



# The HOA Citizen

HOA Citizens are US citizens first!

## Mortgagor works with HOA foreclosure

### Features

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Will your bank help your HOA foreclose?

Earlier this year an Arizona homeowner was foreclosed on by his HOA. He had been in an accident and became disabled, not being able to pay his assessments.

The HOA foreclosed and the property was sold at auction for some \$8,700 dollars with a fair market value of \$112,000. There was an outstanding mortgage of about \$95,000 to Leader Mortgage Co. of Cleveland, OH. The HOA bought the house at the sheriff's sale for that price.

What happened to the mortgage due? HOA didn't pay it, but the HOA now owns the property with a sheriff's deed. There is no filing of an assumption or assignment of the debt with the county clerk.

Looking at the laws it indicates that a lender may not retain the property as security and still keep mortgage debt outstanding. The new owner, the HOA, is obligated for the note, and so will the next buyer when the HOA sells the property.

We need to ask why would a mortgagor give up his security in his mortgage? Usually the lender, in first position bids his debt and takes possession or is paid the debt by the buyer. This is unexplainable why the lender would cooperate with the HOA.

But, wait. During the last 2 legislative sessions in Arizona CAI argued that the HOA would suffer if the foreclosure had to be a fair market value, which would give the homeowner a chance to retain some equity in his home. CAI lobbyists argued that the HOA would have to foot the mortgage debt since it was behind the lender and that that was unfair. (Not really, no matter what the HOA would only get "leftovers")

It appears that CAI has just repudiated its argument.

CAI members were the attorneys for the HOA..

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May be

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# CAI founder Linc Cummings speaks

**From the CAI national web site:**  
“fostering vibrant, responsive, competent community associations”

**The slogan from CAI-Arizona chapter web site:**  
“We can help you keep them happy”

Last month’s appearance by Linc Cummings, a CAI Founder, on On The Commons was basically an echo of CAI’s views on HOAs.

Mr. Cummings still believes that the noble aims, goals and ideals of forming CAI are, and have been proven, realistic in spite of the experiences of the past 31 years. He still believes that CAI has been successful in helping HOAs in spite of the continuing problems and the fact that CAI has only been able to only attain some 5% membership of all the estimated HOAs in America -- by their own statistics.

However, the most serious statement by Cummings is his belief that the homeowner was properly and faithfully represented by the CAI member board director. He dismissed

Shu Bartholmew's argument, which was basically, "You gotta be kiddin'". We know that the nitty-gritty of CAI membership practice in the states is to create disharmony, discord and an adversarial relationship much like business management vs. employees. Yet, as Cummings admitted at the start of the show, HOA boards have a fiduciary duty to the homeowners.

As you will recall some of my prior posts relating to legitimacy of consent in regard to a representative democracy, that doesn't exist for HOAs in real life. Boards reflect their own views of life. Given the reality of the entire election process of governance within HOAs -- from nominations to proxies, to vote counts -- is well known to be corrupted. Add fundamentally undemo-

cratic procedures -- no one person, one vote, no independent elections agency, lack of concern with minority rights that is more prominent in smaller organizations, for example -- we cannot say that the HOA director truly represents the interests of the homeowner. Just look at the opposition to providing the same rights and privileges as other homeowners enjoy before state legislatures across the country.

While Cummings admitted that representative democracy is lousy, CAI has not made attempt, over the years in earnest, to ensure that the rights of the owners of the HOAs, the homeowners, are protected.



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# The myth of private property in HOAs

Private property is simply: "Protected from public appropriation over which the owner has exclusive and absolute rights".

and rights as -- "the interest, claim or ownership that one has in tangible or intangible property"

So, we are talking about your absolute and exclusive rights in real property when it comes to owning our home. And when you see your name alone, or with your spouse on the deed and title to your home you say, **"YES! Mine and all mine to do as I please!"**

But not so in a homeowners association where the buyer must look at the fine print that simply says "subject to any covenants, conditions and restrictions attached to the property". This is a warning to buyers that your absolute and exclusive rights to your home no longer exist. But the myth of "your very private home ownership" still pervades the real estate promotional and advertising literature, and by the public policy, civil liberties and constitutional rights organizations.

Not so as the courts have pointed out when they uphold these CC&Rs. The HOA, a private organization, has been granted the right to decide what you can do with your property because they also have an interest, a claim, a right to do so as granted by that simple phrase in your deed -- "subject to any covenants, conditions and restrictions". A more accurate description would be "communal", a sharing in your property rights by the HOA as representative of the community.

The HOA can decide the color of your house, the landscaping of your property, what structures may not added/modified, etc. And the HOA is not a governmental agency with all those built-in protections, but a private government whose purpose is not the same as the Preamble to the US Constitution, but to maintain property values without regard to the Bill of Rights.

We have lost the fundamental belief and value of the American Revolution -- private property rights. And these public policy organizations, while claiming to be in support of private property rights, do nothing for homeowners. It appears that they are really not for private property rights, but are opposed only to government interference. So the interference into your property rights when it comes to quasi governmental homeowners associations is not a concern for these organizations. Somehow they split hairs and see a difference.

No, there is no difference. Whether your private property rights are taken by the government or by unconscionable adhesion contracts sold under highly suspect sales practices, it is abuse of your individual property rights.

HOAs are communal with respect to your individual private property rights. Compare your rights with homeowners not living in an HOA..



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# Restricting political speech

In the City of Ladue v. Gilleo (1994) US Supreme Court opinion, the right to display political signs in one's home could not be prohibited by a city ordinance. The opinion, in part, said,

"Special respect for individual liberty in the home has long been part of our culture and our law and that the principle has special resonance when government seeks to constrain a person's ability to speak there. Most Americans would be understandably dismayed, given that tradition, to learn that it was illegal to display from their window an 8 x 11 inch sign expressing their political views".

The courts have held that a covenant would be considered unconstitutional if it were a city ordinance that was found to be unconstitutional. In spite of this opinion, several state cases have objected to the display of certain signs, basically commercial signs. In a Minneapolis appeals case (Brayton v. City of New Brighton), a sign restriction ordinance that opposed commercial signs but not a noncommercial sign during elections was not unconstitutional. The appeals court said (emphasis is mine),

"Minimizing visual clutter, **maintaining property values,**

public safety, the elimination of traffic hazards, are legitimate purposes providing the regulations are carefully drawn, reasonable and do not permissively prefer one kind of speech over the other".

In short, since homeowners associations are private organizations homeowners are outside this protection of the 14th Amendment, which applies only to state governments. The courts have permitted covenants restricting freedom of speech by HOAs. It is very difficult to believe that a homeowner had knowingly agreed to give up his right to free political speech, right here in the bastion of democracy, and the courts are upholding that restriction.

Any suit against an HOA must show a state action, which could be the reliance of the HOA on a statute or ordinance, or the court enforcing an unconstitutional law or covenant. An important case that can be applied here is Shelly v. Kraemer where the US Supreme Court found judicial enforcement of a racially restrictive covenant (14th Amendment restriction) was found to be a state action and unconstitutionally enforced.

If it's good for racially restrictive covenants, it should be good for a freedom of political speech covenant.

**“Special respect  
for individual  
liberty in the home  
has long been part  
of our culture “**



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# Calif. Passes new HOA laws



First Amendment  
to free political  
speech

California homeowners appear divided on the results of recent legislation and the new HOA/CID laws. While the laws give some benefits, they all deal with the existing legal structures that are at the heart of serious complaints regarding the homeowners civil and constitutional rights.

One such important bill is AB2895 that attempts to provide protections to homeowners by restricting nonjudicial foreclosures to amounts over \$2500.

And how does the leading pro-HOA lobbying organization, CAI, feel about foreclosure reform? From its *Common Ground* magazine:

“With all these legislative remedies swirling around [in several states] , you wonder, are association foreclosures so prevalent, and so routinely abused, that such sweeping measures are necessary? Or is it not coincidental that each of the three legislatures presides over a state that has witnessed a sensation-ally publicized association foreclosure proceeding within the last year?”

Here are two of the new California laws:

## **AB2718:**

This bill would, among other things, revise provisions governing the preparation and distribution of financial and other documents to members of the devel-

opment, require certain community service organizations, as defined, to prepare and distribute a specified financial statement, and set forth a specified form regarding assessment and reserve funding disclosures.

## **AB1836:**

This bill would revise and recast the provisions described above relating to dispute resolution. The bill would specify that a common interest development association and an owner of a separate interest may enforce governing documents other than the declaration.

The bill would require an association to provide a fair, reasonable, and expeditious procedure for resolving these disputes, as defined by certain minimum standards, and would provide a procedure for associations that do not have a procedure of their own that meets the minimum standards, among them that the member not be charged a fee to participate in the process.

The bill would also require that the association provide notice of its dispute resolution process, as specified.

This bill would revise the existing dispute resolution provisions, described above, to clarify their application to other nonjudicial processes and to broaden their applicability.

**CAI wonders,  
“are  
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## Representative democracy in HOAs

Fred Pilot comments on representative democracy in HOAs. (See article on page 2, Linc Cummings).

I would add that representative democracy in private CID governance has substantial functional weaknesses. Due to a lack of interest, CID elections often lack robust debate of issues and candidates stand for office uncontested. Those who are elected to the governing board

often view their duties resentfully as a thankless task instead of positively as an opportunity to serve their constituents.

The nomination process is overly controlled by incumbent directors due to an inappropriate corporate elections protocol and are not supervised by independent third parties

such as county elections offices. When there are disputed elections, they are frequently not timely resolved by the courts in a priority manner as with those overseen by county election offices and instead drag on for years and place litigants at risk of mootness, substantial waste of time and economic resources and festering ill will.



## Lack of state protection for homeowners

[Unpublished letter to AZ Republic]

The letter from a reader outlines existing problems that are happening throughout many HOAs.

CAI continually states that the problem lies with Bad Boards, but they ignore the issue that Bad Boards are nearly impossible to remove from office. The AG handles every other type of case of corporate fraud, and every other type of investment fraud, yet they refuse to handle issues of fraud with HOAs! Our homes are our greatest & dearest investments!

Why does the State of Arizona refuse to protect it's citizens living in these oppressive private communities? Why haven't they provided enforcement for the laws they make? Without enforcement, laws are lip service. Without Protection, HOAs are Oppressive & Corrupt.

All citizens living in private/planned communities & condominium complexes, write your lawmakers and ask them why they refuse to protect you?

Rauni Armbruster

Arizona



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# CATO Institute and HOA governments

The CATO Institute is a national nonprofit with interests in public policy. In its current issue, of *Regulation*, Summer 2004, two articles are presented on HOAs as muni-governments.

Robert Nelson argues that planned communities were a response to “the tragedy of the commons” that focused on concerns for the deterioration of “higher quality neighborhoods”. And in keeping with this concern he points out benefits of having private government “ordinances” and enforcement that would not be possible under a public form of government. And that being private does not mean the absence of legal authority to enforce the CC&R contract. As for homeowner rights, Nelson continues, “the courts have deferred to the private autonomy of the private neighborhoods.”

In response, William Fischel agrees with Nelson with respect to the many municipal functions already exercised by HOAs. He focuses on zoning and land-use functions of the municipality in relation to the private regulations of the HOAs, which appeal to home buyers.

He is opposed to Nelson’s argument to replace municipalities by HOAs as well as consolidating HOAs into municipalities because it throws out the virtues of local government to cure a vice.

As I have proposed in my Muni-ization scheme, the HOA and its rules can be part of the municipality, while bringing back the Bill of Rights.



**“Neighborhood associations are replacing municipalities ... community associations are not substitutes for local government”**



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# Political speech in HOAs

[Unpublished letter to the Cincinnati Enquirer.]

Erica Solvig's article on signs and homeowner associations raises very important issues of political free speech, a fundamental basis of our democratic system of government.

Is it in the best interest of the public and this country to permit a private organization, with all the attributes of a territorial government, to prohibit the exercise of free speech guaranteed by the Bill of Rights? If the association were indeed a public, governmental entity, the Bill of Rights would still be protecting our fundamental freedoms.

G. K. Staropoli



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# It needs to be in writing!

I've heard it too many times. A homeowner seeking to make improvements on his private property gets a verbal "go-ahead" from the HOA manager or some HOA official. He proceeds with construction over a period of weeks to months and spending a considerable sum of money.



Then comes the violation letter from his HOA with the threats of fines, leaving the homeowner shocked and puzzled. What has happened to their beliefs of a happy and great community of people sharing the same views of the community?

These unfortunate, good people had forgotten that they are subject to a binding private contract in real property. And as such, all modifications must be in writing.

However, justice may be found by filing an injunction by estoppel which is a legal doctrine that it's inequitable to give your word knowing others will act on it, and then at a later time change your mind. Check out this important legal defense against these unethical acts.



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