CC&Rs: The Non-legitimate

Social Contract

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The formation of private HOA governments raises the same concerns of 250 years regarding the legitimacy of the social contract between the members and the community, the bona fide existence of mutual consent, and the protection of individual rights within the community.

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CC&Rs: The Non-legitimate Social Contract

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

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

Rousseau wrote,

> But the social order is a sacred right which serves as a basis for all other rights. And as it is not a natural right, it must be founded on covenants. The problem is to determine what those covenants are.[1]

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."[2]

The national lobbying organization, Community Associations Institute (CAI), promotes planned communities with their HOA governance as the means to better communities and community governance. It's promotional brochure, *Rights and Responsibilities for Better Communities*[3] clearly

[1] Jean-Jacques Rousseau, *The Social Contract*, Book 1, Ch. 1 (1762).
[2] John Locke, *The Second Treatise of Government*, § 171 (1690).
[3] *Rights and responsibilities*, Community Associations Institute, http://caionline.org/rightsandresponsibilities/ index.cfm (July 2, 2006).

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; must comply with rules and regulations (community ordinances with less protections for homeowners than provided by the municipality); are subject to fines (equivalent to community crimes for violations of said "ordinances"); and liens are granted for the fines; are governed by a corporate form of a board of directors, with less protections for fair and open elections; with a disenfranchisement if late in any payments to the HOA, including inability to use the "public" amenities; and there are other features of the control and regulation of the people within the territorial community.

These CC&Rs are not the result of a bargain and exchange process resulting in a meeting of the minds and a mutual consent of the homebuyer to be governed by the HOA. The CC&Rs can easily be interpreted and viewed as meeting the criteria for an unconscionable adhesion contract under current statutory and case law.[4] The CC&Rs have not been subjected to a vote of the affected community nor approval by a state or other government entity as to conformity with the general requirements to establish an incorporated town or village. No, not at all, and one wonders why not? Why has our government permitted, supported and protected a private contract that creates a corporate form of community government that is outside the laws governing all other government bodies? Why has our government permitted constructive notice to meet the necessary and sufficient conditions to deny constitutional rights? Since "all legitimate authority among men must be based on covenants" and "might does not make right, and that the duty of obedience is owed only to legitimate powers[5], do the CC&Rs create a legitimate government?

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

Rousseau's opening words, "*Man is born free, but everywhere he is in chains. Those who think themselves the masters of others are indeed greater slaves than they"*[6], 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

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[3] See generally, *Harrington v. Pulte Home Corp*., CA-CV 04-0576, Ariz. App. Div. 1 (2005); *Maxwell v. Fidelity Fin. Srvcs. Inc.*, 907 P.2d 51 (Ariz. 2005); Restatement (Second) of Contracts, § 211 (1981).
[5] Rousseau, supra n. 1, Book 1, ch. 4.
[6] Supra n. 1.

objectives, and where the Bill of Rights is 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[7] 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[8] 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* **. . . ."**[9] And HOAs are equivalent to civil governments and must be so recognized by the legal system.

Second, the most immediate question to be resolved is that of the legitimacy of the CC&Rs and, consequently, that of the HOA private government. Since the legal basis of CC&Rs reside not in constitutional law or politics, but in real estate and commercial laws, the explicit and mutual consent of the people to be governed by any government[10], 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

[7] "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).
[8] *Marsh V. Alabama*, 326 US 501 (1946).
[9] *Jacobellis v. Ohio*, 378 US 184 (1964) (relating to a definition of hard-core pornography).
[10] 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).

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.[11]

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, 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

[11] Rousseau, supra n. 1, Book 4, ch. 2.

> 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.[12]

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 . . .
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> 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 . . .[13]

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."[14]

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 the a state imposed constitution designed and promoted by the real estate and land planning special interests, and the national lobbyist, CAI, totally ignoring any input from political scientists. There are no concerns for guaranteeing 14th Amendment protections; no concerns about complete and open dissemination of information that a corporate form of private government will be imposed on the homeowner; no Homeowner Bill of Rights; and just obligations to obey the rules and pay the assessments regardless of any dispute relating to the payment of these assessments. UCIOA is a state imposed social contract sanctifying the CC&Rs. It, like the CC&Rs cannot be accepted as a legitimate social contract requiring the obedience of homeowners. It is for this reason that the state must impose these UCIOA laws to coerce the obedience to the illegitimate political authority of the HOA.

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[12] Id, Book 2, ch. 4.
[13] Id, Book 2, ch. 3.
[14] Id.