

The HOA Citizen

2004: privatized government exposed

Inside this issue:

Calif. HOA meeting a NO!	2
Pandora's Box	2
Legislative bills	3
Court failures	4
HOA election abuse	5
Rutgers on constitutionality	6
Common law government?	8

Special points of interest:

- HOAs as municipalities present a Pandora's box. p2

The year 2004 saw the major exposure of the issues regarding the loss of constitutional and civil rights; the widespread problems and abuses with planned association management across the country; the growing realization that they have the legal protection, support and creation by state governments that benefit from

these undemocratic private governments that lack a bill of rights; and the increasing shock and surprise to discover that it is indeed public policy to support the privatization of government by means of homeowners associations.

Not only in the major problem states of California, Florida, Arizona and Texas, but the me-

dia is helping to expose these problems in Idaho, Nevada, Colorado, Illinois, Ohio, Pennsylvania, North Carolina, South Carolina, Georgia, Virginia and New Jersey. Legislation has been introduced in many of these states and have met with varying degrees of limited success. Most

(Continued on page 6)

Florida's CCFJ hires HOA lobbyist

[Note: This is an historic first for homeowner rights advocacy.]

For the first time since its inception in 2000, Cyber Citizens For Justice, Inc. (CCFJ) has

contracted with someone to represent its interests in Tallahassee. CCFJ is an organization that represents Florida homeowners and condominium owners and the time is right to

enlist the aid of a person with experience in Florida government.

Jerry Melvin, former Dean of the House, now heads his own firm, Jerry Melvin Con-

(Continued on page 3)



Calif. Roundtable on foreclosure a NO!

Consumers Union, the nonprofit publisher of Consumer Reports, urged that a roundtable on association foreclosures be canceled.

In its letter, Consumers Union said it would not be participating in yesterday's meeting, because it did not conform to Governor Schwarzenegger's veto message promising to bring "all of the interested stakeholders" together to deal with association foreclosures. "Because key stakeholders are excluded from the forum

you will be convening tomorrow, wrote CU's senior staff attorney, Norma Garcia.

The purpose of the meeting, according to its organizers, was to find "alternatives" to foreclosure. "We agree that foreclosure should be the last course of action to collect delinquent dues. Your participation is needed to find the right legislative solution," said the meeting announcement mailed to a select list of participants.

A Sacramento public relations firm, the Perry Group, organized the forum. Hired by CAI, the Perry Group also organized this summer's campaign to get the Governor to veto AB 2598, the Steinberg legislation overhauling California law governing association foreclosures.

Marjorie Murray

"Because key stakeholders are excluded from the forum, it cannot be said that your meeting conforms with the Governor's wishes,"

HOAs: A Pandora's Box?

Note: Wayne S. Hyatt is co-author of the 1998 treatise, *Community Association Law and a co-founder of CAI.*

In its Preface he says, "The author's experiences have framed a perspective which believes in the

community association concept and in the capacity of the community association."

An excerpt from the chapter, Enforcement in the Community. Some 10 pages are devoted to the Unit Owners Ass'n v. Gillman, the 1982 Virginia case on the constitu-

tionality of HOA fines, and that assessments are fines indeed.

Under the discussion of Estoppel, he quotes a 1996 Colorado Appeals case, Woodmoor v. Brenner dealing with a common occurrence with ACCs and boards -- an

(Continued on page 8)

Woodmoor claimed that Colorado statutes make the association a municipal government



An alert: reading legislative bills

With new legislative sessions beginning in January, it's important that we understand the wording of these important HOA reform bills.

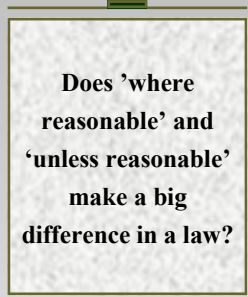
I spoke of the how the use of a single word can dramatically impact the meaning of the bill: **shall vs. may**. We all know what a difference it would make to change one word in the common dissolution or HOA duration provision in the CC&Rs. For example, change the

word "dissolve" in the following. *A vote of 80% of the membership is required to dissolve the association to the word "retain" the association.* BIG difference.

Take the California Nahrstedt case involving equitable servitudes (covenants) and pets. The case is important for its discussion of the power of equitable servitude doctrine over our lives. California's Davis-Stirling Act,

§1354, changed the wording of the following, "restrictions shall be enforceable equitable servitudes where reasonable" to "**unless unreasonable**". Get the huge unfavourable change in the law by changing just two little itty-bitty words?

So we need to read those bills carefully, and if we are proposing changes, we must construct them very carefully.



... Florida HOA lobbyist

(Continued from page 1)

sulting/Marketing. He has contracted with CCFJ to be its lobbyist, beginning immediately and continuing through the 2005 Florida legislative session.

We need clear and easy-to-understand

laws that make the management of homeowner associations easy and will stop the many expensive lawsuits constantly being filed — suits that drain associations of their membership funds and consume the major time and efforts of members that could be utilized for needed

projects and issues.

We feel that with the assistance of Jerry Melvin, working with Representative Julio Robaina and other legislators, we can begin to see our goals become realities.

Jan Bergemann, Pres.
CCFJ



Why have we failed in the courts?

Why do we see so many court decisions that support the actions of association boards that borders on the absurd and highly unreasonable? For example, the Desert Crest Case in California where retired people in a mobile home association were made to pay for a golf club not owned by the association, that was open to the public and operated as a for-profit club.

My readings of numerous cases at all levels across the country is very depressing. I've concluded that it is indeed public policy to encourage, promote and create homeowner associations without any oversight protections of our civil liberties. All this 1) in the name of benefiting the community as a whole through a privatization of government, the HOA itself and not the planned community package; 2) to maintain property

"standards" without constitutional protections; 3) the reduction of services to be provided by the municipality, and 4) the double-taxation benefits to the municipality. All accomplished at the disregard of our constitutional rights and freedoms.

I believe we are failing in the courts because those who are filing these law suits still possess an underlying belief in planned communities and they support the oppressive HOA form of government. The law suits are filed with respect to some particular action by the board and not against the basic principles and legal foundations of the HOA. It should be obvious that the "deck" is stacked against us with these onerous Declarations of CC&Rs.

Filing such law suits is much like a "reform" approach rather than a

redo effort, and it should be clear to everyone by now that reforms will not work. The establishment has strongly resisted any infringement on the rights and privileges granted HOAs by our government's lack of oversight and it will continue to do so.

It's time homeowners become realistic and face the obstacles before us as the Founding Fathers did at the Constitutional Convention in 1776. Convened to make reforms to the Articles of Confederation, then governing the 13 colonies, they choose to scrap it as unworkable and created the US Constitution in its place. We must do likewise with the planned community concept with its mandatory, private organization government that contains no protections for our civil liberties.



I've concluded that it is indeed public policy to encourage, promote and create homeowner associations without any oversight protections of our civil liberties. "



HOA election abuse & no state help

[From the Arizona Republic, Edythe Jensen.]

Allegations of voting irregularities and proxy tampering have some residents in Chandler's Carino Estates subdivision calling for an outside investigation of a recent homeowners association election.

But it's unclear who or what oversees such elections in the state's thousands of homeowners associations, even though their elected boards set fees, levy fines and enforce neighborhood rules. Jan Fiakas, 53, a Carino Estates resident who lost his bid for re-election to the board last month, said he took evidence of more than 40 altered proxies to the Arizona Attorney General's Office this week. State law, however, doesn't give the office jurisdiction over homeowners association elections, agency spokeswoman Andrea Esquer said.

"I feel like my vote was stolen," said resident Bob Johnson, 76. Election winner Steve Heiser's name was written on a proxy signed by Johnson's wife, but Johnson said the couple didn't write it there and a line on their proxy stated it would be used "for quorum purposes only," and not to elect board members.

Homeowners associations use proxies to allow members to vote without being present at a meeting. However, the Carino Estates proxies were worded to allow signers to submit them "for quorum purposes only" to legitimize the board election, without giving proxy holders the right to vote for candidates.

After viewing a copy of the "quorum purposes only" proxy she signed, resident Barbara Anson, 65, said the paper had been altered to appoint election winner Joe Skurtovich.

This article demonstrates the widespread claim by homeowners of election irregularities in supposedly democratic homeowners associations. Homeowner rights advocates have argued that the incumbent board becomes a clique to further the aims and views of the view.

The HOA form of governance over planned communities lacks a separation of powers and checks and balances to protect the homeowners from such cliques. Homeowners are at the suffrage of the board and the democratic elections process that they are so used to in public elections is a myth in HOAs.

Homeowners need the same protections as we have come to require in public elections in these undemocratic private governments in order to protect their interests.



"the widespread claim by homeowners of election irregularities in supposedly democratic homeowners associations."

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... a privatized government

(Continued from page 1)

notorious is the veto of the foreclosure reform bill by Gov. Schwarzenegger, while Arizona managed to pass a good segment of its foreclosure reform bill. Nevada has an Ombudsman and so does Florida.

Opposition to these reforms remains strong, especially by the national lobbyist trade group, Community Associations Institute (CAI) that mounted very strong lobbying efforts in California and Arizona in order to keep the status quo and to keep its quiet innovation in housing and in the privatization of government still quiet. These lobbyists con-

tinue to mislead the public with respect to those who seek to remove this un-American form of government with the real estate package of amenities that define the planned community. The planned community can exist as is today, except that the HOA governing body must be replaced with a body subject to the laws of the land as any other municipal form of government that rules over the people within a territory, whatever its size. Existing legal mechanisms and laws allow for this today and can be found in the statutes of almost every state.

Standing up against the entrenched industry

lobbyists is a small band of homeowner rights advocates and activists, as they call themselves, who continue to grow in number and support as more homeowners across the country begin to realize that "something's wrong in Denmark." Groups like American Homeowners Resource Center in California, Cyber Citizens for Justice in Florida, Citizens for Constitutional Local Government in Arizona and The Texas Homeowners Advocacy group to name a few.

More and more information is being made available to the public by means of the Internet, where the money influence of the well-



“who seek to remove this un-American form of government from the real estate package of amenities that define the planned community.”

Rutgers attorney & HOA constitutionality

The following are additional excerpts from Prof. Frank Askin's Twin Rivers HOA brief. (located in East Windsor, NJ) [http://www.aclu-](http://www.aclu-nj.org/downloads/twinriversbrief.pdf)

[nj.org/downloads/twinriversbrief.pdf](http://www.aclu-nj.org/downloads/twinriversbrief.pdf)

"Twin Rivers must be recognized as a constitutional actor under the state Constitution

required to accommodate the rights of its residents/members to exercise the fundamental prerogatives of citizenship in the operation

(Continued on page 7)

... privatized government

(Continued from page 6)

heeled industry lobbyists cannot penetrate. By numerous email lists, live Internet radio like On The Commons in Virginia, web sites and the new BLOG sites. These sources have flourished because the media, in the past, and governmental sites have avoided any nega-

tive portrayal of homeowners associations as a result of years of unopposed lobbying by the industry.

But, the year 2004 has demonstrated a strong change in the winds of progress. Soon, homeowner advocates believe that these undemocratic private governments will be gone with the wind because

they are constitutionally indefensible. Next year, 2005, will bring continued petitions for reforms to protect average homeowners living in homeowners associations. This growing demand for change will occur -- as it is written in the winds.

George K. Staropoli

... HOA constitutionality

(Continued from page 6)

and governance of the community".

"Twin Rivers homeowners do not waive their constitutional rights by signing contracts containing non-negotiable deed restrictions." And in the footnote on this same page 25, "This argument [that homeowners voluntarily waived their constitutional rights] ignores the doctrine of 'constitutional conditions', which forbids a constitutional actor

tions', which forbids a constitutional actor such as Twin Rivers from conditioning a right to own property on a waiver of constitutional rights." [So why should a private entity be allowed such a conditioning of constitutional rights without the express consent as to such a waiver?]

"That is to say: the source of the 'public policy' that renders unenforceable the restrictive covenants here at issue is the

State Constitution itself, the supreme embodiment of public policy of this State."

Also, "[Katherine Rosenberry in CAI's *Journal of Community Association Law*, Vol. 1, No.1, p 23 (1998)] reports that state action was found under the California Constitution because of Leisure World's municipal attributes."

Note: Professor Askin heads Rutgers Constitutional Litigation

"homeowners do not waive their constitutional rights by signing contracts containing non-negotiable deed restrictions."



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[Http://pvtgov.org](http://pvtgov.org) <http://pvtgov.blogspot.com>

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... Pandora's box

(Continued from page 2)

approval to construct a structure that is relied on and results in harm to the homeowner when the board, or new board, now considers the new construction as a violation. In his Notes and Questions section, Hyatt raises the issue made by Woodmoor, the HOA, whereby Woodmoor claimed that Colorado statutes make the association a municipal government and equitable estoppel does not apply (and this is 1996).

Hyatt asks, "**However, why might such an argument be unwise for a community association (i.e., opening Pandora's Box') [sic]?"** This sort of sets the tone for the industry lobbyist's views of homeowners associations as a real estate entity and not one of the democratic governance of people within a territory or community.

Common law HOA governments?

From the Berkshire Eagle:



The SFNA was a sleepy little voluntary homeowners' association in the 600-acre subdivision created in one of the worst land-use decisions in the history of Berkshire County.

Then Carl N. Edwards got himself elected vice

president last year in a stacked meeting and began working to create a sort of shadow town government.

He changed the bylaws to preclude any challenges to his power, and began issuing tax bills to finance the expanded activities of the Neighborhood Association, which included the removal of unregistered pleasure boats. It's

supposed to take an act of the Legislature to establish a government with the power to tax, but Mr. Edwards told anyone who questioned him that it was all legal under common law.

Note: Can a person declare himself "mayor" by some form of election and then bind all other residents?