

## What are HOAs doing wrong?

In my "Unconstitutional legislation, court enforcement and state actions" post, I asked, "What are CIDs doing wrong"? I am referring to the equivalent of a state real estate tax sale that has a redemption period that leaves California waiting 5 years, and Arizona 3 years. Let me answer that here.

What CID boards are doing wrong is to rely on the police powers of the state rather than to prudently manage their associations with sound business practices, such as using a sound budgeting process and maintaining adequate reserves. Reserves for bad debts is a standard and simple accounting procedure used by businesses and other non-profit organizations, but is found lacking in CIDs and in any of the CID educational literature from the business trade group, CAI. Instead, it's easier to get state law to obtain a disclosure which can be seen as a punishment for offenders. With proper education and legal requirements CIDs can be better managed.

The argument that it's unfair for one member to pay for "deadbeats" is a false and misleading argument because it's done everyday as a matter of course in business and in personal affairs. Call it insurance payments for social security, workmen's

comp, unemployment, errors and omissions, property damage, etc. The word "fair" must be seen in terms of practical and cost effective solutions, benefiting everyone including our society and communities, and not as cruel and unusual punishment supported by the state.

No, CIDs/HOAs must be made to conform to the laws of the land and the private contract/equitable servitudes defense be put into proper context.

"We are called upon to consider whether enforcement by state courts of the restrictive agreements in these cases may be deemed to be the acts of those States.... We have no doubt that there has been state action in these cases in the full and complete sense of the phrase."

"We hold that in granting judicial enforcement of the restrictive agreements in these cases, the States have denied petitioners the equal protection of the laws and that, therefore, the action of the state courts cannot stand.

The word "fair" must be seen in terms of practical and cost effective solutions, benefiting everyone

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# The HOA Citizen

*HOA citizens are US citizens first!*

March 2004

eNewsletter

## NJ suit on HOA as a government

### STATEMENT OF RUTGERS LAW SCHOOL PROFESSOR FRANK ASKIN ON DECISION IN TWIN RIVERS CASE

Although we are disappointed that Judge Shuster failed to find that the Twin Rivers Homeowners Association was a quasi-municipality subject to the constraints of the New Jersey Constitution, we are gratified by his decision regarding the obligations of the association to provide members' access to the community room, prohibiting the gagging of Board members who wish to discuss association business with their constituents, and to guarantee candidates for the governing board access to voters' lists.

For members of commu-

nity associations in New Jersey, this decision should mean an end to arbitrary decision making concerning access to common facilities, to restrictions on access to governance information and to restrictions on electoral participation.

More importantly, this is just the first round in a battle over democratic rights in homeowner associations. In professional football, this is what is referred to as the end of the regular season, where the only thing that matters is getting to the post-season. We have now advanced to the playoffs – the appellate process.

And just as happened in the decade-long fight over the right of free speech at New Jersey shopping malls, which the Rutgers Constitutional Litigation Clinic and the American Civil Liberties Union

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## California hearings on CID foreclosures

[Taken from background paper of the California Senate Housing & Communities Committee meeting of Feb 17, 2004 on HOA foreclosures]

Homeowner Association Foreclosures Statistics show that homeowner associations foreclose on

members homes for relatively small amounts of delinquent assessments in comparison to non-CID creditors. A 2001 study done by Sentinel Fair Housing conducted an evaluation of foreclosures in Alameda, Contra Costa, San Mateo, Santa Clara and Sacra-

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## ... NJ and HOA as government

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of New Jersey lost at the trial court level, we remain confident of ultimate vindication by the State Supreme Court.

Of the nine original counts of the complaint, the plaintiffs have thus far prevailed on four:

1. The association may not deny members the right to rent the community room for a meeting;

“failed to find that the Twin Rivers Homeowners Association was a quasi-municipality subject to the constraints of the New Jersey Constitution”

2. An association resolution forbidding members of the Board of Trustees to discuss certain governance matters with their constituents without approval of the full Board has been struck

down under state statute;

3. Candidates for the Board of Trustees are entitled to a list of voters without agreeing to pay the association an arbitrary monetary penalty if they are accused of misuse of the list;

4. The right of members to tape the proceedings of Board of Trustees meetings was resolved in favor of the plaintiffs by consent of the parties earlier in the proceedings.

Ultimately, we expect to prevail on the remaining issues: the right to post political signs on homeowners lawns; equal access to the community newspaper; a democratic voting system

for election of board members; the charging of an excessive fee for rental of the community room; greater access to association governance documents; and an inexpensive Alternative Dispute Resolution System (ADR) for resolving disputes between the board and homeowners.



## ... CA Senate foreclosure

(Continued from page 1)

mento counties. The analysis reported that median amount owed in homeowner association foreclosures was \$2,557; the median amount in all other cases was \$190,000. The recent example of the Copperopolis family who lost their home for \$120 could be seen as an extreme example but it demonstrates the legal authority that associations possess to foreclose for negligible amounts. Associations primarily use non-judicial foreclosure which does not require review by a court. The California Civil Code stipulates that non-judicial foreclosure must be afforded basic due process and must be conducted "with fairness, openness and scrupulous integrity and the trustee must exercise sound discretion to pro-

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## Case law on our rights

Lee v. Katz, Case #: 00-35755

Citation: 2002 DJDAR 373 US 9th Court of Appeals, 1/10/02

"The fact that property is private is not sufficient to justify the State's permitting a corporation to govern a community of citizens so as to restrict their fundamental liberties."

Shelly v Kraemer, 334 US 1, 13 (1948)

"We are called upon to consider whether enforcement by state courts of the restrictive agreements in these cases may be deemed to be the acts of those States.... We have no doubt that there has been state action in these cases in the full and complete sense of the phrase.

"It is clear that but for the active intervention of the state courts , supported by the full panoply of state power, petitioners would have been free to occupy the properties in question without restraint. [emphasis added]

"We hold that in granting judicial enforcement of the restrictive agreements in these cases, the States have denied petitioners the equal protection of the laws and that, therefore, the action of the state courts cannot stand. "



## ... non-judicial

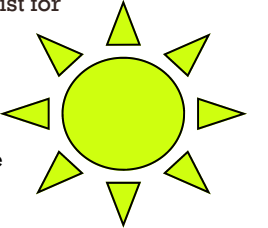
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played out over this issue. Not only is there a lot of money involved in this lucrative field but many questions have been raised at some of the foreclosure practices used.

Californians are hoping that the legislature will finally end non-judicial foreclosure in homeowner associations. It has caused too much suffering.

Only one speaker, the lobbyist for CAI argued in favor of non-judicial foreclosure.

Senator Ducheny, the committee chair told reporters that she expected a bill to be introduced in the next few days.



[From the AP coverage]

Jim Wasserman of AP reports that lobbyists for association-governed neighborhoods warned lawmakers against rushing into bills to prevent people from losing their homes. The lobbyist said that it only occurs in only 1 percent of throughout the United States.

CAI lobbyist, Daum, said non-judicial review motivates people to pay their bills.

## Arizona anti-foreclosure & anti-fine bill

The homeowner fight for the equal protection of the laws includes Arizona with Rep. Farnsworth's anti-foreclosure & anti-fine bill, **HB2402**. The essentials of the bill are (caps show proposed statute changes):

The association has a lien on a unit for any assessment levied against that unit

or monetary penalties imposed against its unit owner from the time the assessment or penalty becomes due. The association's lien FOR ASSESSMENTS, FOR CHARGES FOR LATE PAYMENT OF THOSE ASSESSMENTS AND FOR REASONABLE ATTORNEY FEES INCURRED WITH RESPECT TO THOSE ASSESSMENTS may be

foreclosed in the same manner as a mortgage

on real estate, EXCEPT THAT IT SHALL NOT BE FORECLOSED ANY SOONER THAN SEVEN YEARS AFTER THE RECORDING OF THE LIEN. THE SALE OF PROPERTY TO SATISFY A JUDGMENT UNDER THIS SECTION SHALL BE FOR FAIR MARKET VALUE AND ANY REMAINING BALANCE SHALL BE PAID TO THE UNIT OWNER.

Unless the declaration otherwise provides, Fees, charges, late charges, monetary penalties and interest

charged pursuant to section 33-1242, subsection A, paragraphs 10, 11 and 12, OTHER THAN CHARGES FOR LATE PAYMENT OF ASSESSMENTS, are NOT enforceable as assessments under this section. If an assessment is payable in installments, the full amount of the assessment is a lien from the time the first installment of the assessment becomes due.

THE ASSOCIATION HAS A LIEN FOR FEES, CHARGES, LATE CHARGES, OTHER THAN CHARGES FOR LATE PAYMENT OF ASSESSMENTS, MONETARY PENALTIES OR INTEREST CHARGED PURSUANT TO SECTION 33-1242, PARAGRAPHS 10, 11 AND 12 AFTER THE ENTRY OF A JUDGMENT IN A CIVIL SUIT FOR THOSE FEES, CHARGES, LATE CHARGES, MONETARY PENALTIES OR INTEREST FROM A COURT OF COMPETENT JURISDICTION AND THE RECORDING OF THAT JUDGMENT IN THE OFFICE OF THE COUNTY RECORDER AS OTHERWISE PROVIDED BY LAW. THE ASSOCIATION'S LIEN FOR MONIES OTHER THAN FOR ASSESSMENTS, FOR CHARGES FOR LATE PAYMENT OF THOSE ASSESSMENTS AND FOR REASONABLE ATTORNEY FEES INCURRED WITH RESPECT TO THOSE ASSESSMENTS MAY NOT BE FORECLOSED AND IS EFFECTIVE ONLY ON CONVEYANCE OF ANY INTEREST IN THE REAL PROPERTY.



Winged Victory stands over Arizona Capitol

## ... foreclosure

(Continued from page 2)

protect the rights of all interested parties and obtain the best possible price." Several legal cases have asserted that the courts will scrutinize all non-judicial foreclosure sales for fairness and for a gross inadequacy of price. Although there are existing legal protections for the homeowner, in reality it is difficult for individual property owners to challenge the actions of the homeowner associations through the legal process after the fact.

Individuals who lose their home via the CID non-judicial foreclosure process often lose a significant amount of their equity due to the small amounts at which the homes are sold in auction. The minimum bid at sale is the amount owed to the homeowners association, regardless of how much the home is worth. In contrast, the judicial foreclosure process mandates that the minimum bid at foreclosure sale cover the amount owed, any junior liens, and the homestead amount which ranges from \$50,000 to \$150,000.



Hear no evil, see no evil, speak no evil

## Non-judicial foreclosure

[From a report by Peter Amherst of AHRC News Services]

The California Senate Housing Committee hearing focused on the question whether homeowner associations should be stripped of their power of non-judicial foreclosure. Tom Radcliff, the disabled man from near Sacramento who lost his home in foreclosure for \$120 in unpaid homeowner association assessments, was there. His house was worth \$280,000.

Many speakers called for the elimination of non-judicial foreclosure for unpaid assessments. In addition many homeowners sent in reports supported with documentation about illegal foreclosures and foreclosure practices in homeowner associations. As an alternative, speakers called for the use of small claims actions prior to any collection activity being taken for unpaid dues.

Senator Ducheny announced that one of the two foreclosure witnesses, Melissa Colburn, would not be testifying because the lawyers who foreclosed on her home, Peters & Freedman, threatened her with a lawsuit if she testified. She did not testify. The committee is reportedly in the process of issuing her a subpoena which would protect her from suit.

This move by Peters & Freedman highlights the high stakes drama being

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## The Melissa Colburn saga

In the movie, *The Insider*, big tobacco resorts to the threat of a lawsuit against *60 Minutes* as a last ditch attempt to prevent the exposure of their role in the “nicotine is a drug” cover-up. It worked, for a while, but the truth was eventually told.

Melissa Colburn sat in the public audience at the February 17th meeting of California’s Senate Housing and Communities Committee, ready to testify against California’s non-judicial HOA foreclosures. She did not testify as anticipated.

“threatened her with a lawsuit if she testified”

Senator Ducheny, committee Chair, announced that one of the two foreclosure witnesses, Melissa Colburn, would not be testifying because the lawyers who foreclosed on her home, Peters & Freedman, threatened her with a lawsuit if she testified. As in the movie, it is reported that the committee is in the process of issuing her a subpoena which would protect her from any lawsuit suit.

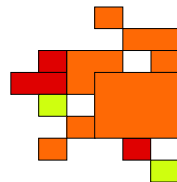
This past July, it’s reported that Peters & Freedman settled with Ms Colburn to drop all charges against them, including RICO charges. In April 2003, the Judge Vargas gave Melissa the go ahead to file such a suit. A gag order was part of the settlement and so no details are known. The judge wrote:

“allegations that Defendants engaged in multiple unlawful and fraudulent

acts for their financial gain in connection with foreclosure sales of real property ... these allegations to be sufficiently specific to sustain a claim of RICO violations at this stage of the proceedings”.

Melissa did get her home back after losing it in a foreclosure in 2002 for some \$990 in money owed the HOA. With the settlement, all action has stopped, or has it? Will the Housing committee issue a subpoena in the name of justice.

Peters and Freedman was also the attorney for the Desert Crest HOA where a new board came to power and hired the firm to amend the CC&Rs and by-laws. The purpose of the amendment was to give the HOA powers to collect mandatory fees for a country club that was not owned by the HOA, and was operated as a for-profit business and was open to the public. Earlier, an attempt in the courts to have the HOA ruled as a mandatory association failed — it remained a voluntary association until this amendment made it compulsory to pay fees for the country club.



## Florida HOA activities and events

Dear Florida Legislators, Friends and Members,

After reading the preliminary report by Representative Julio Robaina, Chairman of the Select Committee On Condominium Association Governance, there is very little doubt left where Florida's homeowners and condo owners will find the necessary support to finally stop the abuses in these associations.

Chairman Robaina and the members of the Select Committee listened for hours to the horrifying testimony of the owners, in one case until after midnight. And the report shows that they were not only listening, but as well are willing to act on it.

Congratulations to Chairman Robaina and the Members of his Committee!

This is exactly the opposite of what we see happening on the HOA Task Force, created by Governor Jeb Bush. The industry representatives of the Task force plainly ignored the many testimonies of the concerned owners and voted in the interest of their wallets, definitely failing the mission statement of the Task Force *“to harmonize and improve relations between homeowners, homeowners’ associations and other related entities.”*

I think the recommendations, the task force is willing to propose, even create a bigger gap between the opposing parties. But what

can you expect if you create a task force stacked with ten industry members and three homeowners’ representatives? At the last meeting they were even unwilling to listen to 6 public speakers (three minutes each), who came all the way to St. Augustine, at the end of the meeting. What a difference! I just hope it will be different next Wednesday in Tallahassee.

And on a similar note: Governor Bush proposed today to take \$6 million out of the Condo Trust and add the money to the General Tax Fund. This trust fund is created by a special payment of \$4 by Florida condo owners to finance an agency created to protect their welfare. I don’t think this needs further explanation?

I’m getting slowly to the point where I wish that Florida’s homeowners have a long enough memory to remember on November 2, 2004, who is willing to help them -- and who is not! And vote accordingly!

Jan Bergemann, Pres

Cyber Citizens for Justice

