

## HOAs ruled quasi-governments with public meetings

Here's an interesting opinion in a California Appeals case (*Damon v. Ocean Hills*), which was related to SLAPP (Strategic Litigation Against Public Participation) statute and the homeowner had to show that it was in a public place and involved a matter of public interest. It deals with board meetings.

A "public forum" is traditionally defined as a place that is open to the public where information is freely exchanged. (See *Clark v. Burleigh* (1992) [4 Cal.4th 474](#), 482.) The Board meetings fit into this definition. The Board meetings were televised and open to all interested parties, and the meetings served as a place where members could communicate their ideas.

Further, the Board meetings served a function similar to that of a governmental body. As our Supreme Court has recognized, owners of planned development units "comprise a little democratic subsociety . . ." (*Nahrstedt v. Lakeside Village Condominium Assn.* (1994) [8 Cal.4th 361](#), 374; see *Cohen v. Kite Hill Community Assn.* (1983) [142 Cal.App.3d 642](#), 651.)

In exchange for the benefits of common ownership, the residents elect an legislative/executive board and delegate powers to this board. This delegation concerns not only activities conducted in the common

areas, but also extends to life within "the confines of the home itself." (*Nahrstedt v. Lakeside Village Condominium Assn.*, *supra*, 8 Cal.4th at p. 373)

A homeowners association board is in effect "a quasi-government entity paralleling in almost every case the powers, duties, and responsibilities of a municipal government." (*Cohen v. Kite Hill Community Assn.*, *supra*, 142 Cal.App.3d at p. 651.)

Yet, planned communities are still viewed as the result of private contracts between private parties and are outside the US Constitution, and even outside the application of the 5th and 14th Amendment protections that subject only bona fide, de jure, government entities like states and cities. Not even your rights you have come to expect as a citizen do not necessarily apply to your HOA. It must be a fundamental right within the first eight Amendments or some right as defined and accepted by the US Supreme Court.

In short, homeowners living in planned communities are second-class citizens. It may not bother you until an event occurs, maybe some 10 or 15 years after moving into a planned community, that you may find yourself out in the cold with no recourse whatsoever, losing all your equity in your home.

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# The HOA Citizen

*HOA citizens are US citizens first!*

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eNewsletter

## State legislatures: protectors of our rights

Have homeowners entering into an HOA controlled home entered into a new social contract? One that replaces American political views of the social contract espoused by Locke and others? One that values the enforcement of property values over the rights and freedoms guaranteed to all Americans?

What is the role of state legislatures in protecting our rights against those who would deny us of those cherished rights and freedoms? What rights do citizens have under state laws? What prohibitions are there on legislatures when there are no enumerated rights or restrictions except those that may be found in individual state constitutions?

Let's look at the political theories going back to Locke's Two Treatises. ('Theories' is used to pre-

sent arguments and issues for a certain view or position because there is no absolute proof that they are correct. They are just someone's organized statement of a position).

Prof. Barnett offers the following in his *Restoring the Lost Constitution*:

"The propriety of the laws made by legislatures is dictated by the rationale for yielding the lawmaking power to the government. '...Men, when they enter into Society, give up the Equality, Liberty and Executive Power they had in the State of Nature, into the hands of the Society, to be so far disposed of by the Legislature, as the good of the Society shall require ... **the power of the Society, or Legislative constituted by them, can never be supposed to extend farther than the common good.**' [Locke, Two

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## More government regulation needed?

Jan Bergemann, Pres. of Florida based CCFJ, a homeowner rights advocacy group, writes, As expected the CAI pulled the poll regarding state regulation. The question was:

**Should community associations be more or less closely regulated**

**by state government?**

At midnight last night **91,2 %** of the participants had voted **Much more**. That's what we all keep saying and it definitely shows that not only a few "disgruntled" homeowners want regulation.

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## Special interests & fraudulent collusion foreclosures?

By Bob Laylo of The Morning Call in Monroe County PA writes about owners planning a suit over Poconos homes seeking \$1.5 billion in compensation for high housing costs. Seven people who say they were victims of a housing scandal in the Poconos will file a \$1.5 billion lawsuit against developers, banks and appraisers, a homeowners group said in early August.

The Pennsylvania Homeowners Defense Association, formed as a result of thousands of mortgage foreclosures in Monroe County,

also accused the state of "seeking to protect the banks" without compensating victims for their losses.

The group plans to present its suit at a news conference today in Stroudsburg and respond to the state Banking Department's study on foreclosures in the

county.

Among the plaintiffs in the planned federal suit is Almus Wilson, founder of the homeowners group. "We will pursue the case to the end," he said. "We feel strongly that we will support the allegations in the lawsuit."

He said the suit will be filed Friday in federal court and he expects others to sue as well.

"The courts will be bombarded with lawsuits," Wilson said. "Massive lawsuits are in the process of being drafted." "His group's news conference comes two days after the Banking Department released findings of its study of Monroe County's high foreclosure

rate and announced a plan to help homeowners, prevent problems and investigate wrongdoers.

Complaints from hundreds of homeowners prompted the study, which found that since 1995 Monroe has had 6,100 mortgage foreclosures. It attributed rapid foreclosures to inflated sales prices and high interest rates in what is the state's second-fastest growing county.

On Tuesday in East Stroudsburg, Banking Secretary William Schenck reviewed the study and outlined steps to help people, including a toll-free telephone number — 888-4PA-0456 — staffed by state banking, housing and legal officials to help people who have a problem with their mortgages.

He also announced the start of two mediation processes to help resolve disputes between homeowners and financial companies.

In a prepared statement, the Pennsylvania Homeowners Defense Association said the initiatives don't address the problem hundreds of people have. "The homeowner overpaid for the house," the statement says. "He paid expenses on an inflated appraised value at the time of closing. His points were excessive; his closing fees were excessive; his transfer costs were excessive."

Some people were unwittingly paying higher interest rates, the statement says. It also says that some in the housing industry failed to point out other fees such as garbage services and assessments for homeowners in gated communities.

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"All we are seeing is that the state is seeking to protect the banks ... without giving the current victim any compensation for his damages"

## ... HOA violence

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property dispute.

Sadler, 47, said she appeared in June before the state appeals court in Elgin in one of those cases. The appeal was moved from the court in her region after she complained that some judges were biased because they once represented Oak Run. "If this can happen to me and my family in rural Illinois, this can happen anywhere," she said.

John Robertson, an attorney for Oak Run, would not discuss Sadler or the lawsuits. Still, he said he would welcome legislation that resolves such problems more fairly and efficiently. He noted that mandatory arbitration works in personal injury cases in Illinois.

Evan McKenzie, an associate professor at University of Illinois at Chicago, said such community associations can voluntarily hire a mediator to resolve such conflicts -- although Robertson noted that an association's internal governing rules may not allow such an alternative to legal action.

Another option is for a municipality or the state to assess a small fee -- maybe \$10 a year -- to each condo owner or homeowner belonging to a community association to cover the costs of a mediation program.

## ... state legislatures

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improper abridgement of the private rights of the people? As with the federal laws, the key is whether state laws are a pretext for purposes other than the prevention of future or rectification of past rights violations. One sign that a law is pretextual is when it benefits a particular group rather than the general public. Building on the Lockean idea of 'common good', courts examined whether a particular law benefited every person in the community as a whole or whether it instead was implemented for the benefit of a majority or minority faction."

"Specifically, it came to be determined, first, that laws that singled out specific groups or classes for special treatment would withstand constitutional scrutiny only if they could be justified as really related to the welfare of the community as a whole ...

and were not seen as a corrupt attempt to use the powers of government to advance purely private interests; and second, that acts that interfered with an individual's property or market liberty would be considered legitimate so long as they were not designed to advance interests of just certain groups or classes" [Gillman, *The Constitution Besieged*].

I believe that this is what has been happening from the very start of planned communities and the realization that private contracts are needed in order to coerce homeowners into compliance with CC&Rs that are onerous and offensive to American liberties.

"private contracts are needed in order to coerce homeowners into compliance"

## ... law suits

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The American Psychological Association describes emotional or psychological abuse to include, intimidation, insults and threats. While on oxygen, one senior kept asking for assistance in seeing association books and records, she said "they keep ignoring my requests because they say, 'if we wait long enough you'll die and then we won't have to worry about it.'" Owners who persist on enforcing their rights are ostracized by peers for "making trouble" or given the

"seniors ... must sell and move quickly. Those interviewed, said, 'they hope they die first.'"

"silent treatment and ignored" by management and boards.

The APA and The National Committee for the Prevention of Elder Abuse recognize that the elderly may be unsophisticated about financial matters because of advancement in technology, and most don't realize the value of their assets. Seniors owning in communities erroneously come to depend on those individuals perceived to be "running the place" or "in charge." Unfortunately, those most adept at perpetrating abuse and deceit, are usually found in positions of trust, and they are also typically "very nice." Many elderly simply do what they are told. They hand over copies of bank statements and tax returns. They fail to get assurances of confidentiality and security of the information being shared. Boards and management are instantly placed in

positions of trust. They have access to cash, checks, books, records, accounts, names, addresses and personal information about residents making identity theft plentiful.

Easily intimidated and eager to please, seniors hand over their front door keys to management or board members. Others hand over social security numbers and drivers licenses to people they describe as "a very nice person" or because "someone told them to." Though incidents of elder abuse violations are dramatically rising, seniors are hesitant to report it, leaving cases to be discovered only after a complaint is filed.

Because of these problems seniors are finding themselves in positions where they must sell and move quickly. Those interviewed, said, "they hope they die first."

Through bad laws, a ruling elite emerges under the guise of representing the "majority." Realistically, most owners are in the "minority" and disenfranchised by board actions. Boards notoriously claim to further some liberating manifesto that is in the best interest of the association. In application, those interests serve to wholesale disenfranchise. Homeowner associations constitute part of the overt and mostly legislated forces of subjugation.

**Donie Vanitzian, Arbitrator, BA, JD.**

## HOA disputes and violence continues

The Chicago Sun Times' FRANK MAIN reported earlier in August that Rita A. Hohmeier was shot to death last month in a condominium dispute in west suburban Franklin Park, IL.

Kuchlewski gunned down the 75-year-old Hohmeier -- his condo board secretary -- after he was evicted for failing to pay \$640 in condo assessments, \$350 in court costs and \$3,133 in attorney's fees, police said.

State law allows condo associations to recover a property owner's debts by renting out the unit. Once the debt is paid off, the owner gets the property back. A lawyer typically handles the eviction proceedings for the association.

Monica Sadler -- a Knox County woman fighting her homeowners association -- was horrified. Yet she understood the frustration of alleged killer Zdzislaw "Wally" Kuchlewski.

Sadler said the legal system discourages property owners like Kuchlewski from settling arguments with their associations.

She believes Illinois ought to follow the example of Florida, where in June, Gov. Jeb Bush approved reforms that provide oversight for homeowners associations and condo boards -- and encourage the parties to settle their differences quickly.

"The lawyers play a huge part in all of these problems," Sadler said. Occasionally, such problems explode

in violence. In Arizona, for instance, Richard Glassel burst into a retirement community's homeowner meeting and killed two people in April 2000 after he lost his home at the complex to foreclosure, police said.

Yet, this past session saw the Arizona Legislature kill a bill that would require a JP judge's agreement that an alleged HOA was valid before any liens or fines be placed on a home. It died, it appears, amid concerns of being too costly for the JP Court system to handle.

Other times, seemingly trivial disputes drag on for years. George Andres, a former Marine, planted a flagpole in front of his Jupiter, Fla., town house six years ago and started flying the American flag.

His homeowners association took him to court, saying installation of the flagpole violated its rules. Andres said he appeared before judges 28 times and piled up about \$40,000 in attorney's bills. He lost the case and was ordered to pay \$25,000 to cover the association's expenses.

In 1997, Sadler sued the lakefront Oak Run subdivision where she lives, opposing the subdivision of a neighbor's lot. A second home was never built on the lot. Yet the wrangling continues over three lawsuits spawned by the

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**"the legal system discourages property owners ... from settling arguments with their associations"**

## ... fraudulent collusion? ... state legislatures

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"All we are seeing is that the state is seeking to protect the banks and make the current non-performing loans performing, at some basis, without giving the current victim any compensation for his damages," the statement says. It calls for prosecution of some professionals in the housing industry. So does state Rep. Kelly Lewis, R-Monroe.

Complaints from hundreds of homeowners prompted the study, which found that since 1995 Monroe has had 6,100 mortgage foreclosures.

"Absolutely, criminal prosecution must be commenced immediately against all builders or developers who have been implicated of wrongdoing," he said. "The study clearly indicates that 50 percent of the foreclosures are from nine sets of builders/developers."

Schenck on Tuesday said his department has three full-time investigators working in the county. The state attorney general has filed two lawsuits and plans to file another later this month, and a grand jury is investigating allegations of fraud.



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Treatises]. This 'good of society', however, is no open-ended grant of power simply to do good; it is defined and limited by the rights retained by the people when they surrender their powers of enforcement, and this is what makes it a genuine common good or good for everyone, not merely a segment or fraction of society."

Barnett continues his argument with, "... legislation restricting 'liberty interests' is typically defended, not on the ground that such liberty is wrongful, but because the restrictions achieve some desirable social policy or 'legitimate state interest'. When legislation encroaches upon the liberties of the people, only review by an impartial judiciary can insure that the rights of citizens are protected and that justice holds the balance between the legislature or executive branch and the people. Of course, if legislatures do take pains to regulate the rights of citizens only when it is necessary and proper to do so, he can expect them to be able to justify their actions."

"Regrettably, our actual experience with legislatures has not been so utopian. For this reason, meaningful scrutiny of legislative and executive branch actions by an impartial magistrate is required if the laws imposed on the citizens are to bind in conscience."

"How can a proper regulation of rightful activity be distinguished from an

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## One Lawsuit Can Ruin Your Day

### ~ But Abuse in a Homeowner Association Can End Your Life

The culprits laid in wait in separate cars with lights off as the victim approached. Returning home from work as he did every night, he proceeded to turn into his private driveway, park and lock his car. But, he never make it to the front door. This California senior was injured when he was brutally assaulted and battered by his homeowner association board members in his own driveway. Bloody, he called 911 on his cell phone. What happened? Pursuant to the California Civil Code, this titleholder sent a letter to the board and the insurance agent requesting copies of the association's insurance policies. The board's personally delivered message and parting words were something to the effect of, *don't ever send the agent or the board a signed, return receipt for insurance policies again, and you're not getting them so stop asking!*

Too many seniors are convinced they should buy a condo or home in an association or community because "it's simple, only one monthly payment." This deceptively simple lifestyle is costing seniors billions of dollars nationwide. The estimated value of the homeowner association industry is \$9.4 billion per month, or more than \$100 billion a year. Damage estimates in the collapse of the World Trade Center buildings were between \$35 and \$40 billion in total. Yet, turnover in such communities is overwhelming and no entity to date, has produced a *bona fide* study on senior deaths caused by, or related to "abuse" in such environments.

Too trusting, many seniors empty their savings accounts into what they believe to be a carefree and trouble-free purchase of housing. But, there's more to buying a condo than agreeing to pay a monthly fee. Still, every year thousands of seniors are deceived into parting with their money because of expensive brochures and slick sales agents. Amenities, like pools, saunas and hiking trails, are also risks and liabilities; and, condo purchases like these can quickly deplete the senior's resources because there is a flagrant lack of accountability and laws do little or nothing to protect elderly homeowners.

"Too many seniors buy a condo or home in an association ... Too trusting, seniors empty their savings accounts into what they believe to be a carefree and trouble-free purchase of housing"

Few, laws *per se* protect seniors who purchase in age-restricted communities, or associations in general. Government agencies overlook the severity of actions against seniors occurring in associations. Seniors rarely understand the legal ramifications of deed-restrictions and don't understand that restrictions mean conditions are imposed on the use of their home thus effecting their quality of life. Worse, boards and management freely inject themselves into the sales process and present disclosure laws are inadequate when it comes to protecting consumers from such interlopers.

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