become possible. For example, if neighborhood associations become more numerous, the political pressures for substantial rebates from property taxes – for relief from the

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current system of ‘double taxation’ – are bound to grow.”<sup>22</sup>

Is this treason?

“”[A]s traditional norms are increasingly challenged, the use of government coercion to enforce a set of uniform set of social norms has become less acceptable. What, then, can justify the use of coercion to compel one political jurisdiction to remain ‘married’ to another jurisdiction?”<sup>23</sup>

Or is Nelson referring to planned community private governments and the complaints echoing in the media across the land? And to make his argue solid and acceptable to all, including government officials, he states, citing Georgette C. Poindexter,

“As a form of private secession from an existing local government, it is consistent with the spread of pro-choice attitudes in marriage, abortion, and many areas of American life.”<sup>24</sup>

And he further resorts to arguments of peoples having a strong commitment to their own values, by using examples of Muslim communities and the attitudes of Arab women. And finally, Nelson argues that there should be no objection



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to the just exercise of voluntary consent to “exit” the local government and create the HOA principality. However he ducks the constitutional and ethical question of consent of the majority, and the taking of property rights from those who do not consent.

The author ends this highly controversial chapter with, “Secession’ really means ‘group freedom’ to exit in matters of local governance and land use.”<sup>25</sup> As I’ve written earlier on this topic, the future holds,

### **The United HOAs of America**

And holds, similarly, for each and every state in the Union.

#### **5.4 HOAs as de facto political governments (August 2007)**

##### **The status of our judicial system**

America is no longer a country governed under the laws of the land, but by the laws of men and the predilections of judges. Americans are living in a society that has been reinvented by public interest firms, government officials and the courts, including the US and state supreme courts. A society where black is defined to look like white, and white is defined to look like black. Where what you see is not

what you get – a modern version of the Wonderland of Alice and Lewis Carroll. Where important and meaningful philosophies and political theories are made less and less distinguishable so that everything A is like everything B.

Where traditional legal meanings such as constitutional and private property rights have become whatever the current group in power says they are. Where “government intervention” really means “laissez faire” government at the turn of the 20<sup>th</sup> century, or that “anything favorable to business goes”. Where the courts have upheld the common law of equitable servitudes superior to constitutional and state laws, and, therefore, as the true supreme law of the land.

As applied to homeowner associations, Americans are faced with the same changing legal landscape, where traditional laws and legal precedent are being treated as starting points of discussion rather than as the foundation of our system of jurisprudence. Randy H. Barnett wrote,

When a writing can be contradicted by testimony of a differing understanding, the purposes for which the agreement was put into writing in the first place is undercut. . . . If we let writings be contradicted by extrinsic evidence, then . . . little or no purpose would be served by the original writing.<sup>26</sup>

As an example, the Supreme Court's holding that "public use" is the same as "public purpose" for eminent domain takings of private property<sup>27</sup> is a contradiction to the original meaning of the Constitution. However, attempting to arrive at a just application of privacy and confidentiality protections to the technological advance of the internet is a legitimate interpretation and construction of the Constitution to new areas not existing at the time of the writing of the Constitution.

As an example in regard to the changing legal HOA landscape, the Constitution prohibits *ex post facto* laws that make an activity that was legal in the past now an illegal activity and a violation of law. Yet, HOAs are allowed to amend their CC&Rs to declare a prior activity not in violation of the CC&RS to be now a violation — an "ex post facto amendment". The courts not only permit the retroactivity of these amendments, but require such application are necessary for the benefit of all homeowners — all homeowners new that there can only be one set of rules declared several state courts. The original CC&Rs have no legal status under equitable servitudes, but would remain binding under contract law. If the HOA were deemed a municipality then these *ex post facto* amendments would be prohibited, as they are for any other public government.

Further confusing the landscape, homeowner associations have been described as a business, as a government or

quasi-government, and the compromise, but empty, description of a “sui generis” (unique, one of a kind), and are marketed as a community association with the implication of a government, and not a business. What are HOAs under law? What are HOAs in reality? These important questions must be answered before any workable and effective solutions to their continued problems can be given.

This writing relates to the nature and status of HOA governments in this changing landscape. What factors or functions define a government? More specifically, what distinguishes a municipality from the government of a business? Or, from a church? Or from a university? Or from an HOA Board of directors? What or who does a “government” govern? What does a “quasi-government” mean?

In order to answer these questions satisfactorily, the meanings of related terms need investigation: political government, sovereignty, state and board of directors. (See Exhibit A for Black’s Law Dictionary, definitions of these and other concepts and terms).

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**The “public functions” test fails and needs to fade away into oblivion.**

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The antiquated and poorly arrived at opinion<sup>28</sup> of a delineation of a town as to the public functions it performs is a grossly poor definition of a government. The public functions test fails under scrutiny of the various state municipality laws setting forth the requirements for incorporating towns/villages and cities, the most obvious two requirements are state approval of the charter and a vote of the affected citizens. Not all towns, villages or cities provide the same set of functions, as the incorporation of these entities is based on population criteria. In other words, small towns are not created with the identical functions of a large city. In fact, as opposed to the Marsh opinion, state municipality laws do not require municipal entities to have a library or a park, or to permit businesses to operate, or to require public streets.

### **The government of business, university or church**

Clearly and indisputably, the body responsible for the government of these entities is set forth in state laws and in the articles of incorporation and bylaws, and is given the designation of board of directors, or board of trustees, etc. “The who” and “the what” are delineated in state laws and in the above-mentioned corporate documents. The NJ Supreme Court in its opinion on HOA constitutionality considers HOAs to have business-like legal properties:

That is, a homeowners' association's governing body has "a fiduciary relationship to the unit owners, comparable to the obligation that a board of directors of a corporation owes to its stockholders."<sup>29</sup>

The court stopped short of declaring that HOAs as bona fide businesses, knowing all too well that a "nonprofit business" is an oxymoron (self-contradictory), and that the distinguishing characteristic of a business is to make a profit. Blink your eyes Alice, because the Community Associations Institute (CAI) continues to argue that HOAs are a business to further advance its own personal agenda. However, the CC&Rs are binding not by virtue of business law, but by virtue of property laws and equitable servitudes. Yet, CAI, and other special interests, continues to speak of, advertise, and promote HOAs as community associations (CAs) and not business residential associations (BRAs).

It must be noted that each of these entities usually regulates and control the activities of the people within a territory, such as the campus or dormitories. These organizations may even issue monetary fines against people within and subject to their territory for violations of rules of conduct. Further criteria are needed to distinguish municipal governments from these governments.

**Municipal government**

A quick blink of the eye, Alice, now shows CAI now proclaiming that HOAs, as community associations, are a form of community government, a government created by and for the benefit of the homeowners and not by and for the developers and hired hand members of CAI. CAI argues that they are the expression of the people, local democracy at work.

It is safe to define and to distinguish a municipal government from the entities responsible for the governing of a nonprofit board of directors or university board of trustees simply by the laws that permit and govern their existence, namely, the municipality laws.

While municipal governments perform, or contract for, the same services that the business would provide or perform does not make the municipal government a business, even though the municipality may charge for the service or product as it's purpose was similar to that of a business, except for one very important point. Municipal governments are not allowed to make a profit. Any surpluses go back into state funds for the benefit of the inhabitants or the territory so government by the municipality. Therefore, it can be argued that the municipality is just like any other nonprofit organization.

However, the mission as specified in the town charter differs markedly from that of the nonprofit, or a business. As seen

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below, a municipality neither is not a business or a nonprofit, nor is a business or nonprofit a municipal government.

The Scottsdale, AZ city charter reads (emphasis added),

### Sec. 1. Incorporation.

The inhabitants of the City of Scottsdale, within the corporate limits as now established or as hereafter established in the manner provided by law, shall continue to be a municipal body politic and corporate in perpetuity, under the name of the "City of Scottsdale".

### Sec. 2. Form of government.

The municipal government provided by this charter shall be known as the council manager form of government. Pursuant to its provisions and subject only to the limitations imposed by the state constitution and by this charter, all powers of the city shall be vested in an elective council, hereinafter referred to as "the council," which shall enact local legislation, adopt budgets, determine policies and appoint the city manager and such other officers deemed necessary and proper for the



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orderly government and administration of the affairs of the city, as prescribed by the constitution and applicable laws, and ordinances hereafter adopted by the city. All powers of the city shall be exercised in the manner prescribed by this charter, or if the manner be not prescribed, then in such manner as may be prescribed by ordinance.

### Sec. 3. Powers of city.

The city shall have all the powers granted to municipal corporations and to cities by the constitution and laws of this state and by this charter, together with all the implied powers necessary to carry into execution all the powers granted, and these further rights and powers . . .

The Austin, TX charter reads (emphasis added),

### § 1. INCORPORATION.

The inhabitants of the City of Austin, Travis County, Texas, within its corporate limits, as established by Chapter 90, page 634, Special Laws of Texas, 1909, 31st Legislature, and as extended by ordinances of the City of Austin enacted subsequent thereto, shall continue to be and are hereby constituted a body

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politic and corporate, in perpetuity, under the name the “City of Austin,” hereinafter referred to as the “city,” with such powers, privileges, rights, duties, and immunities as are herein provided . . .

§ 2. FORM OF GOVERNMENT.

The municipal government provided by this Charter shall be, and shall be known as, “council-manager government.” Pursuant to the provisions of, and subject only to the limitations imposed by, the state constitution, the state laws, and this Charter

§ 3. GENERAL POWERS.

The city shall have all the powers granted to cities by the Constitution and laws of the State of Texas, together with all the implied powers necessary to carry into execution such granted powers.

As can be plainly seen, these charters explicitly mandate that municipal governments be subject to the state constitution and municipality laws, and as such, are subject to the Fourteenth Amendment to the US Constitution. Consequently, it is quite clear that a

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nonprofit corporation like an HOA (which actually refers to the entity that governs a subdivision, or territory, and not the subdivision itself) cannot be a municipal government. Neither can boards of directors of universities or other nonprofits be considered a municipal government. In the Twin Rivers opinion, the NJ Supreme Court held that (emphasis added),

We find that the minor restrictions on plaintiffs' expressional activities are not unreasonable or oppressive, and the Association is not acting as a municipality.<sup>30</sup>

We briefly outline the development of our law expanding the application of free speech or similar constitutional rights against nongovernmental entities.<sup>31</sup>

Note that the court is not saying that the HOA is a municipality, which is obvious that it is not, but that it is "not acting as a municipality." Now, this pronouncement can be seen as begging the question – since the HOA is not a municipality it cannot act like a municipality. How does a HOA? In the instance before us, both entities set rules and regulations (ordinances), regulate a person's conduct, and are permitted to impose monetary fines against noncompliance. How is the HOA not acting like a municipality when it restricts free speech? Or regulates usage of property or services?

If the court had found Twin Rivers to be acting like a municipality, then the HOA would be a state actor subject to the 14<sup>th</sup> amendment restrictions.

### **What's a "quasi-government"?**

What is meant by the term, "quasi-government"? Everyone involved in this HOA controversy, including the courts, have referred to HOAs as quasi-governments at one time or another. A search of Black's results in no such definition! However, the word "quasi," alone, is defined using a Corpus Juris Secundum (legal encyclopedia) citation in terms of "resembling", but "sufficiently similar for one to be classified as the equal of the other" (see Exhibit A).

In an effort to clear the smoke and escape from plunging further into this legal Wonderland, Black's offers a definition of a "quasi-autonomous nongovernmental organization" that is a semi-public organization supported by government, but not answerable to it, such as a tourist authority or university-grants commission. Perhaps a better characterization of an HOA is that it's such an animal. The status of this "animal" as a state actor remains unanswered.

**Can there exist a “government” that is not a municipality?**

Does the US Constitution permit or prohibit the existence of non-municipal governments to regulate and control the people in a territory within the United States? Do private contracts that establish governments over a community, yet are thereby excluded from the prohibitions of the 14<sup>th</sup> Amendment, violate the Constitution or good public policy? The Constitution simply states that, “New States may be admitted by the Congress into this Union . . . (art.4, sec.3), and “The United States shall guarantee to every state in this Union a republican form of government . . . (art.4, sec. 4).

A test of these provisions occurred in 1870 with a dispute concerning the transfer of jurisdiction of two counties from Virginia to West Virginia. Under the Constitution, the US Supreme Court ruled that such a transferred required Congressional consent, the consent of both states, and the majority vote of the affected population. (*VA v. WV*, 78 US 39; see Exhibit B for a summary).

Both federal and state constitutions are silent on the establishment of governments not formed under their respective municipality laws. But states generally prohibit the formation of any municipal corporation except by the legislature: “Municipal corporations shall not be created by special laws, but the legislature, by general laws” (Ariz. Const., art.13, sec. 1). However, some states allow for a

grant of self-government powers within which the municipality functions as the sovereign.

Municipalities shall have authority to exercise all powers of local self-government and to adopt and enforce within their limits such local police, sanitary and other similar regulations, as are not in conflict with general laws. (Ohio const., art xviii).

Specifically regarding municipalities, records pertaining to the creation/modification of state counties are hard to come by. In Arizona, however, La Paz County is the only county in Arizona to have been formed after statehood (1983), and via county initiative. Northern residents of Yuma County proposed and won an initiative to split the northern portion into a new county, which became La Paz.

HOAs seem to have the powers of local self-government, but without being established under the municipality laws of the state or without a plebiscite. What is the legal status of an HOA government? In particular for our analysis, considering all the evidence, are HOA governments state actors? Should they be formed under and subject to the municipality laws?

Does the prohibition against interference with contractual obligations allow private parties to contract for such

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entities, governments that are not subject to municipality laws? Does the government possess a right to restrict contractual agreements? It is a well-entrenched legal doctrine that government has the police powers to restrict constitutional freedoms and liberties under certain conditions, that being concern for the general welfare of the public. Another way of looking at “promoting the general welfare” is to look at the pronouncements of public policy by our government, including the legislature and the courts.

Can there exist a form of government that is not a municipality, but a legitimate government under law, or a de jure government? The answer is simply, yes. Under the various definitions by Black’s Law Dictionary in Exhibit A, HOAs are governments over a people within a territory, and are essentially sovereign since state laws do not hold them accountable and the courts defer to the judgment of the HOA board. HOAs are de jure governments since state law does not prohibit their existence, but recognizes and regulates them, and only in very limited ways prohibits their activities. HOAs exist according to and under the laws of the state and are, by definition, de jure governments. HOAs are also de facto governments — they exist in fact.

**Why are HOA governments not recognized as legitimate governments?**

HOAs are not created as a result of a vote of the people or approved by any state agency or legislature, and are based not on municipality laws but on the property laws of servitudes. They are primarily constructed to protect the financial interests of private developers, while adding physical features that may add to the attractiveness of the landscape, employ an “enforcement agency, the HOA board. However, HOAs deny homeowner rights and freedoms to which homeowners are otherwise entitled to if they did not live in an HOA. Especially in regard to restraints on HOA government actions as restraints on any government were deemed essential under our American system of government.

Constitutional law requires explicit legislative consent for a valid delegation of its authority to other government agencies or to private entities. The following citation is from Grimaud concerning an unconstitutional delegation of legislative power to a cabinet secretary. Note the requirement for the legislature, Congress in this case, to delegate authority for administrative regulation, for the “determination of minor matters” and with “power to fill up the details”. With respect to HOAs, there is no grant of any authority by state legislatures giving HOAs policy making discretionary powers that are the sole domain of the



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legislature as set forth under the US and state constitutions.

Congress was merely conferring administrative functions upon an agent, and not delegating to him legislative power. The authority actually given was much less than what has been granted to municipalities by virtue of which they make by-laws, ordinances, and regulations for the government of towns and cities. Such ordinances do not declare general rules with reference to rights of persons and property, nor do they create or regulate obligations and liabilities, nor declare what shall be crimes, nor fix penalties therefor.

By whatever name they are called, they refer to matters of local management and local police. They are 'not of a legislative character in the highest sense of the term; and as an owner may delegate to his principal agent the right to employ subordinates, giving to them a limited discretion, so it would seem that Congress might rightfully intrust to the local legislature [ authorities] the determination of minor matters.'

From the beginning of the government, various acts have been passed conferring upon executive officers power to make rules and regulations,- not for the government of their departments, but for administering the laws which did govern. None of these statutes could confer legislative power. But when Congress had legislated and indicated its will, it could give to those who were to act under such general provisions 'power to fill up the details' by the establishment of administrative rules and regulations, the violation of which could be punished by fine or imprisonment fixed by Congress, or by penalties fixed by Congress, or measured by the injury done.

*US v. Grimaud*, 220 US 506 (1911).

CAI seems to think that interference in these contractual obligations is a “sacred cow”, untouchable, and one of the few undeclared unalienable rights in the US Constitution in contrast to free speech, due process protections and the equal application of the laws.

We are pleased that the court has disallowed intrusive government interference in the rights of private homeowners . . . . With this

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decision, homeowners can continue to govern their own communities by mutual consent and continue to enjoy the self-determination and quality of life they have come to enjoy.<sup>32</sup>

This is an important victory for homeowners and associations across the country. . . .and it supports the traditional concept that government (whether it be the executive, legislative or judicial branches) should not interfere with private contracts and associations freely entered into.<sup>33</sup>

This is rather disingenuous of the long-time national lobbying organization for the HOA industry, CAI. The only evidence for any claim of a freely entered into contract or a mutual consent to be governed by the HOA is the purchase of a home in HOA-land. Furthermore, homebuyers are not buying with full and complete knowledge of the consequences of living in an HOA that is easily characterized as an authoritarian government operating outside the protections available to homeowners living outside HOAs. And, when the homebuyer has no choice for comparable homes without an HOA, as is increasingly happening in more and more communities, these claims become more unsupportable.

Blink your eyes Alice. It appears that CAI is once again looking at HOAs as municipal governments where all

residents are bound to the laws of the area regardless of having read or understood the applicable laws, while, in the same breath, claiming interference with private contracts. Consent to be governed by the public governmental entities is presumed when a person moves into the area, and CAI is taking the same approach with HOAs. Why? Because the legality of CC&Rs is not based on bona fide contracts, but real property servitudes, and some other avenue of defense is necessary – the “now HOAs are a government” defense.

Blink your eyes Alice, and now see CAI imposing on local communities the top-down uniform common interest laws, known as UCIOA, for adoption in every state. This model is authoritarian and is essentially the model adopted from the seminal publication on the creation, development and operation of planned communities contained in the 1964 Urban Land Institute’s *The Homes Association Handbook*<sup>34</sup>. Note that the sponsor of the guide to HOAs is a real estate public interest organization formed from a split-off from the national Realtors organization in 1933, and not a political science or public interest organization seeking to establish better communities.

Those familiar with many HOA CC&Rs will see many similarities with this handbook, but with UCIOA as well. This should not be a surprise to anyone, since all parties share the same beliefs and belong to the same real estate interests club. Documents that do not contain any

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protections for homeowners, but many rights granted to the HOA to coerce payments of assessments, issuing of fines, inadequate election procedures to insure fair elections and removal of board members, and completely ineffective mechanisms whereby homeowners who differ with the actions of the board cannot obtain effective due process. Documents that either themselves are adhesion contracts — take it or leave it — or support and legalize these unconscionable “contracts”. This imposition of an un-American state charter for HOAs, UCIOA, is a direct contradiction to the claims of community democracy in action

Why shouldn't HOAs be recognized as a public entity subject to municipality laws and the 14<sup>th</sup> Amendment? Because continued failure to do so serves to establish a legitimate America as a New America, whereby citizens who do not like their government can create their own political governments free of US Constitutional constraints, prohibitions and restrictions. Form an HOA with CC&Rs over your village or town. Let the people in St. George do so! Or these militant groups! Form a New America that rejects the US Constitution, the Bill of Rights, and the political philosophies and theories, beliefs and values that make America stand out as a nation for the people, of the people, by the people.

Truly, this New America is one of a growing balkanization of principalities not accountable or answerable to the

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government of this country. America must remain a government under law, and not under HOA governments inconsistent and conflicting with the Constitution, creating a multitude of laws applied to differing groups of citizens.

This state of affairs may lead to HOA secession, a New America, according to Robert Nelson.

Hence it may be desirable to review systematically the institutional mechanisms that can provide an exit from local government. . . . That is, the area could secede from the local government . . . The best hope might be a constitutional revolution that involved ‘dramatic devolution’ of governing authority.<sup>35</sup>

### **Restoring the America of our Founding Fathers**

The solution to over 43 years of planned community discord and continued problems, incapable of solution under these 43 years of “patching”, is the simply declaration that HOAs are public entities. Then, all citizens are subject to the same laws and constitutional protections while permitting individual variations from local ordinances and amenities

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restricted to the “HOA taxing district”, which are the two basic claims to any valid argument to the right to local expression.

This can be accomplished quite easily and painlessly, if it were not for the national lobbying organization’s pursuit of its personal agenda for “laissez-faire” private governments, and its insistence on complete independence of HOAs from the judicial application of the supreme laws of the land. Completely independent of course, except under the centralized, national dominance of UCIOA, and its derivative state laws and CC&Rs, that establish authoritarian regimes contrary to the American system of government.

### **Exhibit A. Black’s Law definitions<sup>36</sup>**

#### Government

2. The sovereign power in a nation or state, 3. **An organization through which a body of people exercise political authority;**

#### State

1. The political system of a body of people who are politically organized;

annotation:

A state or political society is an association of human beings established for the attainment of certain ends by certain means.

**Modern states are territorial; their governments exercise control over persons and things within their frontiers . . .**

De facto government

2.      An independent government established and exercised by a group of a country's inhabitants who have separated themselves from the parent state.

De jure

Existing by right or according to law.

**Sovereign state**

**A political community whose members are bound together by the tie of common subjugation to some central authority.**

Sovereign

The ruler of an independent state.

Politics

The science of the organization and administration of the state; the activity or profession of engaging in political affairs.

Political

Of or relating to the conduct of government

Business

A commercial enterprise carried on for profit; a particular occupation or business habitually engaged in for livelihood or profit

Quasi-government

No definition provided. Under "quasi" we find, Quasi, citing 74 C.J.S at Quasi, 2:A Latin word [that] marks the resemblances, and supposes a little difference . . . . [I]t negatives [sic] the idea of identity, but . . . [concepts] are sufficiently similar for one to be classified as the equal of the other.



Quasi-autonomous

nongovernmental

organization

A semi-public administrative body having some members appointed and financed by, but not answerable to, the government, such as a tourist authority, a university-grants commission . . .

Sovereign power

**Power that is absolute and uncontrolled within its own sphere.**

**Within its designated limits, its exercise and effective operation do not depend on, and are not subject to, the power of any other person** and cannot be prevented or annulled by any other power recognized within the constitutional system [of the state or territory].

**Exhibit B. Transferring state jurisdiction<sup>37</sup>**

The following summary provides guidance as to the requirements for the alteration of municipal boundaries.

Essentially, with the allegiance of Virginia to the Confederate States, the northwest part of Virginia, on the other side of the Shenandoah Mountains, sought to remain

with the United States. Several counties were given the option to transfer to the new state of West Virginia, but a majority vote would first be necessary to make that happen. It eventually took place, but the agreement between the two states, ratified as required by Congress, called for the Governor of Virginia to certify the elections in his own discretion. The vote to transfer of these two counties was challenged in the case before the Supreme Court.

Our interest is in the approval of all governmental entities affected by the transfer, and in the requirement for a vote the people, and not simple the acceptance of a deed recorded in the new state of West Virginia. The Supreme Court found the certification of the vote valid. Some highlights:

As there seems to be no question, then, that the State of West Virginia, from the time she first proposed, in the constitution under which she became a State, to receive these counties, has ever since adhered to, and continued her assent to that proposition, three questions remain to be considered.

1. Did the State of Virginia ever give a consent to this proposition which became obligatory on her?

2. Did the Congress given such consent as rendered the agreement valid?
  
3. If both these are answered affirmatively, it may be necessary to inquire whether the circumstances alleged in this bill, authorized Virginia to withdraw her consent, and justify us in setting aside the contract, and restoring the two counties to that State.

The State of Virginia, in expressing her satisfaction with the new State and its constitution, and her consent to its formation, by a special section, refers again to the counties of Berkeley, Jefferson, and Frederick, and enacts that whenever they shall, by a majority vote, assent to the constitution of the new State, they may become part thereof;

These statutes provide very minutely for the taking of this vote under the authority of the State of Virginia; and, among other things, it is enacted that the governor shall ascertain the result, and, if he shall be of opinion that said vote has been opened and held and the result ascertained and certified pursuant to law, he shall certify

that result under the seal of the State to the governor of West Virginia; and if a majority of the votes given at the polls were in favor of the proposition, then the counties became part of said State.

### **5.5 HOAs are separate but equal public governments (November 2006)**

As I far as I could determine, from my non-lawyer research, the issue that constructive notice meets the US Supreme Court judicial review tests for the surrender of constitutional rights has never been specifically challenged. The complex issues relate to the taking of one's rights and property under the 5th and 14th Amendments without "*due process*", or a violation of the "*equal application of the laws*" doctrines.

Under procedural due process, levels of review have been stated regarding any such "*takings*" — were proper procedures followed in the taking. Under substantive due process, was the Constitution violated?

In procedural due process, for example, minor rights need only meet the "*government interest*" test — it's in the interest of the government to take away such rights, as putting up signage on one's property, or notice of an HOA violation. And, under substantive due process, there are the "*fundamental rights*" that are NOT found in the

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Constitution, but have been determined by an activist Supreme Court.<sup>38</sup>

In regard to HOAs and planned communities, the task before advocates is very similar to the landmark civil rights cases relating to “*separate but equal*” facilities in Plessy<sup>39</sup>, which was overturned in part with respect to education by Brown.<sup>40</sup>

Are private HOA governments separate but equal to public government? Lower courts have implicitly said “Yes” by their decisions to uphold the loss constitutional rights, without examining or raising the issues of explicit agreement, sufficient notice and a legitimate government interest. It appears that our courts have held that, **“No, Americans do not have a right to public government.”**

### **Welcome to the New America!**

#### **5.6. Do HOA statutes create state actors? (July 2007)**

Do state laws coerce homeowners and support HOAs? Are UCIOA and other HOA statutes establishing state actors? A state actor or action is one involving an entity or action that would be considered an act by a government entity.

The New Jersey Supreme Court appears to headed for a decision soon on constitutional issues for homeowner rights — the Twin Rivers case. Steven Siegel,<sup>41</sup> whose very

important paper on state actors, constitutionality and private governments is referenced has also co-authored the Twin Rivers AARP amicus curiae brief for the homeowners.

The US Supreme Court has stated criteria for state actors/actions beyond the antiquated “public functions” test based on the 1946 company town model in *Marsh*<sup>42</sup>. In my view, many state statutes easily satisfy one or more of these criteria and clearly establish HOAs as state actors.

Our cases have identified a host of facts that can bear on the fairness of such an attribution. We have, for example, held that a challenged activity may be state action when it results from the State’s exercise of **“coercive power,”** *Blum*, 457 U.S., at 1004, 102 S.Ct. 2777, when the State provides **“significant encouragement, either overt or covert,”** *ibid.*, or when a private actor operates as a **“willful participant in joint activity with the State or its agents,”** *Lugar*, *supra*, at 941, 102 S.Ct. 2744 (internal quotation marks omitted). We have treated a nominally private entity as a state actor when **it is controlled by an “agency of the State,”** *Pennsylvania v. Board of Directors of City Trusts of Philadelphia*, 353 U.S. 230, 231, 77 S.Ct. 806, 1 L.Ed.2d 792 (1957) (*per curiam*), **when it has been**

**delegated a public function by the State,** cf., e.g., *West v. Atkins*, supra, at 56, 108 S.Ct. 2250; *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 627-628, 111 S.Ct. 2077, 114 L.Ed.2d 660 (1991), **when it is “entwined with governmental policies,” or when government is “entwined in [its] management or control,”** *Evans v. Newton*, 382 U.S. 296, 299, 301, 86 S.Ct. 486, 15 L.Ed.2d 373 (1966).<sup>43</sup>

I believe that many elements of state laws can be shown to create HOAs state actors. Many phrases in law are simple pro-active statements, such as the words “constitute” or “create”, as in “acceptance of the deed constitutes acceptance of the CC&Rs” or “creates a lien on the property as of the date the assessment is due”. In other phrases we run into the issue of state mandates. For example, the word “shall” in statutes is interpreted to mean “must”, and the word “may” does not constitute a command or order, but a just an option. Therefore, it has been argued, a statute is not a legislative mandate if it contains the word “may” rather than “shall”, as many HOA statutes contain.

But, let’s examine this a little more closely. The state has the right under its police powers to regulate our activities, but it must justify its interference as a legitimate government interest. And the tests for “legitimate government interest” become more severe as the state

attempts to take away our fundamental rights. For example, the state restriction on our rights must not be one of convenience for them, but of necessity because the state's objective could not otherwise be accomplished. I have not seen any such justifications in any state HOA Acts or statutes, not even in the various UCIOAs.

If the law is silent on an issue, the legality of the issue is open for a decision. If the law says "shall" or makes what I referred to as a "simple pro-active statement", then the answer has been given quite clearly. If the statute says "may not", then it is also quite clear. Now, if it says "may", isn't this a legalization of the act and a permission for a person to act in such a manner? While it is not the same as a mandate by the state, isn't it a legalization of the act? And as such, isn't the state "sanctioning" the act, which can be viewed as state support for the action, such as fining a homeowner without providing proper due process protections by independent tribunals? Otherwise, if the state disapproved or did not support the action, the statute would have read "may not". But, it said. "may".

I argue that all these "mays" are a clear indication of state support, encouragement and coercion in favor of HOAs that deny homeowners their fundamental rights, and make HOAs state actors.



**5.7 “Municipalize” homeowners associations (July 2004)**

Why are private corporations permitted to "grant" private government charters to organizations that give the power to control and regulate the people within the territorial boundaries of the subdivision? The developers are creating political governments, sometimes as a requirement of a local government.

What is the purpose of permitting and protecting such agreements through legislation that "sanctifies" these provisions in CC&RS? These CC&R "constitutional charters" that lack protection for the rights, freedoms and liberties of homeowners living in these planned communities governed by HOAs. This is an issue of constitutionality, of the delegation of private governments unanswerable under the 14th Amendment. Let me offer this quote by Gillman in his *The Constitution Besieged* to help clarify this point:

Specifically, it came to be determined, first, that laws that singled out specific groups or classes for special treatment would withstand constitutional scrutiny only if they could be justified as really related to the welfare of the community as a whole ... and were not seen as a corrupt attempts to use the powers of government to advance

purely private interests; and second, that acts that interfered with an individual's property or market liberty would be considered legitimate so long as they were not designed to advance interests of just certain groups or classes'.

I have argued for some time now that the inequities and oppression of the current legal structure of planned communities can be successfully dealt with. This approach will better meet the legitimate government ends and interests and better provide social and general welfare benefits to citizens within the state, while treating all citizens equally under the law. The proposal is to simply make HOAs public entities after the developer meets the CC&R criteria of turning the HOA over to the homeowners and loses control of the community. At this point in time, the developer no longer has a stake in the community and its covenants, that are profit motivated, should not continue to be a burden to the homeowners.

Let me explain my proposal. By setting up special taxing districts for HOAs you will subject them to the same municipality laws and protections of our government while still retaining the individual rules and regulations so dear to many as may be their belief in protecting property values. In short,

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1. all amenities can be turned over to private operators, and I do mean "operators" as exist today to run such private facilities.
2. the current rules and regulations of HOAs would be incorporated into the district's ordinances subject to the same application of the laws as any other muni-government (think of incorporated or unincorporated towns). Certain rules and procedures would not make the "cut", as expected in order for justice to prevail.
3. use of the subdivision's facilities can be restricted to homeowners by the special district's tax basis — only members.

Let me clarify at this time, that there is an important distinction between the HOA and the subdivision real estate "package" known as a "planned community". HOA supporters continually cloud this distinction, because a planned community can exist without the private, undemocratic governing body known as the homeowners association. "Doing away with HOAs", as sometimes seen in the media, falsely implies doing away with the planned community real estate package. No, it doesn't. But the HOA special interests want you to think so. There is no need to impose undemocratic private governments over these communities of Americans that operate outside the 14th Amendment and the Constitution.

Let's examine this proposal to some extent. All objections relating to creating more levels of government and increasing government costs are not true, because each HOA will operate on its own as they do today. Yes, there will be some oversight involvement costs, but they can easily be handled as a "per door" charge to HOAs as currently used in Florida, Nevada and other states. But the state legislatures must realize that they helped create and allowed this problem to get out of hand, and must now rectify past errors.

These governments, this "additional layer of proposed government" as some have argued, already exists in large numbers and has been ignored by the states. It's now time to take effective action to stop the abuse of rights. These private governments are allowed to operate outside the laws of the land by remaining private entities that benefit not the state — witness the cries of lost rights and the lack of justice — but benefit the special interests who live off the discord and adversity that they themselves foster.

I will not pursue the argument here relating to informed consent supposedly attributed to homebuyers in order to declare that the CC&Rs are a binding contract. But, the alternative to this proposal is to keep the status quo with its false recognition that home buyers agreed, with full knowledge and express consent, to surrender their constitutional rights and freedoms to the HOA government.

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The planned community concept has had its problems for over 40 years now, since its inception and wide scale promotion by ULI, NAHB and FHA in the 50s and 60s. It was sold as a social benefit, "affordable housing" to the government agencies and as a profitable business to the real estate special interests — the developers, real estate associations, contractors, etc. Adherence to the laws of the land and the rights of homeowners was a secondary, if that, consideration. Even the formation of CAI in 1973 couldn't stop these problems, but created even more desperate measures in 1992 when CAI realized that it had to strongly lobby its interests in the face of mounting opposition. And the problems are still here and will remain here, because the concept is inherently defective and an anathema to American values.

Turning HOAs over to the government places no problems on the operation of the facilities. All that is necessary is to form a special taxing district that has limited and restricted authority as so specified. Your HOA's rules and regulations can be incorporated as special ordinances, but will now be subject to municipality laws and oversight, and public hearings and meetings and public disclosures, etc. Also, by taking this route, the HOA procedures or rules will be subject to review as just and legally appropriate and binding.

This is a first proposal, one that I've studied for some time now as a result of my four plus years of involvement in

homeowner rights advocacy. Let's work together on this to solve the problems. Let's not be afraid of finally taking decisive action and stand up to those special interests that will not really be hurt by this proposal. Think about it.

Agents will still sell homes because developers will still build homes. HOA management firms will now manage the facilities, cut grass, keep the books, etc, but now independent of the CC&Rs. As for attorneys, well, there is always a need for attorneys. And, homeowner advocates can finally stay at home, away from the legislature.

## **Endnotes**

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<sup>1</sup> Jean-Jacques Rousseau, *The Social Contract* (1762).

<sup>2</sup> John Locke, *The Second Treatise of Government* (1690).

<sup>3</sup> *Supra* note 1, Book 1, Ch. 1 (1762).

<sup>4</sup> *Supra* note 2, § 171 (1690).

<sup>5</sup> *Rights and responsibilities*, Community Associations Institute, <http://caionline.org/rightsandresponsibilities/index.cfm> (July 2, 2006).

<sup>3</sup> 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).

<sup>7</sup> Rousseau, *supra* n. 1, Book 1, ch. 4.

<sup>8</sup> *Supra* n. 1.

<sup>9</sup> “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).

<sup>10</sup> *Marsh V. Alabama*, 326 US 501 (1946).

<sup>11</sup> *Jacobellis v. Ohio*, 378 US 184 (1964) (relating to a definition of hard-core pornography).

<sup>12</sup> See generally, The Declaration of Independence; The Second Treatise, supra n. 2; The Social Contract, supra n.1; Randy E. Barnett, *Restoring the Lost Constitution: The Presumption of Liberty*, Chs. 1, 2, (Princeton Univ. Press 2004).

<sup>13</sup> Rousseau, supra n. 1, Book 4, ch. 2.

<sup>14</sup> Id, Book 2, ch. 4.

<sup>15</sup> Id, Book 2, ch. 3.

<sup>16</sup> Id.

<sup>17</sup> Supra, note 2.

<sup>18</sup> Robert H. Nelson, *Private Neighborhoods and the Transformation of Local Government*, chapter 20, Urban Institute Press, 2005. (This author is cited on page 102; and on p. 342, explained in endnote 6).

<sup>19</sup> Id., p. 426.

<sup>20</sup> Id., p. 427.

<sup>21</sup> Id., p. 429.

<sup>22</sup> Id., p. 432.

<sup>23</sup> Id.

<sup>24</sup> Id., p. 433.

<sup>25</sup> Id., p. 439.

<sup>26</sup> Randy E. Barnett, *Restoring the Lost Constitution: The Presumption of Liberty*, Princeton University Press, 2004.

<sup>27</sup> KELO

<sup>28</sup> *Marsh v. Alabama*, 326 US 501 (1946).

<sup>29</sup> *Committee for a Better Twin Rivers v. Twin Rivers Homeowners' Association*, A-118-122-05, p.32, July 27, 2007).

<sup>30</sup> Id., p. 31.

<sup>31</sup> Id., p. 14-15.

<sup>32</sup> *New Jersey Supreme Court Sides with Associations*, Community Associations Institute website (<http://www.caionline.org/news/detail.cfm?PRNumber=125072607>) 6/16/2008.

<sup>33</sup> *Twin Rivers, Twin Rivers - The Final Episode*, Welcome to Ungated, Community Associations Institute website ([http://cai.blogware.com/blog/\\_archives/2007/7/26/3120991.html](http://cai.blogware.com/blog/_archives/2007/7/26/3120991.html)) 6/16/08.

<sup>34</sup> The Homes Association Handbook, technical Bulletin 50, Urban Land Institute, 1964.

<sup>35</sup> Supra note 18, see generally Chapter 20.

<sup>36</sup> Black's law Dictionary, sixth ed.

<sup>37</sup> *Virginia v. West Virginia*, 78 US 39 (1870).

<sup>38</sup> *US v. Carolene Products Co.*, 304 US 144 (1938) (the landmark Footnote Four decision); *Planned Parenthood v. Casey*, 505 US 833 (1992) (Footnote Four Plus). For a general discussion, see *Constitutional Law*, Sec. 11.5 - 11.7, Nowak and Rotunda, (West Group 2000).

<sup>39</sup> *Plessy v. Ferguson*, 163 US 537 (1896).

<sup>40</sup> *Brown v. Bd. of Educ.*, 347 US 483 (1955).

<sup>41</sup> See Siegel, *infra* note 43.

<sup>42</sup> Supra note 10.

<sup>43</sup> *Brentwood Academy v. Tennessee Secondary School Athletic Ass'n*, 531 U.S. 288 296 (2001). (See generally, Steven Siegel, *The Constitution and Private Government: Toward the Recognition of Constitutional Rights in Private Residential Communities Fifty years After Marsh v. Alabama*, Wm & Mary Bill of Rights J., Vol. 6, Issue 2 (1998)).



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*An unjust is no law at all*

St. Augustine

*We must provoke until they respond and change the laws.  
We must make the injustice visible.*

. . . . Gandhi

### 6.1 Homeowners Declaration of Independence (September 2000)

The author first addressed a legislative committee in August 2000, and followed with the following statement to the Arizona Interim HOA Committee hearing of September 7, 2000.

Good morning Mr. Chairman. Good morning ladies and gentlemen of the Committee. Once more I reluctantly find myself before the committee to speak against my neighbors and other citizens of Arizona. I don't relish being here; however, circumstances and events have brought me here.

As in the times of 1776, a small, principled and dedicated group of citizens are seeking a redress of their grievances. They first looked to the existing government, the HOA Board, and having failed to obtain satisfaction therein,

must seek other means of redress – a radical change in the concept and legal structure of the homeowner association and its controlling document, the CC&Rs. What is needed is an inclusion of a homeowners Bill of Rights and the removal of such onerous provisions that make the homeowner nothing more than an indentured servant, living at the suffrage of the board – pleased if the board is benevolent; living in fear if the board is oppressive. To quote from the Declaration of Independence,

“We hold these truths to be self-evident, that all men are created equal, that they are endowed by their creator with certain unalienable rights, that among these are life, liberty and the pursuit of happiness. That to secure these rights, governments are instituted among men, deriving their just powers from the consent of the governed.”

“That whenever any form of government becomes destructive of these ends, it is the right of the people to alter or abolish it, and to institute new government . . .”

Mr. Chairman, ladies and gentlemen of the Committee, at this time I had hoped that the citizens of Arizona would be able to present and enumerate their long list of abuses, and solutions to these abuses, similar to those found enumerated in the Declaration of Independence, without

the interference and obstruction by elements of these “oppressive governments”. I see that this will not be the case. Continuing my quote,

In every stage of these oppressions we have petitioned for redress in the most humble of terms; our repeated petitions have been answered only by repeated injury.

The people of Arizona only wish to be able to present their case before this Committee in a fair and just manner. However, sadly I feel that, because of the composition of the committee they are being asked to justify their grievances before their oppressors; they are being put directly into a trial situation with their “oppressors” sitting in judgment. The homeowners, Arizona citizens in good standing, who find these truths to be self-evident, are being called to justify their complaints without the committee calling for the perpetrators to answer for these repeated acts against them.

Further injury has occurred by the acts and actions of certain members of this committee. These insidious acts do not help to arrive at a solution to our grievances or to propose revisions to the CC&Rs, but only serve to further alienate the homeowners. Here are a few statements from the “nation’s voice for” the industry:

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- “the majority of boards quietly go about their business, and that the major problems are rare”
- “I am here to try and make the industry better ... I heard mostly complaints without any real suggestions on what can be done”
- “Perception vs. Reality – Promoting a Positive Image at the state legislature”, from a CAI luncheon announcement on 8/17 sponsored by Mr. Ekmark’s committee”

I haven’t read any call for CAI members to “bring your solutions to the hearing”. This silence is perplexing when you consider the following quotes from a paper by Prof. Evan McKenzie in CAI’s 1999 publication, *Community First!*,<sup>1</sup> offering advice on what is needed.

“A homeowner bill of rights including basic constitutional liberties and due process of law, all consistent with functioning local democracy”

“plain-language CC&Rs that make the basics easy to understand so that it is fair to expect compliance”

“Too often neither the association members nor the candidates for the board understand ... what the director may and may not do . . .  
“It may be that government can help here —

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through licensing, certification, public complaint, and continuing professional educational requirements.”

In over 5 months since this committee was announced, I have not heard said:

“We agree that homeowners have been denied their civil rights and we will work with you for their restoration”, or

“We will join with you in helping to stamp out those boards that violate state law and the governing documents, including those management firms and attorneys that conveniently look the other way”

Today we seek the replacement of the homeowner’s association form of totalitarian government as set forth in the CC&Rs. We seek, among other changes to the CC&Rs, the inclusion of a homeowners’ bill of rights, restoring those rights that every American is entitled to and should enjoy in today’s society.

This committee has an historical opportunity to eliminate this dictatorship form of government that denies civil liberties for the betterment of and in the interest of the state, the homeowners association, with its façade of democratic principles and allure of a better world, and

restore those principles of American democratic government to the citizens of Arizona. You, ladies and gentlemen, can put a stop to dictatorship in the midst of America by proposing a homeowners' bill of rights along with additional restrictions and legal sanctions against the abuse of these rights by boards of directors, management firms and attorneys who supposedly represent the association. We need to re-write the CC&Rs.

Thank you for this opportunity to speak before you.

## **6.2. California's homeowners bill of rights (March 2005)**

The following is a letter sent to the California Law Review Commission (CLRC) regarding its review of the Davis-Stirling Act governing CIDs (HOAs). (CLRC **has** since submitted its recommendations to the California Legislature in May 2008. See Section 2.3 herein).

RE:    CLRC Memorandum 2005-3, Homeowners Bill of Rights

Dear Mr. Hebert:

Coming on to the scene somewhat late, I wish to comment on your discussion and concerns relating to a homeowners bill of rights as contained on p. 3- 4 of your recent Staff Memorandum, 2005-3.

I'm pleased to see these concerns from an agency of a state government within these United States in regard to the status of the rights, freedoms, liberties, immunities and privileges of its citizens who happen to be living in a planned community. These CIDs, while somewhat regulated by the state of California, are subject to a private government constitution, but unrecognized as a de facto government, and are therefore allowed to operate and function outside the protections of the Fourteenth Amendment as if they were independent governments similar to a principality. This is the real concern with respect to a bill of rights – private contractual governments are not subject to the Fourteenth Amendment with its due process and equal protection clauses.

I must stress these two fundamental rights, due process and the equal protection of the laws, since they are not explicitly stated in your discussion of the applicability of the Bill of Rights. However, there appears to be a reference to the 1946 U.S. Supreme Court company town holding in *Marsh v. Alabama*<sup>2</sup> in the example of door-to-door religious solicitation (§ 4) that is both a First Amendment and a Fourteenth Amendment decision relating to the equal protection of the right to free speech. The Marsh holding and issues of just what rights do homeowners in CIDs possess have evolved about the doctrine of state actors and state actions by private entities and issues under the color of law doctrine of 42 U.S.C.A. § 1983. This should be the criteria to be used in determining the role of CLRC with

respect to the rights of homeowners living in CIDs, because it is much broader in application than the Bill of Rights. It also encompasses the equal application of all state and local laws to all persons to eliminate discrimination by arbitrary and capricious classifications without a justifiable government interest.

While there have been a number of cases across the country pertaining to CIDs/HOAs as quasi-governments or whether certain actions constituted state actions<sup>3</sup>, many of these cases focused on the Marsh company town analogy and the enumeration of the public functions that would make a company town a government entity; thereafter referred to as “the public functions” test for state actors. While much attention has been given to the public functions test, the Supreme Court summarized recent decisions in *Brentwood*<sup>4</sup> with respect to clarifying what constitutes state actions/actors when (p. 7);

1. “[I]t results from the State’s exercise of ‘coercive power’”;
2. “[T]he State provides ‘significant encouragement, either overt or covert’”;
3. “[A] private actor operates as a ‘willful participant in joint activity with the State or its agents’”;
4. “[H]as been delegated a public function by the State”;



5. “[I]t is ‘entwined with governmental policies’ or when the government is ‘entwined in [its] management or control’”;
6. “[I]f, through only if, there is such a ‘close nexus between the State and the challenged action’ that seemingly private behavior ‘may be fairly treated as that of the State itself’”.
7. A private organization “[A]cted in a symbiotic relationship with the government”. (Dissenting opinion).

These tests of state action have much more direct application to the status of CIDs as quasi-governments or state actors than the single public functions test and will affect the issues of homeowner rights, fundamental or otherwise, before the CLRC<sup>5</sup>. Are CIDs state actors under the *Brentwood*, holdings that state actions may be found when a close nexus and entwinement between the state and the private entity exists? Consider the following:

1. CID laws permitting and allowing the non-judicial foreclosure by CIDs for amounts far in excess of the damages to the CID that had not advanced any substantial funds, as in the case of a mortgage company or lender, to warrant a deprivation of property that amounts to an excessive punishment of the homeowner. Civ:1367, 1367.1.

2. Favorable CID treatment: allowing (1) as a punishment for homeowners, the laws are silent on punishments for CID boards and individual board members who violate the same CID governing documents;
3. The failure to require CIDs free and open elections with oversight on the same level as public elections, a major obstacle to the true exercise of representative democracy, while allowing (1) above;
4. The requirements of the CID alternate dispute resolution procedure are biased against the member as a result of favorable application to the board.<sup>6</sup>
5. Protection of CID covenants: allowing home buyers to waiver and surrender their fundamental and other civil rights, enjoyed by other homeowners not living in CIDs, by means of an adhesion contract that does not permit a free exchange of views that lacks an explicit acknowledgement by the buyer that he is aware, understands and agrees to such surrender of his rights and freedoms; constructive notice being insufficient notice to rise to the level necessary for one to surrender these rights;
6. The double-taxation of the homeowner who pays for public services to the CID without an offset from the municipality.

These problems and issues with CIDs have existed from their very inception with the publication of the ULI Homes Association Handbook, Technical Bulletin #50, in 1966 and will continue for the next 40 years unless the mental set and attitude toward planned communities undergo a major paradigm shift.<sup>7</sup> And that shift is reflected in the absence, as an example, of input from political scientists and government policy experts discussing the de facto government aspect of CIDs. Just because the state does not recognize CIDs as a government entity does not mean that CIDs do not exercise government regulation and control over a people within a territory within the state, as if they were a self-governing principalities.

The tone and questioning of Memorandum 2005-3 gives me some hope of a brighter future, in spite of some last minute awareness of the magnitude of the problems. Unfortunately, the problems will not go away unless squarely confronted. The Commission should consider a second study, in support of the above concerns, conducted by recognized authorities not with an eye to real estate interests, but to the neglected areas of constitutional law, government and political science as they strongly affect those 36,000 private governments already in existence in California as well as those to come. The following issues should be addressed by such a study:

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
  - a. without the same due process and equal protection clauses of the Fourteenth Amendment, and that
  - b. do not conform to the state’s municipal charter or incorporation requirements, or that
  - c. do not provide for the same compliance with the state’s constitution, statutes or administrative code as required by public local government entities?

The inescapable conclusion to which the Commission will inevitably be drawn, if our Constitution is to remain meaningful and “that government of the people, by the people and for the people, shall not perish from the earth” and be replaced by the increasing number of private governments, is for CIDs to be subject to the same municipality laws of the state to which all other local government entities are subject. There will again be only one rule of law for everyone. This can be accomplished by

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means of special taxing districts that will retain individual preferences with respect to community “rule and regulations”, now “local community ordinances”, and “private” facilities”, now public but restricted to those tax (formerly assessments) paying members of the community.

Respectfully,

George K. Staropoli

### **6.3. Arizona HOA reform legislation (September 2005)**

The following Commentary attempted to provoke the Arizona Legislature into passing HB2824, sponsored by homeowner rights champion, Rep. Eddie Farnsworth, that would provide for an independent tribunal, the Office of Administrative Hearings, to adjudicate HOA problems. The bill was put into law.

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

With another Legislative session soon to start, homeowner rights advocates are again seeking the substantive reforms to correct long-term problems with planned community governance. 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?

1. I ask the legislators, the public interest organizations and policy makers to consider the following questions:
  
2. 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?
  
3. 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

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administrative code as required by public local government entities?

4. When did “whatever the people privately contract” dominate the protections of the U.S. Constitution?
5. Please state what, if any, are the government’s interests in supporting HOAs that deny the people their constitutional rights?

George K. Staropoli

### **6.4. Colorado defends protective HOA laws (May 2007)**

Ever wonder how a territory was granted authority from the federal government to be a state? Here's how Colorado got its authority. Contrast this to CCIOA (UCIOA), CRS 38-33.3.101 et seq., that reflects the state's entwinement in the operation, the encouragement and support of planned communities, and its coercion of the homeowners (See Brentwood citation below). In other words, how Colorado establishes authoritarian, private governments that are treated as independent principalities. Let's look at the misleading and somewhat defiant and arrogant Annotation to CCIOA.

**Colorado Revised Statutes, 38-33.3-102, Annotation**

There is no support for the proposition that enactment of a legislative scheme governing the operation of homeowners' association thereby transforms such homeowners' association into cities or other governmental entities. *Woodmoor Improvement Ass'n v. Brenner*, 919 P.2d 928 (Colo. App. **1996**).

The above was dicta, comments not related to the opinion rendered, which involved the doctrine of equitable estoppel and not related to the question of HOAs as state actors or as governments.

Statutory authority to the contrary exists in the Colorado Enabling Act and Colorado Constitution,

**§ 4. Constitutional convention - requirements of constitution.** That the members of the convention thus elected shall meet . . . and after organization, shall declare, on behalf of the people of said territory, **that they adopt the constitution of the United States . . .** whereupon the said convention shall be and is hereby authorized to form a constitution and state government for said territory; provided **that the constitution shall be republican in form . . . and not**



**be repugnant to the constitution of the  
United States and the principles of the  
declaration of independence....<sup>8</sup>**

which require adherence to the US Constitution and principles of the Declaration of Independence. Or have these documents become meaningless? Further legal doctrine relating to what constitutes state action can be found summarized in the US Supreme Court opinion in *Brentwood*<sup>9</sup>, or in Steven Siegel's paper, *"The Constitution & Private Govt"*<sup>10</sup>.

**6.5. Florida Condo/HOA reform hearings**

Good morning members of the Committee. I'm George K. Staropoli. Pres. of Citizens for Constitutional Local Government, an eight-year old nonprofit located in Scottsdale, AZ, where I live. I maintain websites and I can be found by simply doing a Google on "Constitutional Local Government" or my name, whichever you find easier.

My 2003 book, *The Case Against State Protection of Homeowners Associations*, is cited in the 2006 *AARP Homeowners Bill of Rights* mentioned by Jan Bergemann last week (footnote 104, p. 41). "Citizens for Constitutional Local Government" is also cited in the Robert H. Nelson 2005 book, *Private Neighborhoods and the Transformation of Local Government*, (Urban Institute Press, p. 102 & 342), in regard to my call for a Bill of Rights before the Arizona

Legislature in 2000, and my arguments that HOAs are not true democracies – there are no separation of powers, or checks and balances).

I'd like to thank Chairman Robaina for allowing me this time to address the committee.

I come as a “friend of the committee” to speak of things hardly ever spoken or written, but are essential to the understanding of the legal structure of condo and homeowners associations, and that is their history, and the motivations and purposes behind the mass merchandising of homeowners associations. This committee is charged with recommending legislation to deal with the condo and HOA problems. However, without an understanding of this history and background, the people of Florida, the homeowners that you see here today, and whom you saw during the past hearings of this committee, will return next year, and the next, and the next, as they have in previous years, until their petitions for a “redress of grievances” have been answered without injury.

Without an understanding of this history and background, Legislatures across this country will continue to find piecemeal solutions or fixes to complex issues created by these private governments with their unique “constitutions” inconsistent with state and municipality statutes. Because this information has not been previously made known to legislators, no guiding policy or principles could be

developed to provide a plan of action, and to give direction to your decisions and recommendations, which would treat the people of Florida living in these associations in a fair and just manner, under the laws of the State of Florida.

I have previously provided the committee with a detailed statement to this effect, as well as a copy of this oral statement in which I will just touch on a few important points concerning this history.

In Florida, and across this nation, we have problems with homeowners associations, and have had them ever since the introduction of planned communities in 1964 with the ULI publication, *The Homes Association Handbook*, known as TB#50. Only nine years later, in 1973, CAI was formed to deal with problems with association management. It was an educational organization then, but as problems continued over subsequent years, as reflected in numerous studies by university researchers, and not by the special interests “studies” that we see today, changes were deemed necessary. In 1992 CAI made substantial changes to its structure and became a business trade group primarily to lobby state legislatures in order to protect their “turf” and the status quo. More changes followed as CAI attempted to deal with continued dissatisfaction with HOAs. In 2005, CAI dropped its membership category for HOAs since HOAs were consumers, users of CAI services — and don’t belong in a tax benefited group whose aim is to support the

business interests of its members – namely the lawyers and management firms.

After 44 years of failure to address HOA problems, its time for change. Allow me to paraphrase a speech by that Illinois Congressman,

“A house divided cannot stand. We are more than a collection of condo and homeowners associations. We are, and always will be, the United States of America. Maybe Florida doesn’t have to be run by lobbyists anymore. Maybe the voice of Floridians can finally be heard again. Homeowners are tired of being disappointed, and tired of being let down, and tired of hearing promises being made . . . and nothing changed. We have to choose between change and more of the same.”  
(Barack Obama’s Super Tuesday Speech).

Getting to some specifics:

1.      The root justification for permitting condos and HOAs to operate as they do comes from the arguable claim that the homeowner willfully and with full knowledge agreed to be bound by the declaration and bylaws. And in support of this alleged “consensual agreement” to be so bound, the special interests argue, and by including certain presumptions, that the government is prohibited from

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interfering with contractual obligations; that private parties may contract as they please; and that the people are free to associate as they please and to choose to live in these associations. Interestingly, neither the words “private” nor “interfere” appear in the Contracts Clause of the Constitution.

Yet, there is no explicit consent to be governed, as required in other arenas involving the surrender of constitutional rights and freedoms. While the purchase contract is signed and initialed all over the place, homeowners are allowed to be bound by a simple posting to the recorders office without even having to have read the CC&RS.

When a rational person steps back and views the entire legal scheme, and the marketing and sales of these homes, and the lack of consumer protections by state agencies, it is very difficult to accept continued legislative support for these private governments. State police powers operate in every sphere of life to regulate and prohibit contracts except with these associations. And, constructive notice is held superior to the explicit surrender of constitutional rights and freedoms. Why?

If everybody truly loves their association, why are the state, and the special interests, afraid of a full disclosure regarding what it’s like to live in an authoritarian regime that is outside constitutional protections, where the laws of

the land by which they are commonly expected to abide do not exist?

2. Florida laws have been amended to specifically protect the HOA and to deny the equal application of the laws to homeowners. See the redefinition of a mortgage to include assessments. See the statutory lien granted to association assessments, and the right to foreclose the lien as if it were a mortgage when, in reality, the association has not advanced any funds to make it a bona fide mortgage or debt to justify the right to foreclose. This is cruel and unusual punishment by the state, because the loss of one's equity in his home far exceeds the debt owed to the association, while the special interest attorneys, who wrote these laws, receive an unconscionable percent of the amount owed.

While granting these "boons" to the special interests, very few protections are granted to the homeowners. Where are the penalties against board violations? Why can't the homeowner foreclose on a board member who violates the obligations of his office? Where is the accountability of boards and management firms as real estate brokers, banks, title companies and escrow agents held accountable for other people's monies? Shouldn't the HOA board be held to the same standards as a trustee since it is responsible for, in reality like a public entity, the homeowners' money?

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I suggest giving it a shot and let's see what happens? My guess is that you will see less and less homeowners coming before you with grievances.

3. Finally, I'd like to mention one more very important point, and that is the status of the association as a state actor since it's clearly evident that the acts and actions by the State of Florida meet the criteria for state actions as set forth by the US Supreme Court. I am not talking about an archaic public functions test based on today's almost nonexistent company towns. A test first held way back in 1946 concerning free speech rights by a Jehovah Witness seeking to spread his message within the bounds of a company town.

The Supreme Court criteria include such conditions 1) as when there is a close nexus or symbiotic relationship between state and private party, or 2) when the state exercises coercive power, or 3) offers significant encouragement, either overt or covert, or 4) is entwined in the private party's management or control. Or when the party is entwined with governmental policies, or is controlled by a state agency, or is a willful participant in joint activity with the State or its agents.

I believe the Florida statutes and the enforcement by Florida courts to deny the equal protection of the laws and due process protections would fully warrant the decision

that these associations are indeed state actors subject to the 14<sup>th</sup> Amendment.

A very good example of associations as state actors can be found in Constitution's prohibition on ex post facto amendments. But, the courts permit ex post facto amendments to condo/HOA declarations because of a loosely worded contractual amendment procedure. A validly passed amendment is binding on all members regardless of what the declaration said when the unit was purchased. The Florida Supreme Court upheld the communal nature of these homes, with respect to these ex post facto amendments, over the Florida Constitution in 2002. (*Woodside Village HOA v. Jahren*, 806 So.2d 452 (Fla. 2002)).

The much-cherished "contract" that has been bandied about so often is not worth the piece of paper it was written on, if it can be modified without the homeowner's consent. Should this decision represent the public policy toward homeowners in these associations, yet while in the public domain the constitution prevails? I think not!

One can ask, as I've asked of the Arizona Legislature in 2005,

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? (*Arizona Capitol Times*, Nov. 25, 2005).

Now, on record, we have the position of the national lobbying organization on the application of the constitution — the supreme law of the land — in its amicus brief to the NJ Appellate Court. That was the Twin Rivers HOA free speech case, decided last July. In its brief, CAI warned the court about “*the unwise extension of constitutional rights to the use of private property by members*”. *CBTR v. Twin Rivers HOA*, 929 A.2d 1060 (NJ 2007), p. 19.

I'd like to thank the members of this committee for allowing me this time to make an important statement on behalf of Florida homeowners — the people — in their petitions for a redress of their grievances.

George K. Staropoli

**6.6.    Arizona ignores HOA wrongs (March 2008)**

Note: The following is the author's Commentary to the Arizona Capitol Times, March 21, 2008.

At the Homeland Security and Property Rights Committee hearing on Feb. 25, Rep. Doug Clark commented that this bill was "trying to solve a lot of society's ills." This astute observation has been long in coming. Still, the Legislature fails to acknowledge the wrongs of the past. The bill has been in limbo since the hearing, and the Legislature has failed to act to protect homeowners against Homeowner Association boards.

HOA boards can operate not as representatives of the people, but as authoritarian, through private agreements that are held as binding contracts, although easily recognized as adhesion contracts. Boards are unaccountable to the state and to the homeowner for their actions, as all public governments are accountable.

I have long held that the fundamental problems that surface year after year are both political and societal, and not simply real estate issues as the special interests ardently strive to confine the debate. In no other area have the laws been so bent and distorted to protect private, contractual enforcement agencies. HOAs have been granted, under the law, powers to inflict financial harm to citizens

without adequate due process. In no other area has justice been so perverted and the Constitution so denied to support these private de facto governments as a convenient approach to ease the financial burdens of local government. While it may be arguable that there is indeed a legitimate government interest in such support, it cannot be argued that the means to this end, the denial of the 14th Amendment protections for homeowners, is justifiable.

What does this public policy say about the society in which we live? Does the Constitution still stand as the supreme law of the land, or has the common law of covenants superseded the Constitution? Are we still living in the America of our founding fathers or in a new America where maintaining property values has become the dominant and overriding concern for people living under more and more HOA regimes? Two state Supreme Court cases, *Twin Rivers*<sup>11</sup> in New Jersey and *Inwood*<sup>12</sup> in Texas, have held that, essentially, the restatement of property laws as applied to HOAs is the rule of the land. The restatement states: “The question whether a servitude unreasonably burdens a fundamental right is determined as a matter of property law, not of constitutional law.”<sup>13</sup>

H2724 seeks several substantive reforms to protect not the special interests, but the people, the homeowners who seem to have been forgotten by the legislators. We still hear legislators using the special-interest mantras of “agreeing to

abide by the contract” and “interference in contracts” as the rationale to protect these HOAs. Those defenses imply that the state has no business in regulating HOAs to protect the people, the homeowners, as it does with truth in advertising, truth in lending, equal opportunity, etc.

It reflects an unrealistic view that whatever a group agrees to do cannot be touched by the state, that the group can do no wrong. Our Constitution was deliberately constructed in full awareness of the weaknesses of human nature, and that power corrupts and absolute power corrupts absolutely. What has changed with HOAs? Could it be the strong arm of the special interests? Will the Legislature act to protect the people, the homeowners, by fixing some of the ills of society brought about by the wrongful protection of HOAs?

George K. Staropoli

**Endnotes**


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<sup>1</sup> Community First!: Emerging Visions Reshaping America's Condominium and Homeowner Association, Bill Overton, ed., Community Associations Institute, 1999.

<sup>2</sup> *Marsh v. Alabama*, 326 U.S. 501 (1946) (the Court held in the case of a company town, “[T]he State’s permitting a corporation to govern a community of citizens so as to restrict their fundamental liberties and the enforcement of such restraint by the application of a State statute” is not justifiable. Justice Frankfurter, concurring, “But when decisions by State Courts involving local matters are so interwoven with the decision of the question of Constitutional rights that one necessary involves the other, State determination of local questions cannot control Federal Constitutional right”).

<sup>3</sup> See, e.g., *Brock v. Watergate*, 502 S.2d 1380; *Chantiles v. Lake Forest II Master Homeowners Assn.* 37 Cal.App.4th 914 (1995); *Cohen v. Kite Hill Community Assn.* 142 Cal.App.3d 642 (1983).

<sup>4</sup> *Brentwood Acad. v. Tennessee Secondary Sch. Athletic Assn.*, 531 U.S. 288 (2001)

<sup>5</sup> For a detailed discussion of the theories of state action as applied to homeowners associations, see Steven Siegel, *The Constitution and Private Government: Toward the Recognition of Constitutional Rights in Residential Communities Fifty Years After Marsh v. Alabama*, Spring, 1998, *Wm. & Mary Bill Rights. J.*, 461 (1998).

<sup>6</sup> See civ:1369.590 in which the failure by a member, only, to comply with the ADR procedures may result in the loss of due process. Furthermore, the intent of this ADR procedure is defeated by civ:1369.570 where the penalty to the CID is minimal, but requires the member to pay court fees in order to bring a suit against the “moneyed” CID in the event of non-participation by the CID.

<sup>7</sup> For a history of planned communities, see Ronald. R. Stabile, *Community Associations: The Emergency and Acceptance of a Quiet Innovative in Housing*, (Greenwood Press 2000), funded in part by ULI and CAI. In general, the development was a business for-profit undertaking with minimal concerns for democratic government and the protection of homeowner rights.

<sup>8</sup> [http://198.187.128.12/colorado/lpext.dll?f=templates&fn=fs-main.htm&2.0\)](http://198.187.128.12/colorado/lpext.dll?f=templates&fn=fs-main.htm&2.0)

<sup>9</sup> *Supra* note 4.

<sup>10</sup> *Supra* note 5.

<sup>11</sup> *Committee for a Better Twin Rivers v. Twin Rivers Homeowners' Association* (A-118-122-05).

<sup>12</sup> *Inwood v. Harris*, 736 S.W.2d 632 (1987).

<sup>13</sup> *The Restatement Third, Property: Servitudes*, § 3.1, Comment h, p. 359.



## **7. Community Associations Institute (CAI)**

*Community associations are not governments . . . . Yet they are clearly democratic in their operations, electing their leadership from among the homeowners on a periodic basis. . . .*<sup>1</sup>

### **7.1. Overview of CAI<sup>2</sup> (August 2007)**

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.<sup>3</sup> 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.”<sup>4</sup> 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.”<sup>5</sup> Today, CAI requires:

Every dollar of the mandatory \$15 Advocacy Support fee goes directly to states with Legislative Action Committees and supports the efforts of CAI to represent and protect our members on state legislative and regulatory efforts.<sup>6</sup>

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



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Legislative Action Committees represent CAI members before state legislatures and agencies on issues such as assessment collection, foreclosure, and construction defects.<sup>7</sup>

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.<sup>8</sup> 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).<sup>9</sup> 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. 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.<sup>10</sup>

## 214      **Establishing the New America**

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 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.<sup>11</sup>

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:

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.<sup>12</sup>

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.<sup>13</sup> 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.”<sup>14</sup> 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 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.

**7.2. CAI no longer accepts HOA memberships (June 2006)**

For several years, we have been informing all interested parties that the CAI business trade organization, a tax exempt 501(c)6 nonprofit organization subject to the requirement of this federal tax exemption, has no business representing homeowners or homeowner associations, since they are consumer groups.

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Finally, Community Associations Institute, CAI, has removed the category “homeowner association” from its membership. Instead, it offers discount membership to individual board members of an HOA, if the HOA signs up a group of board members. However, please be aware that CAI is inducing HOAs, via their board of directors, to sign up their board members in order that the board members qualify for discount membership fees. This action, if taken by HOA boards, still presents them with very serious conflict of interest and breach of fiduciary duties to the membership, the assessment paying homeowners, if assessments are used to fund memberships and not used to maintain the HOA property.

Excerpt for CAI’s web page:<sup>15</sup>

### **CAI’s New Membership Structure**

#### **We’re Changing**

Instead of “associations” being members of CAI, volunteer community leaders and homeowners will hold individual memberships as of July 1. Member benefits, including discounts, will be available only to those who hold individual memberships.

Community association volunteers: Annual dues will be \$85, **with discounts available when board members are signed up as a group by the association** [emphasis added] (\$55 for the second member, \$45 for each additional

member). Each individual member will receive benefits directly from CAI. Individual homeowners who are not part of the group membership will pay \$85 in dues.

**7.3. Rights and Responsibilities (December 2006)**

The CAI Rights & Responsibilities statement<sup>16</sup>, offered as a guide to build better communities, reads in part,

Homeowners Have the Right To:

- 1 responsive and competent community association.
  
2. Honest, fair and respectful treatment by community leaders and managers.
  
- 6 Live in a community where the property is maintained according to established standards.
  
7. Fair treatment . . . .
  
8. Receive all documents that address rules and regulations governing the community association . . . .

9. Appeal to appropriate community leaders those decisions affecting non-routine financial responsibilities or property rights.

**Comment:** These so-called rights have never been reduced to a bill of rights and made part of the legal contract between homeowner and HOA. As it stands, these are just statements of policy without any legal obligations placed on the HOA.

Homeowners Have the Responsibility To:

Read and comply with the governing documents of the community.

2. Maintain their property according to established standards.

6. Contact association leaders or managers, if necessary, to discuss financial obligations and alternative payment arrangements.

7. Request reconsideration of material decisions that personally affect them.

9. Ensure that those who reside on their property (e.g., tenants, relatives, friends) adhere to all rules and regulations.

**Comment:** These obligations imposed upon the homeowners quickly become exercises in futility when the HOA ignores and is non-responsive to homeowner communications. Some of these responsibilities are actually state laws relating to HOA conduct, and not homeowner conduct. Some of these responsibilities assume that the “laws” of the community have been openly and fairly debated and voted upon by all homeowners, when such is not the case and where many CC&Rs do not permit homeowner participation in the drafting of the standards, and rules and regulations or even amendments to the bylaws.

Rather shockingly, CAI fosters a police state where it is a responsibility of the homeowner to inform the authorities of violations of “state” laws (see 9).

And, under “Community Leaders Have a Right To”, we see many of these so-called rights as really obligations of the board, not a right of a homeowner, or as mandated homeowner behavior and attitudes equivalent to “politically correct” behavior denying the homeowner his right to display dissatisfaction with board actions and behavior. For example,

2. Expect residents to know and comply with the rules and regulations
  
4. Conduct meetings in a positive and constructive atmosphere.



5. Receive support and constructive input from owners and nonowner residents.

Furthermore, under “Community Leaders Have the Responsibility To”, we once again see no legal responsibility by the HOA to act according to these “ought to” statements. In fact, the punitive aspects in these statements are the only responsibilities put into law, but they are meaningless laws without penalties against the boards for violating the laws, or as a deterrent against future acts by the board in violation of state laws and the governing documents.

### **Summary**

While CAI’s R & R policy may make good reading, it fails to make any of these “suggestions” part of the governing documents and state laws, or part of a homeowner’s bill of rights, or to seek accountability and penalties against HOA that currently violate state laws and the governing documents with impunity. CAI ignores the reality of the HOA model and its legally binding Declarations, and ignores the conduct of its members who continually seek the enforcement against “letter of the law” violations, in contrast to R & R appeals for fairness and just treatment. CAI’s Rights and Responsibilities does not deal with reality, nor has CAI lobbied for the legalization of its “ought to” recommendations.

**7.4 Revolting at democracy at its most local form (June 2006)**

In this May 22nd entry in "Welcome to Ungated",<sup>17</sup> CAI's non-restricted BLOG, Mr. Skiba ignores those who see HOAs as a defective product. So, allow this humble advocate who, in Mr. Skiba's words, "revolt[s] at democracy at its most local form" to shed some light on these "word games" — you know, It depends on what the meaning of "Is", is.

For example, democracy is freedom, but HOAs are compulsory and government mandated housing. Homeowners are not free to negotiate the CC&Rs provisions, nor are they fully informed of the consequences of HOA living to a make voluntary and freely exercised consent to these restrictions. Homeowners are not even told that the democratic principles of government cease when you take possession of your deed restricted HOA home. Democracy is not simply voting rights. If so, Cuba and China would be declared democracies.

The CEO then goes on to make contradictory statements, not talking about democratic governance, but about corporate government and the declaration that associations are businesses, pure and simple. Everyone knows that Civics 101 or Government 101 do not talk about corporate governance, but public governance.

"What we cannot support are situations that compromise

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the financial health and well-being of associations, place an undue regulatory burden and cost on associations, or treat associations differently than any other type of business entity. Because that is what associations are - businesses."

"They aren't governments, they aren't personal private clubs, and 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."

Now he calls HOAs a business, but makes no mention that, as such, HOAs would be subject to UCC provisions for bona fide contracts, fraud, debt collection, etc. And yet, CAI supports legislation that makes the HOA more like a governmental entity with protections for the HOA, but without a citizen-member bill of rights. You just can't have it your way all the time, and that's being reasonable. Nor does he accept the fact that a mismanaged or poorly thought out business model should not be propped up by state laws in order to make it work, preventing free market forces to determine what businesses succeed and what businesses fail.

CAI does not want to recognize, and has objected to the application of constitutional restraints on HOAs as if they were, indeed, true principalities subject only to their own private constitutions, the CC&Rs. Why then the statements about democracy and the will of the people as stated in the

BLOG? Because CAI needs the statutes and support of the legislators to sanction the unconscionable provisions of these CC&Rs; and for the enforcement of these contracts that are not understood by many homeowners, who are not asked to even initial no less sign them as must occur in a bona fide contract; and many other reasons, some mentioned here, and too many to list here.

Mr. Skiba offers valid reason or justification for the restriction of fundamental freedoms and liberties, except to coerce compliance with the "laws" of defective, authoritarian regimes that are corporate businesses. He offers no reason why this very important fact is absent from any of CAI's literature that explains and describes to potential HOA buyers that they are not buying a home, or carefree community, but a business. Yet, with this material information being withheld from buyers, CAI dares to proclaim the truth of its surveys on HOA satisfaction.

I have listed below a number of summer reading sources for CAI members to read and try and comprehend [may be found under Resources, herein). Mr. Skiba should be aware that they are full of authoritative sources and not "the vindictive, hateful, and petty behavior" that is "counter-productive to making communities better" as he attempts to discredit those not following the CAI path of authoritarian, corporate governance. This I see as the first step toward the "open exchange of ideas" that Mr. Skiba has put forth in his

blog, and his acceptance that “Criticism is healthy for any industry that takes itself seriously.”

**7.5 CAI miniscule minority (April 2007)**

CAI as a national lobbying organization for over 34 years has been able to overwhelmingly dominate and influence public policy to the detriment of homeowners who are member-owners of the HOA, and deny them their fundamental rights and freedoms.

When will our state legislatures and government officials begin to realize that their pro-HOA legislation and regulation does not have the support of a majority of the homeowners in HOAs, but a minority of individuals with a personal agenda. That their legislation supports special interest interference with the fundamental rights and freedoms of the people in violation of the US Constitution.

**Data**

17,000 people, of the 29,000 CAI members, from 57,000,000 people living in 286,000 HOAs containing 23,100,000 units (CAI stats from [caiservices@caionline.org](mailto:caiservices@caionline.org), 4/3/2007, and its webpage, <http://caionline.org/about/facts.cfm>, Apr 3, 2007).

Assume no CAI member is in the same unit or HOA; there are 2.5 people in a unit (US Census gives 2.6 people).

**Statistics**

**59% CAI membership is from HOA residents** (17k/29k) – there are no HOAs as members any longer

At most, **5.9% of HOAs have a resident member in CAI**, (17k/286k) and that does not mean that the HOA is represented by CAI.

At most, **.03% of all people living in HOAs** are CAI members (17k/57M)

At most, **.07% of all HOA units** are a CAI member.

**Endnotes**

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<sup>1</sup> *Democracy in our Communities?*, Welcome to Ungated, CAI blog ([http://cai.blogware.com/blog/\\_archives/2008/4/2/3616608.html](http://cai.blogware.com/blog/_archives/2008/4/2/3616608.html)) June 17, 2008.

<sup>2</sup> National Lobbyist for HOA Principalities, George K. Staropoli, p. 22-24, Part II, The Truth About the Emergence and Quiet Acceptance of Planned Communities and Homeowners Associations, George K. Staropoli, for a critical look at this document, and the role of CAI in protecting HOAs. ([http://pvtgov.org/pvtgov/downloads/HOA\\_truth.pdf](http://pvtgov.org/pvtgov/downloads/HOA_truth.pdf), 2006, viewed Dec. 10, 2007.

<sup>3</sup> 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)

<sup>4</sup> *Id.*, *Privatopia* at 116.

<sup>5</sup> *Id.*, *Community Associations* at 141.

<sup>6</sup> Community Associations Institute, *CAI Community Association Leader and Homeowner Application*, <http://caionline.org/shop/join/volunteer.pdf> (April 8, 2006).

<sup>7</sup> Community Associations Institute, *About CAI*, <http://caionline.org/about/index.cfm> (April 8, 2006).

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

<sup>9</sup> Community Associations Institute, *California Legislative Action Committee*, <http://clac.org/> (April 8, 2006).

<sup>10</sup> Community Associations Institute, *New Jersey Legislative Action Committee*, <http://www.cainj.com/Legislative/index.htm> (April 8, 2006).

<sup>11</sup> Chris Durso, *Call & Response*, July-August 2006, Common Ground).

<sup>12</sup> Community Associations Institute, *Rights and Responsibilities for Better Communities*, <http://caionline.org/rightsandresponsibilities/index.cfm> (April , 2006).

<sup>13</sup> Community Associations Institute, *Rights and Responsibilities for Better Communities*, <http://caionline.org/>. June 17, 2008. [rightsandresponsibilities/rights.pdf](http://caionline.org/rightsandresponsibilities/rights.pdf) (April 9, 2006).

<sup>14</sup> Community Associations Institute, *Community Associations Institute Press Room: Questions and Answers for Media* <http://caionline.org/news/faq.cfm> (April 10, 2006).

<sup>15</sup> <http://www.caionline.org/mvi/index.cfm>

<sup>16</sup> *Supra* note 13.

<sup>17</sup> *Critical Mass*, *Welcome to Ungated*, CAI blog, May 22, 2006 [http://cai.blogware.com/blog/\\_archives/2006/5/22/1967695.html](http://cai.blogware.com/blog/_archives/2006/5/22/1967695.html).





## **8. Final Thoughts**

### **8.1. God is dead and so are our unalienable rights (February 2008)**

[T]he most fundamental liberal failure of the current era: the failure to embrace a moral vision of America based on the transcendent faith that human beings are more than the sum of their material appetites . . .<sup>1</sup>

Scientists have long held that there is no proof that God exists. The acceptance of this statement by many has had profound effects on our ethical, moral and legal conduct. His Holiness The Dalai Lama wrote<sup>2</sup>,

Now, many people, believing that science has 'disproven' religion, make the further assumption that because there appears to be no final evidence for any spiritual authority, morality itself must be a matter of individual preference

And whereas in the past, scientists and philosophers felt a pressing need to find solid foundations on which to establish immutable laws and absolute truths, nowadays this kind of search is held to be futile.

With this view as their real basis, the 9 Supremes in black have further pursued the separation of church and state to the point that God is an unmentionable within government. However, this position is contrary to the strong beliefs of our Founding Fathers who had deep religious convictions and beliefs with respect to God and the importance of religious values. The foundation of our Declaration of Independence is based on the higher authority of a God:

When in the course of human events it becomes necessary . . . to assume . . . the separate and equal station that Nature and Nature's God entitle them . . . We hold these truths to be self-evident, that all men are created equal, that they are endowed by their creator with certain unalienable rights, that among these are life, liberty and the pursuit of happiness – That to secure these rights governments are instituted among men, deriving their just powers from the consent of the governed.

With the banishment of God from government, the Supremes have struck a mortal blow to the very foundations of American political philosophy, beliefs and values. These rights that were held by the Founding Fathers, and other political philosophers at that time, superior to any rights granted by any government, and expressed in the US Constitution and Bill of Rights, have

been declared null and void by the Supremes. With no substitute standard being announced by the Supremes to guide the people, they are left to flounder. And we have floundered.

In place of these higher standards and ideals, we have the decisions of 9 people in black that are subject to the ebb and flow of the times. These Supremes have decided just which enumerated rights will and which will not be protected, have added additional rights not enumerated,<sup>3</sup> and outright denied the validity and intent of the Ninth Amendment: *The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.*

A poor substitute for a higher authority that has surfaced in recent years is the lame “politically correct” standard. It’s not even a morally or ethically correct standard, but a politically correct standard that spews forth from who knows where and why. But, obviously, it’s a political standard designed to advance the positions of those currently in power.

We are no longer a nation of laws, but a nation of men. We have no moral, ethical or legal compass. Anything the Supremes decides goes. The people have been rendered powerless when the burden of proving unconstitutionality falls to them, and not to the learned scholars; and when legal scholars for the real estate business interests declare

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the laws of equitable servitudes superior to the Constitution<sup>4</sup>.

In regard to planned communities, we witness this deviation from the Constitution quite clearly when legislatures encourage, support and protect private local governments that, unlike our municipal entities, operate outside Constitutional protections and deny their members the rights and freedoms enjoyed by others outside the planned community. Within the homeowners association authoritarian, pseudo-democratic governments, the people do not come first.

**We are living in a New America where the America of our Founding Fathers is rapidly becoming a myth.**

### **8.2.    The land shall be made good (May 2006)**

*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 sacted and holy works,  
And the people shall flourish and prosper.*

*And the legislature looked upon these C&R's  
And said they were sacted 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 accommodation  
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.*

### **Endnotes**

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<sup>1</sup>, *Moyers On Democracy*, p.21, Doubleday, 2008.

<sup>2</sup> *Ethics for the New Millennium*, His Holiness The Dalai Lama, p. 10, Riverhead Books, 1999.

<sup>3</sup> *US v. Carolene*, 304 US 144 (1938) (Footnote Four); *Planned Parenthood v. Casey* 505 US 833 (1992) (Footnote Four Plus).

<sup>4</sup> Restatement Third, Property: Servitudes, § 3.1, comment h.





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George K. Staropoli is a homeowner rights advocate who has for the past eight years appeared before and made presentations to several state legislative committees, as well as has having submitted homeowner rights issues to 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 Developments – Homeowner's Guide (2006)*.

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. HOA videos produced and edited by his StarMan Publishing organization may be viewed on the YouTube [HOAGOV Channel](#).