

HOA Citizens are US citizens

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## Andres: Flying the flag and sued for HOA attorney fees

George Andres is the Marine who had to remove the US flag from his home, and was then sued for attorney fees.

On March 23rd, the appeals court ruled that attorneys fees were not a continuing lien created when the Declaration was filed and binding on all future property own-

ers. The homestead laws allowed for foreclosure for nonpayment of assessments, yet the Declaration failed to explicitly state that attorneys fees were included in the lien as an assessment, and therefor it existed prior to the homestead exemption (Remember Inwood v. Harris in Texas?) The trial court

accepted attorney fees to be treated the same as an assessment under the homestead exception, but the appeals court saw otherwise.

The CC&R wording was "all such assessments, together with interest . . . and attorney fees . . ." indicating that the fees were outside the category of

"assessment". The court held,

"[W]e find that the association documents do not provide for a continuing lien that preexisted the homestead exemption for attorney's fees in question here. . . . We, therefore, reverse the final trial judgment of foreclosure."

## HOA kangaroo courts

Much to my surprise, Black's Law Dictionary defines a kangaroo court as:

"1. A self-appointed tribunal or mock court in which the principles of law and justice are disregarded, perverted, or parodied. 2. A court or tribunal characterized by unauthorized procedures, esp. as to render a fair trial impossible. 3. A sham legal proceeding."

Now, those familiar with the adjudication and hearing procedures with state or federal agencies well know that these procedures are quasi-judicial. All those protections available in our judicial system are not available, but there is an attempt to reach a just decision in less formalistic settings. Still, justice in these proceedings can, and usually do, border on the biased views of the agency.

In contrast, I believe we can safely refer to HOA hearings as nothing more than a kangaroo court where there is generally no attempt to arrive at a just decision.

# The HOA Citizen



## Should the 14th Amend. Apply to HOAs?

*Excerpts from March 14, 2005 Citizen letter to California Law Review Commission Memorandum 2005-3 on homeowner bill of rights. The complete letter may be found at <http://pvtgov.blogspot.com>.*

Tuesday, March 15, 2005

These problems and issues with CIDs have existed from their very inception with the publication of the ULI

Homes Association Handbook, Technical Bulletin #50, in 1966 and will continue for the next 40 years unless the mental set and attitude toward planned communities undergo a major paradigm shift.

The inescapable conclusion to which the Commission will inevitably be drawn, if our Constitution is to remain meaningful and "that government of the people, by the people and for the people, shall

not perish from the earth" and be replaced by the increasing number of private governments, is for CIDs to be subject to the same municipality laws of the state to which all other local government entities are subject. There will again be only one rule of law for everyone. The following areas must be addressed:

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## HOA boards speak for their members?

Elected HOA boards have been promoted, as having a right to speak for the membership on a broad variety of issues. This is analogous

to our elected representatives, but with some differences.

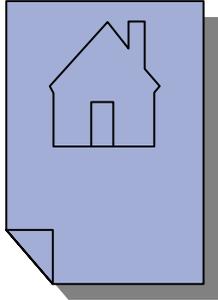
First, under a contractual arrangement as the CC&Rs are held to be, boards have no author-

ity above and beyond those granted to it under this agreement. Much like a government agency, they must conform to the powers

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## NJ bill S2016 on disclosure booklet



**“governmental and non-governmental remedies available in the event of violation of the rights of unit owners.”**

A. An explanation of the nature of home ownership in a common interest community and a glossary of relevant terms, including, but not limited to, "master declaration," "bylaws," "master deed," "covenants and restrictions" and "common elements," "liens," "fines," "rules," "alternative dispute resolution," "fees" and "governing board;"

b. A description of the rights and responsibilities of homeowners, including reference to applicable statutes and rules;

c. A description of the duties and powers of, and restrictions on, governing boards, including reference to any applicable statutes and regulations. The booklet shall include information concerning conflict of interest requirements applicable to governing board members and officers and to professionals

hired by associations and shall also include reference to any other sources of information that may be recommended by the commissioner as being of assistance to governing board members and officers in the discharge of their duties;

d. A description of the statutory and regulatory requirements for association bylaws or rules and such other material as the commissioner shall deem useful; and

e. A listing of documents and other information that a potential purchaser of a unit in a common interest community should obtain before entering into a contract to purchase a unit, including, but not limited to: copies of the association's governing documents; a copy of the latest capital reserve study, if any, showing the condition, life expectancy and replacement costs of major mechanical systems

and other common elements; any litigation pending against the association; any pending notices or orders issued by the Department of Community Affairs or any other governmental entity; the association's procedures for alternate dispute resolution and an explanation of statutory and regulatory requirements, process of adopting rules, providing access to records, approval of budgets, and review of homeowners' applications to do work on their units; delinquency and foreclosure rates; the association's insurance coverages; governmental and non-governmental remedies available in the event of violation of the rights of unit owners. These documents and this information shall be made available to prospective purchasers . . . .

## Petition for a redress of grievances

Excerpt from Letter to Calif. Law Review Comm.

To state my concerns concisely: Any statute, law, agency rule or regulation not accompanied by an enforcement process or procedure is not a statute, law rule or regulation. It's an empty statement of policy, relying on the goodwill and citizenship of the people to whom it applies. And

when in the course of human events, when a long train of abuses and usurpations, pursuing inevitably the same object, evinces a design to reduce homeowners under an undemocratic, despotic form of corporate government over their homes, their private properties and their lives and the lives of their loved ones, restricting the liberties and freedoms given to and enjoyed by other persons not living in a

[HOA], then it's for the government to provide the necessary oversight and to exercise its rightful and proper police powers to regulate the abusers, and to restore to homeowners in living in CIDs the same rights and privileges enjoyed by all other persons in the state. It is only fitting for the legislature to enact such proposed legislation.

“Any statute . . . not accompanied by an enforcement process . . . is not a statute, law rule or regulation. It's an empty statement of policy . . . .”

## ... 14th Amendment

*(Continued from page 1)*

1. Is it proper for the state to create, permit, encourage, support or defend a form of local government of a community of people, whether that form of government is established as a municipal corporation or as a private organization that is not compatible with our American system of government?

2. Is it proper for the state to permit the exist-

tence of private quasi-governments with contractual “constitutions” that regulate and control the behavior of citizens

a. without the same due process and equal protection clauses of the 14th Amendment, and that,

b. do not conform to the state's municipal charter or incorporation re-

quirements, or that

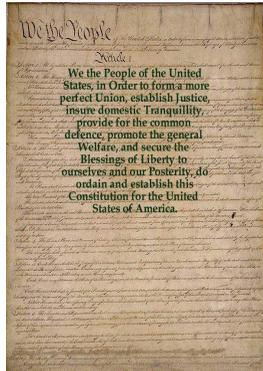
c. do not provide for the same compliance with the state's constitution, statutes or administrative code as required by public local government entities?

George K. Staropoli, Pres., Citizens for Constitutional Local Government.

# Land of the Homeowners Association

At one time, many, many years ago, America lived up to the words of the *Star Bangle Banner*,

*“The Land of the free and the home of the brave”*



Today, with the increasing support by state and local governments for privately government HOAs that see no evils with making property values more important than our inalienable rights and freedoms, America has come to be,

The Land of the Homeowners Association

In some 13 states this year, Americans are fighting to have these rights restored and to be treated equally under the laws of the land. Over the years, homeowners have met with some success, but the larger issues of due process, the equal protection of the laws and

the privatization of government have been negligent.

The Senate Judiciary Committee voted 4-1 to send the bill affecting more than one-fourth of California's households to a full Senate vote later this spring. Lawmakers passed a near identical bill last year making California's 37,000 homeowner associations use small claims court to collect unpaid sums below \$2,500, but Schwarzenegger vetoed it.

Schwarzenegger said it could force dues-paying homeowners to make up for lost money caused by those who don't pay.

The new version, by Sen. Denise Ducheny, D-San Diego, would end the long-standing power of homeowner associations to auction off a member's home for failing to pay assessments that average about \$200 a month in California.

Yet, in Arizona, some 22 HOA reform bills have gone nowhere, including two versions of a bill to restore the homestead exemption to homeowners living in HOAs that was unconstitutionally stripped from them as a distinguishable of citizens.

The taking of one's home as a gross and excessive punishment by these private governments is still permitted in Arizona, and in almost all other states, not as a contractual obligation, but as state law.

Florida and Texas are fighting for justice and the American way. Texas also allows foreclosure on homes in what is obviously not the intent of the Texas Constitution.

New Jersey (see other article in this issue) has introduced a very powerful bill that addresses many of these key constitutional issues, but has run into heavy opposition.

Proponents of HOAs believe that it's their unalienable right to private, corporate, undemocratic governments.

# NJ HOA bill, S-2016, makes sense

EXCERPTS:

c. The requirement to form a homeowners' association shall not apply to any common interest community in which the common elements or limited common elements consist only of open space, including walking trails thereon, and sewerage and drainage basins, at the option of the developer and the municipality. . . . Each unit owner will be required through a deed covenant to deposit such funds as may be calculated annually by the municipality in which the development is located for the maintenance of these common elements. A municipality may assess such costs as an ad valorem tax. P.67.

b. Corporations deemed to be formed or formed under this act shall be subject to the local government jurisdiction in

which the common interest community is located, and as such may not adopt or maintain any rule or bylaw provision in conflict with an applicable municipal ordinances or resolutions, except where specifically permitted by State statute or by the municipality or county.

c. Corporations deemed to be formed or formed pursuant to this act are without authority, by contract or otherwise, to impinge on the inherent or specific rights protected under the New Jersey Constitution or the United States Constitution of any citizen residing in the State. . . . All such rules shall be properly adopted by the membership of the community through a democratic method in accordance with P.L. , c. (C. ) [that stands for Public Law] (now be-

fore the Legislature as this bill) or other relevant law. P.70.

(6) Any provision not inconsistent with the "Common Interest Community and Homeowners' Association Act," P.L.1969 , c.257 (C.46:8B-1 et seq.), which the incorporators elect to set forth for the management and conduct of the affairs of the corporation, or creating, defining, limiting or regulating the powers of the corporation, its officers, trustees and members or any class of members, including any provision which under this act is required or permitted to be set forth in the by-laws; p.75.

Senator Shirley Turner, sponsor



**“Corporations deemed to be formed or formed under this act shall be subject to the local government jurisdiction”**

## ... Boards speak for their members?

(Continued from page 1)

so granted to them under the legislative enabling act or executive order.

Second, there's the implication that the very same procedures used to elect officials in our general elections are at work within the HOA. This we know is not true, the HOA being a corporate and not political form of government.

Questions are raised as to whether or not your elective representative has your consent when he 1) was not the person for whom you voted or 2) votes contrary to the way in which you would have voted. Under the HOA corporate form of government, the question of "consent of the governed" takes on a larger concern when the HOA election process is biased, corrupt and without voter protections.

Furthermore, there are no protections in the CC&Rs against abuse of power by HOA boards,

as there are in our federal and state constitutions.

This question of consent to govern plays a particularly important and divisive role when HOA boards take positions contrary to the rights and interests of the members on legislative reform bills. The board's rationale is that they represent the HOA and not the owners of the HOA, its members, and the state, in this case the HOA, takes precedence.

There is no Bill of Rights obligation stating that the rights, liberties and freedoms of the members are protected, unalienable rights with superiority and precedence over any other provisions of the CC&Rs.

As an example of abuse of power and consent of the members, the Canyon Reporter (CO) writes about Hiwan Golf Assn and its recent events in regard to RV parking

At the annual meeting, the board's approach

was criticized as a circumvention of the CC&Rs that required a 100% to change and the board's proposed rule change was invalid.

A resident survey on a number of issues, including RV storage was conducted of 368 members. The results of the survey demonstrated that the issue was fifth in priority out of a dozen issues suggested for Hiwan to address this year.

It also showed that about a fourth of homeowners wanted no restriction on RV storage and about 60 percent wanted some level of increased restriction - a notable number but far short of the number needed to change the covenants.

This board did the right thing when challenged about its procedures, and did not ignore the members and CC&Rs, proceeding anyway, and betting on nobody would take them to court.

## HOAs & the state: entwined & symbiotic

In *Marsh v. Alabama*, 326 U.S. 501 (1946), the US Supreme Court set forth what has become known as the "public functions" test based on an almost extinct company town model. Several court cases have used this model when deciding whether the HOA in questions was acting like a state actor.

This decision ignores all those state laws that only require a petition, a vote, and perhaps an approved charter, for a community to establish its own state recognized government. See your state laws relating to Counties or Municipalities.

As to our courts, new opinions have been laid down in just the past 4 years. Under *Brentwood Academy v. Tennessee School Bd*, 531 U.S. 288 (2001), a current decision based on our society and culture today, some 51 years after *Marsh*, the Court held that when a close nexus exists between the state and a private

organization then that organization is a state actor and its actions are state actions.

Other criteria include whether the state and private organization are entwined, such as by judicial enforcement of the laws, or by legislation creates, encourages or supports the private organization, then that organization is a state actor /action. Other holdings have included the doctrine of a symbiotic relationship existing between the state and the private entity.

If an HOA is so held by the court, then its actions are subject to the Due Process and Equal Protection clauses of the Fourteenth Amendment.

What does that mean? Plenty. All those special laws in your state that define, specify in detail, uniquely regulate or hold blameless for their actions would fall by the wayside. Your HOA board and your private CC&R

constitution could no longer be argued as a bona fide and freely entered into private contract. Your open meetings rules, freedom of information distribution, elections, board member ethics and accountability would fall under the same laws that your mayor, governor or legislator or councilman is held to obey.

Today, examples of the successful application of these tests abound across the country. Municipalities mandate HOA governments and are the beneficiary of real estate taxes without an offset for privately provided services (symbiotic relationship). State laws do not hold

HOA boards accountable under the law as they do to homeowners and legalize excessive punishments against homeowners by means of foreclosure proceedings. And refuse to pass laws that provide for the equal application of the laws (support and encouragement; entwined).

"when a close nexus exists between the state and a private organization then that organization is a state actor and its actions are state actions."