



The HOA Citizen

HOA citizens are US citizens first!

April 2004
eNewsletter

Prof. McKenzie views foreclosure

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A controversy arose last month between statements made Prof Evan McKenzie(1), a long time critic of HOAs, and homeowner rights advocates regarding his statements made on his web site. (The full text of these statements can be found at his site: <http://privatopia.blogspot.com>)

The controversy arose from a simple comment made in regard to HOA foreclosure legislation now occurring in several states, when he initially wrote:

“So, what should be done? In my opinions, HOAs should not be allowed to use nonjudicial foreclosure. The practice is being abused by a small number of collections attorneys who have invaded the field of community association law but who in reality wouldn't recognize "community"

if it walked up and bit them on the butt. These folks are community destroyers--the HOA version of divorce lawyers. Their goal is foreclosure, not collection of delinquent assessments.

“But I do believe that HOAs need to have recourse to judicial foreclosure as a last resort. Associations need to get paid. They must be able to defend themselves against chronic deadbeats, or disaster will result for those who are paying their assessments as they are forced to carry the load for the free riders. Associations don't have the resources to cushion them for years of non-payment by a significant number of residents.

“Leaving associations only with recourse to debtors' personal assets--garnishment, attachment, and

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Letter to President Bush on HOA mandates

March 24, 2004


Dear President Bush:

Several states are deciding on legislation with respect to homeowner association foreclosure laws that are viewed by homeowner rights advocates as draconian in measure. Advocates raise issues of the lack of

due process and the unequal protection of the laws while proponents of HOAs argue about contractual rights that create undemocratic private governance of planned communities.

There was an old joke about com-

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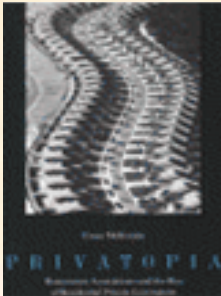
... McKenzie on foreclosure

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so forth--will crush many innocent, dues-paying members, and eventually lead to association insolvency. At least, that's the way it looks to me."

"More on foreclosure

Some people in the anti-HOA activist ranks are angry because I said yesterday that, although I think nonjudicial foreclosure should be banned, associations need to have recourse to foreclosure to collect unpaid assessments (but not fines--that's a different issue) I'm talking about a **last resort**, with procedural protections against abuse and with limits on attorney fees.



"Some of these anti-HOA activist comments make good points about issues like homestead protection, how long should statutes mandate before foreclosure is allowed, and so forth. All good points.... But the loudest complainers, as usual, show the same characteristics. One is the typical tone--uncivil rage, peppered with insults and vulgarity. Another is the refusal to deal with inconvenient facts or arguments, better known as "reality."

"Property and debt collection laws vary from state to state, but all I can say is I don't think associations can remain solvent if all they can do is go after people's wages and personal assets--cars,

boats, bank accounts, and so forth.

"That situation would, of course, leave the entire burden of paying assessments and following rules and maintaining commonly owned property to those who voluntarily chose to do so. They would carry the burden--in this case, the assessment burden--for all the unit owners. That would never work, for the reasons described above. Soon nobody would pay or obey because it would be economically irrational to do so.

"I've always been against associations having dictatorial power. I'm also against going to the opposite extreme and leaving them powerless.

"There have been so many outrageous and highly publicized abuses of the foreclosure power by unscrupulous lawyers that there may well be a kind of legislative over-reaction.

"I don't want to be right about association abuses leading to bad reforms. I also don't want to be right about what those reforms will bring about."

- (1) Evan McKenzie, Associate Professor of Political Science, Political Science Department University of Illinois at Chicago, 1007 W. Harrison St. Chicago, Illinois 60607



... letter to President

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munist Russia back in the 50s. "In Russia you can wear any colored shoes you want, provided they are black. Why? Because we are producing only black shoes." In America today, across the country, you can live in any home you want provided it's in a homeowners association. Why? Because municipalities and cities require the subdivision to be governed by an HOA.

In order to understand how did this state of affairs came about we must look to the role played by HUD, ULI and CAI (Community Associations Institute) going back to the 1960s. One important source is Stabile's *Community Associations: The Emergence and Acceptance of a Quiet Innovation in Housing*, a book funded by CAI and ULI (a review can be found at [FHA](#)). In short, it was a collaboration to promote the widespread acceptance of planned communities with its high density homes that brought high profits to the private real estate interests at the expense of the civil rights and freedoms of unsuspecting homeowners.

The FHA requirements for loan insurance to PUD projects; that is, the planned community developments, contains the following under "Definitions":

"A planned unit development (PUD) is a project or subdivision that consists of

Responses to McKenzie

Fred Pilot

"McKenzie's argument against a prohibition on HOA foreclosure authority is based on the notion that CID unit owners possess a shared sense of financial destiny and thus wouldn't support proposals that might erode an HOA's ability to preserve "their association's" solvency. Therein lies a flawed assumption in McKenzie's logic. To homonymically paraphrase Gertrude Stein's description of Oakland, California, there is no 'their' there.

"That is the true weakness in the economic structure of private residential government -- the lack of owner buy in to the HOA concept that is being exacerbated by local government land use policies requiring nearly all new residential developments be formed as CIDs combined with state enabling statutes that are effectively forcing homeowners into CIDs whether they support them or not. The financial collapse of some HOAs may be one of the consequences of these misguided policies. "

Dianne McCarthy, CIHCNJ

"There is no more loyal or committed advocate for the HOA owner than this

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... responses to McKenzie

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man. Being an HOA association attorney gave him the knowledge and the insight that he has now. His academic bent and fine character are the reasons that he is no longer an HOA attorney representing associations.

"Professor McKenzie flew to New Jersey to serve as the expert witness in the Twin Rivers case for no money at all, just bare expenses. The defense witness, Kathleen Rosenberry, was paid thousands and thousands of dollars from the maintenance fees collected from residents. That is one of the things McKenzie is

"The last thing people who want legislative reform want is to be considered kooks"

objecting to when he talks about debts incurred by BODs to be the responsibility of the people. The residents of Twin Rivers had no idea that they were paying for a witness to rebut the views of a respected authority on the topic of HOA governance.

"We would be wise to heed his words. The last thing people who want legislative reform want is to be considered kooks. And to say that there should be no sanctions whatsoever for non-payment does not come across as sane."

George K. Staropoli, CAPGH & Editor

"Professor McKenzie did not make his usual arguments against HOAs as private governments removing those rights and freedoms that we all take for granted that we still have when becoming an HOA compulsory member, as found in his book Privatopia and in other of his materials. A continuance of such a position would have helped the homeowner rights arguments of injustice as a result of the dual application of the laws -- he is, however, against non-judicial foreclosure with its lack of due process. But, as he said, a wrong bill is not what we should be seeking.

"This is one of a few areas where Professor McKenzie could have further expounded his views of private governments, unequal protection of the laws, lack of education for board members, CAI as a lobbying group, and the licensing of management firms especially to regulate debt collection practices, but instead, chose to side with the special interests for reasons as he has stated.

"I believe that we need this bill [Arizona's HB2402] to stop the horror stories and to put the special interests and misguided boards on notice that due process and the equal protection of the laws come first above protecting

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Florida legislation

Dear Governor, dear Legislators,

As you all know the homeowners' representatives on the Task Force are definitely not in favor of the bill filed as SB 2984 by Senator Atwater. We feel that this proposed bill still leaves homeowners in need without a place to turn to. And we just can't hire an attorney every time somebody violates the laws - because it happens too often! Many of us came to Florida to spend a peaceful retirement, not to waste our life-savings in legal fees. In order to make SB 2984 homeowner-friendly some amendments are necessary. Please see our proposal at:

And it's time to act now! Postponing the decision will ruin even more Florida families!

Please consider the request of your constituents. It's time for changes. The people trying to find reasonable solutions in the last years failed miserably. !

It's about time that your Constituents have a SAY in their own FATE!

Jan Bergemann.

Pres. CCFJ

\$120 foreclosure

Dan Rather of CBS Evening News reported on this California foreclosure incident on March 26, 2004.

"All my life savings is in this house," says Tom Radcliff.

One thing the Radcliffs don't understand is why the homeowner's association just didn't come by and tell them they had a problem. The association office is just two minutes down the road, but nobody said a word.

Legally the association didn't have to, and foreclosure is a proven tool. So the debt was turned over to a collection agency. And though the Radcliffs say they had a verbal agreement to pay off the delinquent annual dues, their house went on the auction block.

"It did not occur to me that they would foreclose," says Anita Radcliff. "I just thought people don't do things like that."

The Radcliff's \$300,000 house went for just \$70,000 to a speculator. They get most of the selling price after their debt is settled and get to stay put for now. And they're mad.

And how does the HOA attorney feel about their plight? "They are victims of their own making....Why isn't the owner paying that [the \$120]?"

Draconian measures, that's what they are. Not even the IRS will take your house and state tax sales allow for a redemption period of several years.

... letter to President Bush

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common property and improvements that are owned and maintained by an owners' association for the benefit and use of the individual PUD units. In order for a project to qualify as a PUD, each unit owner's membership in the owners'

association must be automatic and non-severable, and the payment of assessments related to the unit must be mandatory. Zoning is not a basis for classifying a project or subdivision as a PUD."



Yet, this agency of the federal government took a purely monetary look at these requirements for PUD governance without batting an eye toward insuring a democratic form of government that is subject to the US Constitution and Bill of Rights. This delegation must come from Congress and not from an agency like HUD or a local planning board. (Such actions have been considered as "state actions" by the USSC, 99-901, when the HOA is created, coerced or encouraged by the government). And still there are no requirements or stipulations as to the content of the association's constitution or charter, including the above simple caveats of being subject to the laws of the land.

Article IV, section 3.1 of the US Constitution says that "no new State shall be formed or erected within the jurisdic-

tion of any other State ... without the consent of the legislatures of the States concerned as well as the Congress". It would have been very easy for the FHA/Fannie Mae to stipulate the above requirements -- subject to the US Constitution and Bill of Rights -- as part of and incorporated into any and all CC&RS. Very easy indeed! But, the protections of the laws of the land were ignored.

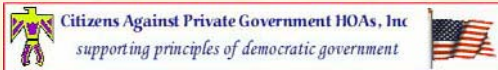
It must stop. Homeowners living in homeowner associations must be given the same rights as all other citizens are entitled to, and the binding CC&R private contract artifice must be held as non-applicable.

George K. Staropoli, President

Citizens Against Private Government
HOAs, Inc

Scottsdale, AZ

[This email letter was sent in regard to President Bush's scheduled appearance in Arizona to speak on homeownership on March 26th]



... response to McKenzie

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a sacred cow status for HOAs and their attorney gunslingers.”

From NOAS

Who cares if a non-person non-profit corporate entity like an HOA goes under. If that happened, the problems would all be solved. So the homeowners might have to resort to self management and the pool might have to be filled with dirt, or the tennis court turned into a parking lot, or the gates will remain permanently open, and the city might actually have to use some of those property taxes HOA homeowners continue to pay but never receive services for - so what? So they get rid of the liabilities, that's what. Why is that a problem? Is it because the need for management companies and HO Assn lawyers would cease to exist? Well, hallelujah! We have seen the light at the end of the tunnel and we are also hearing Cindy Lauper singin' "I see your true colors shining through....."

From Shu Bartholomew


I just don't believe associations should be allowed to foreclose to collect money it alleges it is owed. There are other means of collecting debts without putting families with small children, seniors or any other homeowner, for that matter, on the street, just because they can.

Rights and Responsibilities and the industry members recommend foreclo-

sure as a last resort. What does that mean? Who is going to determine whether other collection methods have been tried and that foreclosure truly is "the last resort"? There are no homeowner protections that I can see to ensure that all other available collection methods have been used or that the debt is to collect legitimate assessments and not trumped up charges, legal fees, fines and other penalties associations are famous for coming up with.

Any attempts to provide statutory oversight or homeowner protections are met with cries of "foul" by the industry claiming the homeowners chose to live in associations, they "agreed" to abide by the HOA rules, the legislature is interfering with a contractual agreement whereby the homeowners intend to govern themselves,yet without the threat of foreclosure none of them would pay their share of the association expenses?

If all the bunk is true about homeowners loving their associations and choosing to live in them, why would they need to be governed by threat and intimidation? I hear from a number of these happy homeowners who are scared to death of what their associations will do to them.



“I hear from a number of these happy homeowners who are scared to death of what their associations will do to them.”

Valuable societal goal or un-American activities?

As a homeowner rights activist myself, I must point out that laws are made for all of us and for all to be treated equally, which is not the case with HOAs. It is quite clear, from the very beginning with the unconscionable adhesion contract being upheld in the courts, the statutes that serve to reinforce the onerous CC&Rs and thereby "validate" these unjust laws, to the claim that HOAs are private organizations and the US Constitution and Bill of Rights do not apply.

However, it is a general principle of law and the American system of justice, fairness and government to rule any contract contrary to the public interest, such as unconscionable adhesion contracts, and subject to misrepresentation, to be unenforceable and null and void. Yet, they are not when it comes to HOAs. Why not?

Are proponents of HOAs justifying these violations of rights and freedoms in order to attain better property values for private organizations? That the government's mandating of HOAs is not a form of fascism or national or local socialism, but is the only way to achieve these societal goals, determined by a few profit-seeking groups, and that they are highly advantageous to society?

We must remember that this is America. And in America a defective product or a highly favored goal of a select few must still be subject to the Constitution, the Bill of Rights and laws of the land. And if not, then another method, a more just, fair and legitimate method needs to be found. And that method has existed here in America since 1787 with the adoption of the Constitution of the US, and it's called civil government, not private government.

There is no reason for mandating the governance of a subdivision to a private group without governmental oversight and regulation, while not providing for those basic protections of our rights. No reason whatsoever. And the "battles" in the legislature over the past 5 years in Arizona has been precisely over our rights as Americans.

[An excerpt from a letter by the Publisher, George K. Staropoli, US Congressman, Secretary of HUD and US Assistant Attorney General for civil rights].

"That the government's mandating of HOAs is not a form of fascism or national or local socialism?"

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