



The HOA Citizen

HOA citizens are US citizens first!

June 2004
eNewsletter

Presumption of constitutionality—2

In my first post on this issue, I presented part of Prof. Barnett's argument that the USSC has adopted a selective interpretation of the Constitution that affects homeowner rights issues. He argues that only those rights contained in the first 10 amendments are considered the domain of constitutional rights and that all other rights are presumed to be constitutional. So, you will not be heard by the USSC if you don't make a strong case that involves some closely linked relationship to the Bill of Rights.

Barnett adds that other wording in the Constitution gives the people those constitutional rights and cites the 9th and 10th amendments -- the enumeration of rights and powers not delegated to nor prohibited -- belong to the people.

In his book, *Restoring the Lost Constitution*, he continues this theme with (page 2), "Whatever may be in their hearts, many constitutional scholars write as though we are not bound by the actual words of the Constitution because those words are obstacles to noble objectives ... By deligitimizing the original Constitution, such rhetoric seeks to free us from its constraints". We face the same attitude with respect to the noble ambitions by the proponents of HOAs in regard to "affordable housing" and "maintaining property values" whereby everybody gains.

He makes the point that in undermining the Constitution, why should anyone pay attention to a judge or a political scientist, there is "no man behind the curtain". "This is a fraud on the public", Bar-

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Arizona passes foreclosure bill

Arizona homeowner rights advocates could not believe the vote tally during last Thursday's Senate Floor vote to reconsider HB2402, a bill that put restrictions on HOA foreclosure powers. Only a week before, the bill suffered a tight defeat of 11 - 15 with vote absentee senators, thereby permitting a motion to re-

consider to pass.

This bill prevents foreclosure due to HOA violations and fines and is a watered-down version of the Original bill that also included a waiting period before foreclosure could occur, sort of the equivalent

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... constitutionality

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nett declares. As for legitimacy, and you can substitute the CC&R "constitution" in place of the US, "A constitution that lacks adequate procedures to ensure the justice of valid laws is illegitimate even if it was consented to by a majority ... constitutional legitimacy can even be seen as a product of procedural assurances that legal commands are not unjust".

Just what justice? Or who decides what is just? Barnett answers by explaining



"the founders' view that 'first come rights, and then comes the Constitution'. The rights that precede the formation of government they call 'natural rights". Furthermore, he contends that "if a

constitution contains adequate procedures to protect these natural rights, it can be legitimate even if it was not consented to by everyone" and if not, it's not legitimate even if consented to by a majority.

This has been the essence of my posts on the "tyranny of the majority" and the need to protect those unalienable rights of all citizens, including the minority. And this is what we have been faced with in regard to protecting our basic freedoms and rights that the CC&Rs, backed by state protection via legislation that "validates" the CC&Rs and the

court enforcement of these measures, that have been taken away from us.

Our opponents speak of "the greatest good for greatest number" as a democratic principle to justify their position. Don't buy it! This slogan originated by Jeremy Bentham, a British economist who has fallen out of favor and who predated the US Constitution.

Our cause, in its broadest application, is "justice and the equal protection of the laws".

AZ foreclosure bill

to a redemption period, and a requirement for a fair market value sale. As it stands, HOAs are still outside the homestead exemption that applies to all other homeowners not living in an HOA.

The issue of homestead exemption was partially addressed by another bill that has been signed by the Governor, HB2380, that requires written notice to the buyer that 1) he's entering into a private contract -- that unseen and unsigned CC&R contract -- and 2) he acknowledges that he is willfully agreeing to surrender his homestead exemption (yeah, that's a \$150,000 grant to the HOA). A good start, so long as all parties are informed as to the new laws and the buyer takes that statement to a lawyer to translate its impact.

Unfortunately, another bill that would have closed a loophole in HB2402 was defeated

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... AZ foreclosure bill

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by the Senate, HB2377, the "due process" bill as I call it. This bill would have required the HOA to get a Justice of the Peace Court ruling as to the legitimacy of an alleged violation before any actions could be taken. As of now, while the HOA cannot foreclose due to fines, it can still lien the property with all those exorbitant attorney fees that the HOA never gets.

In general, advocates are pleased with the results of this year's legislative session. After three years of failing to enact any HOA reform legislation and fighting off the onerous CAI proposed bills, we now have the beginnings of reform activity. Still, many feel that more needs to be done to bring justice and the equal protection of the laws to homeowners living in HOAs.

The House passed the bill, sending it on to the Governor for signing.

Legislative perils

Several advocates believe that this dramatic swing in votes, from an 11-15 defeat to a 25-3 victory just a week later, was the result of emails sent to the senators disavowing any support or agreement with certain actions of the CHORE advocacy group. The emails were sent asking the senators to support homeowners against HOA foreclosure abuse by voting for the bill.

In statements, some made public by CHORE itself, several senators had taken offense at their treatment due to their opposing views. They wrote,

"but I was so turned off and battered by her behavior and that of many other homeowners, that I can't support any of this legislation anymore, which is a shame because I have been a friend and even sponsored some of the legislation";

"My experience with your organization over the past couple of weeks has ensured that I will not be able to support those bills any longer", and

"I appreciate your opposition to [her] actions. She began trashing me about everything I did down here and then expected me to vote with her."

CHORE answered:

"You're damn right I 'battered' [the senator], she deserved to be 'battered' and in the opinion of more than a few [she] has no INTEGRITY. ... In fact, after WE, CHORE, defeated her ill advised amendment [on a separate bill] she sent me an email telling me she would "never vote for an HOA bill again".

"In general, advocates are pleased with the results of this year's legislative session."



Almost final Arizona bill status

Governor signed-- HB2177 -- open meetings and access to records, no enforcement like now, minor revisions to law

HELD -- HB2374 -- proxies -- no proxies, replace with mail-in ballots

FAILED -- HB2377 -- required HOAs to get JP Court review of validity of alleged violations -- the Due Process bill

Governor signed -- HB2379 -- annual audit -- initially mandated annual CPA audit; amended to allow HOA to chose expensive audit or a simple compile, although almost all CC&Rs require and audit

Governor signed -- HB2380 -- written disclosure -- requires HOA or seller to give a written statement that CC&Rs are a binding contract, and agrees to loss of homestead exemption. Good, but falls way short

PASSED -- HB2381 -- board member conflicts -- restates law on conflict of interest — another “quick turn-around, first failing and then passing the House and Senate . As a result of an amendment, like HB2379, the bill now permits directors to vote after disclosing their conflict situation—meaningless.

PASSED -- HB2402 -- lien / foreclosure bill (see other emails). To the Gover-

nor for signing.

PASSED - HB2478 -- political signs -- allows political signs to be posted for HOAs — to Governor for signing.

Governor signed -- HB2492 -- allow public service vehicles to be parked on HOA streets

HELD -- HB2569 -- allow daycare facilities to operate from HOA home

Governor signed -- SB1125 -- register HOAs with county clerk. Good idea.

Governor signed -- SB1137 -- allows single homeowner to challenge HOA actions, a clear victory for homeowners, since it doesn't need a separate enforcement provision.

Note:

1. “Conference committee” means that there are two different versions of the bill that must be reconciled before going to the Governor.
2. “Held” means that a committee chairman has decided not to hear the bill any further, thereby “killing” it.



California legislation

Special by AHRC News Services

Except for **SB 1682 (Ducheny)**, California homeowners have not been party to the negotiations or discussions on laws that are being written that will affect their homes.

Assemblyman John Laird wrote **AB 2718**. The lawyers (CAI and ECHO) and managers (CACM) and realtors are working with John Laird to divide up the homeowner rights money and create another bureaucratic morass for the owners.

AB 2718 (Laird) Passed out of Assembly Housing & Community Development Committee. Next will go to the Assembly Floor.

SB 1682 (Ducheny) Passed out of Senate, Next will be heard by Assembly Judiciary Committee

AB 2598 (Steinberg) Passed out of Assembly Judiciary. Will go next to the Assembly Floor.

AB 1836 (Harman) Passed out of Assembly Housing & Community Development and Assembly Judiciary. Will be next heard on the Assembly Floor.

SB 1581 (Battin) Passed out of Senate Judiciary Committee. Will go next to Senate Floor.

<http://www.ahrc.com/new/index.php/src/news/sub/legis/action/ShowMedia/id/1300>

HOA responsible?

California] E032415 (Super.Ct.No. RIC365996) JAYLEE TITUS, a Minor, etc., Plaintiff and Appellant, v. CANYON LAKE PROPERTY OWNERS ASSOCIATION, Defendant and Respondent.

JAYLEE TITUS, a Minor, etc., Plaintiff and Appellant, v. BARTON PROTECTIVE SERVICES, INC., Defendant and Respondent.

Here are the facts as presented in a suit was against HOA and protective agency, essentially for negligence. Read what authority is granted to the HOA by the CC&Rs, and I ask, Is the HOA responsible?

CLPOA is governed by, and derives its authority from, certain covenants, conditions, and restrictions (CC&R's). Pursuant to the CC&R's, CLPOA may levy fines, set speed limits, enforce curfews on minors, make arrests, detain individuals, and limit, curtail, or prohibit conduct that violates the CC&R's or CLPOA's rules and regulations. Any violation of the CC&R's is deemed to constitute a nuisance against which "every remedy allowable by law or equity" is available.

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"Any violation of the CC&R's is deemed to constitute a nuisance against which "every remedy allowable by law or equity" is available.

... HOA responsible for security?

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Barton had previously ticketed Incorvia for speeding, evading arrest, and "running stops" on several occasions. He had also been arrested or convicted of possession of controlled substances, public drunkenness, trespassing, being under the influence of controlled substances, furnishing methamphetamine to minors, and reckless and erratic driving.

As a result of such conduct, CLPOA and Barton had notice that Incorvia and minors within the Community were consistently violating the CC&R's and CLPOA's rules and regulations. Nevertheless, CLPOA and Barton "did nothing to curtail or prevent" such conduct.

On January 27, 2001, Incorvia "attended a series of gatherings in private homes and elsewhere" where he consumed illegal drugs and alcohol. Intoxicated, he drove his car at a high rate of speed, recklessly and carelessly, in violation of CLPOA rules and regulations and California law. Hauser was a passenger in the car. Incorvia drove off a road within the Community and into a tree, killing Hauser.

(It is unclear from the second amended complaint whether CLPOA or Barton had actual knowledge of these arrests and convictions. In her opening brief, plaintiff states that these defendants

were aware of such arrests.)

Fred Pilot, a long-term follower of CID/HOA developments, writes:

It's an interesting ruling in that it defines the police responsibilities (and to some extent, powers) of privately governed and privately policed common interest developments.

California CIDs do however to owe a duty to maintain security per the California Supreme Court's 1986 ruling in *Frances T. v. Village Green Owners Assn.*, 42 Cal.3d 490. In that case, a female resident was raped after the HOA denied her permission to install a light outside of her unit. The court found the condominium HOA effectively functioned as the landlord and thus owed a duty to the unit owner.

WHAT IS A GOVERNMENT?

- Webster defines a government as "a group of people ruling a country" and Oxford, "the group or organization running a country".
- That uniquely describes an organization as a government. An HOA, like a country, has territorial boundaries and that makes it a government.



Foreclosure reform tide grows

Senator Ducheny's Common Interest Development Bill Passes Out of the Senate [Legislation]

May 18, 2004

by Mark Stivers
AHRC News

California

Senate Bill 1682, by Senator Denise Moreno Ducheny (D-San Diego), passed off the Senate Floor this morning by a vote of 36-0. The bill, which was expected to receive some opposition, left the Senate without receiving any opposition from members of the legislature.

"This bill has been a bipartisan success so far," said Senator Ducheny. "Clearly, the Legislature is convinced that the use of nonjudicial foreclosure by homeowner associations must be limited."

STUNNING DEFEAT FOR CAI IN CALIFORNIA SENATE [An Article]

Ducheny's Non-Judicial Foreclosure

May 18, 2004

by AHRC News Services

AHRC News

Community Association Institute (CAI) lawyers suffered a major blow today when the California Senate voted unanimously in favor of Senate Bill 1682. This bill prohibits the use of non-judicial foreclosure for unpaid assessments in homeowner associations for amounts less than \$2,500.

Homeowner advocates were both happy and cautious. They praised the skill and dedication of the bill's author, Senator Ducheny, in securing passage through the Senate. However, they cautioned that CAI will be waiting for the bill when it goes to the Assembly.

Texas

I think Senator Lindsay [Texas state senator] is more inclined to support the abolition of non-judicial foreclosure and making judicial foreclosure more difficult for associations.

As you may remember in Senate Bill 949, he intended to enact a 2 year waiting period before foreclosure proceedings could take place and a year before attorney fees could accrue. He believes this is the best path to take toward getting owners on a level playing field with associations.



"Homeowner associations have the power to foreclose on homes because the state legislature ... passed laws that make it possible".

North Carolina

In North Carolina, WTOC in Charlotte, covering this issue, says "Homeowner associations have the power to foreclose on homes because the state legislature ... passed laws that make it possible". But now, according to WTOC, "some legislators say it time to take a closer look".



Audio & Videos for viewing online or on VCD

DATE **FILE** **Topics discussed** dio).

April 13, 2004 "Over the Rainbow" video excerpt of Rep. Farnsworth's statements on foreclosure bill on April 6, 2004 at the Arizona Government Committee. (12 min).

Feb. 9, 2004 [audio mp3](#) Local Phoenix Area Fox 10 News interview on HOA bills.

Feb. 25, 2003 [audio mp3](#) Arizona Legislature Senate Government Committee hearing on HOA bill to remove draconian foreclosure measures.

Oct 27, 2002 [vn2](#) Discusses constitutional questions, lobby, legislative reform vs. court complaints and social change movement

Nov. 7, 200 vn3—Emphasis on the failure of our government to tell homeowners the truth about living in an HOA and the potential to disrupt the financial status of homeowners who are currently pleased with their HOA governance.

Dec 23, 2002 [mckenzie organize](#) Prof. McKenzie's segment from **On The Commons** on the need for advocates to organize and the obstacles to success. (10 min. au-

Available CDs — Just \$5 to cover all costs.

With Liberty and Justice Forever--A Video CD documentary of the April 21, 2004 HOA debate in Green Valley, AZ (34 minutes)

Over the Rainbow --A Video CD documentary of the HOA reform bill hearings by the Arizona Senate Government Committee on April 6, 2004. Hearings on a foreclosure and a due process bill are shown. - (42 min).

Note: A Video CD can be played on certain DVD players and by Windows Media Player on your PC. For WMP, click on File, then you need to click on the MPEGAV folder and then click on MUC01.DAT. Viewing on large TV screens will lose some sharpness and clarity.

See <http://starman.com/starpub>

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