



# The HOA Citizen

## Arizona HOA legislation again

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Last year there were some 16 HOA bills submitted and 9 were made into law. Not that all the bills were treated appropriate to HOA reforms.

The major bill relating to stopping foreclosures passed in a watered-down form, yet it brought substantial relief with respect to foreclosures resulting from fines. A due process bill that would require a JP court judge to rule on the validity of an alleged violation was defeated, mainly because it would cost the courts too much. Funny, what happened to the statements that 95% of HOAs are good, so why this concern?

Another bill that required an annual audit was turned into a voluntarily choice by the HOA, rendering a meaningless bill.

But a definite change and understanding has shown its face and the legislators are tired of the staunch resistance by CAI and others to adopt a fair and reasonable position over the years. Rep. Lucy Mason, sponsor of several of the 14 bills this year, said in an interview with Shu Bartholomew on *On The Commons*, ". If this is not possible, they just have to go".

Perhaps the lunacy that results from not holding boards ac-

countable for their actions got her started on HOA reform. Rep. Mason mentioned a neighbor being told to remove her roses because people might be allergic to them.

Foreclosure reforms are back and so is the restoration of homestead protections. Many bills relate to cleaning up last year's laws.

Dramatic changes have been introduced that call for a Planned Community Board to oversee complaints about HOA unjust fines and liens due to violations. This Board replaces the right of HOAs to fine, which is stripped in an-

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### Special points of interest:

- HOAS exist within the state as a principality with their own laws." p2

## Unwise extension of constitutionality

The law suit against the Twin Rivers HOA (NJ) has entered the appeals phase. This suit raised a number of constitutionality issues relating to free political speech, the disenfranchisement due to failure to make timely payments, the election process and the un-

equal access to the HOA newsletter.

In the appeal, homeowner committee attorney Frank Askin, General Counsel for ACLU and head of the Rutgers University Constitutional

Law Clinic, asks the court to look into several issues of law.

He asks if a person can waive his constitutional rights by means of a non-negotiable

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## The HOA Principality

“HOAs exist within the boundaries of a larger political body, the country or nation, and are essentially self-governing with their own laws.”

A few years ago I made the comparison that HOAs were a modern version of the independent city-states of ancient Greece and medieval times. I was wrong. I was wrong because these city-states had no higher level government, no king or emperor, to whom they were answerable. That's why they were independent city-states.

The more accurate comparison would be to a principality that exist in small numbers today in Europe; such as, the Principality of Monaco. They exist within the boundaries of a larger political body, the country or nation, and are essentially self-governing with their own laws. They are governed by an almost absolute ruler, the Prince. They are protected, a "protectorate" you might say, by their surrounding nation and

exist by this "higher" government choosing to honor the principality in accordance with its laws.

Today, in the United States of America, the federal and state political bodies have issued "charters" to private individuals, granting them the status equivalent to a principality, much as the kings and emperors of the 16th - 18th centuries handed out charters to loyal followers. These modern charters are known as homeowners associations and are issued without requiring a republican form of government (US Const., ART IV, §4) or subjecting all of its citizens to the privileges and immunities that apply to all citizens of the US (US Const., ART IV, §2).

If you follow the arguments of the longtime promoter of HOAs, you will find that its justification for this state of

affairs and private government does not address the US or state constitutions, but the lesser laws of the land, the real estate common laws of servitudes. These opposing views are quite apparent when you follow the arguments by the Frank Askin of the Rutgers Constitutional Law Clinic in the Twin Rivers New Jersey case on HOA constitutionality questions.

I am not arguing against the right for communities to set their own special ordinances and special taxes for community amenities, but for the guarantees of life, liberty and the pursuit of happiness for all people. If we are to remain true to that contract between the federal and state governments, embodied in their respective constitutions, then the era of the HOA principality must come to a swift and decisive end.



## Enforcement & consent of the governed

**Q.** Since the purpose of a CC&R is to agree to a common set of actions, how else should the HOA make certain that its members follow their self-imposed rules, other than fines and penalties?

**A.** Dear Legislator, please read the purpose found in most CC&Rs - to maintain property values. Some may say for the general welfare of the people. This phrase means creating rules for orderly behavior, like use of pools, golf course, club houses and safety protections.

The CC&Rs are not an agreement freely entered into and negotiated, but handed down by a developer who will shortly leave. It is absent any constitutional protections for homeowners.

There is no agreement to a common set of actions as in a fixed

contract with all the precise terms and conditions clearly stated. The CC&RS grant broad and open powers to the board that can be interpreted and modified by the board.

It is a false assumption that HOA boards are a representative government. How can there be agreement when there is no true democratic processes and protections in place? No oversight for clean elections. Board control of the records and meeting agendas. Failure of the board to obey the CC&Rs and by-laws. There are no penalties or fines against them as a restraint upon future actions.

Obedience to a governing board is one that affects all levels of government, and comes under the heading of good laws, good government and informed consent. To talk about

penalties and fines reflects a police state mentality of the HOA.

Coercion is the only means in the typical undemocratic, unrepresentative government that is unresponsive to the people. HOAs are mismanaged and are faulty in conception and can only exist due to the onerous CC&Rs and state laws that back them. HOAs contain mandatory membership and compulsory dues without democratic protections. People are not free to choose and to leave depending on how "good a place to live" as they themselves, see it.

Therefore, all that HOAs can do is to demand compliance backed by the coercive forces of foreclosure and liens because they are defective governments incapable of, and not required to, governing justly as public governments must do.

Coercion is the only means in the typical undemocratic, unrepresentative government that is unresponsive to the people.

## HOAs: a social club or commune?

**Q.** Would the state be able to deny this right to freely associate to a social club, for example?

**A.** Dear Legislator, this is another of the partial, simplistic sound bite arguments. The HOAs are not a social club, although, sadly, they are too often loosely managed as if they were a social club. The HOAs are unique because unlike other voluntary and freely entered into associations, HOAs are contractual and require mandatory membership with compulsory dues. In fact, the HOA requires a 80% vote to terminate this coerced servitude, as I call it.

Furthermore, the right to freely associate is a 1st Amendment right. Advocates do not argue the right to freely associate, but focus on the question of "freely". Advocates believe that this CC&R contract was not freely entered into with full knowledge of the consequences of the deci-

sion. Some argue that compulsory HOAs violate your freedom of choice and is constricted speech in violation of the 1st amendment.

For example, do you really think a homeowner would freely consent to paying assessments for a lawyer who will not talk to him, but who will sue him and take his house away? Or freely consent to give the HOA a gift of his homestead protection?

Social clubs do not have statutes saying it's OK to take away your house or to place a lien on you for not paying your dues or your fine. In a social club, failure to pay any assessments results in a termination of membership, a freedom not available in HOAs.


No, HOAs are more like governments with their assessments (what are real estate taxes called, but assessments), with their fines, with their rules and regulations that affect

how a person behaves (laws), and the fact that, like governments, their income derives not from any particularly paid for service, but on the basis of a general levy just like a state tax.

Black's Law Dictionary defines a political government simply as "a person or group that controls and regulates the people within a territorial boundary".

Yes, you can join and donate to social clubs and allow them to perform various services. But the "contributions" to HOAs are more akin to taxes than a contribution to United Fund.

It's interesting to think of which organization is more social, the social club or the communal planned community with its intrusion into your private life and infringement on your private property rights, all without your informed consent.



"In a social club, failure to pay any assessments simply results in a termination of membership, a freedom not available in HOAs."



## A CAI opinion, not a poll

"Survey" is just the fancy word for opinion poll, but if you already pre-select the people you want to respond to your survey, you automatically destroy the credibility of any honest result you try to get. Just remember the fancy survey of the Community Association Institute that was supposed to prove that Americans are happy with their associations? It turned out to be a farce, after we found out who had been selected to answer the poll. (See critique of this 1999 survey at [http://pvtgov.org/pvtgov/downloads/survey\\_1999.pdf](http://pvtgov.org/pvtgov/downloads/survey_1999.pdf)).

I live in a homeowners' association with about 280 homes. Now, depending on the result of the survey I would like to see, I just pre-select 80 owners and ask: "Are you happy with association living?" Most likely about 97% will answer: "YES!" -- if I've selected the right owners. Then I send my survey to about 80 dif-

ferent neighbors and 98% will answer: "Will never move into another association again!" Any more questions?

But the real fun parts were actually the conclusions of Donna Berger, an attorney in the law firm of Becker & Poliakoff and the mouthpiece of CALL. [CALL concludes] that over 90% are in support of strict enforcement of the rules. There has never been an argument! The main problems are selective enforcement, making up rules as boards go along and the number of abusive lawsuits, pushed by attorneys who will always get paid -- Win or Lose!

And we're back at the old discussion that goes on over years: Let's make it very clear: Nobody should claim that they represent people who don't even know them. Unlike the CAI and CALL, who claim to represent whole groups of people.

Funny, most of these people don't even know what CAI and CALL stand for.

If CALL should ever become an organization run by owners, financed by owners and actually representing interests of the owners, then I will gladly say there are two organizations in Florida representing owners' interests. And not even the most fancy, but flawed survey will change my mind!

Don't forget: Nearly all of the association laws of Florida were written by attorneys, who are members of the Community Association Institute. It's time that we finally create statutes that guarantee the welfare of our citizens and not the welfare of some specialized attorneys!

Jan Bergemann, Pres.  
CCFJ (FL based).

Jan's complete statement can be found at <http://www.ccfj.net/CALLsurvey.htm>

“The main problems are selective enforcement, making up rules as boards go along and the number of abusive lawsuits, pushed by attorneys who will always get paid -- Win or Lose!”



## ... Arizona HOA bills

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other bill.

Completing this reform procedure is a requirement that the HOA publish, on its web site, all the fines and penalties as notice to homeowners. This listing notice is similar to the requirement that any crime must be contained in a statute, along with its penalties.

I've found it quite humorous that supporters of the HOA status quo have argued for the right of HOAs to survive and that it was not fair for other homeowners to pay for deadbeats. Yet, the lack of due process protections and the just and fair application of the laws of the land do not con-

cern them — they don't apply to these principalities as I've classified them.

This view of HOAs is reflected in a bill that will require HOAs to stop watering their lawns during a drought (in existence for some time and there are currently water restrictions in effect). The need to have a statute to just apply to these organizations raises the issue of who actually runs this state. Laws apply to everyone and this bill treats the HOA as a special entity, a principality.



**"I don't want to remove HOAs at this time ... I just want them to be fair and reasonable"**

## Business judgment rule prevails?

Amazingly, the trial court rejected the designation of Twin Rivers as a quasi-government state actor not on the basis of *Marsh v. Ala-*

*bama* (company town has same functions as a municipality), which it would have met, but on the basis of the business judgment

rule.

This rule applies to corporate directors and holds them harm-

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## ... business judgment rule prevails

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less for decisions that they made that they believed in the best interests of the corporation and made in good faith. Why is the court saying since the directors followed the rules of the corporation, there is no issue of state action as if it were a government?

What about following the rules of the US Constitu-

tion? Are private corporate agreements superior to the Constitution? Is the court saying that so long as a director fervently believes that his just cause will benefit the community, everything else does not apply, not even the Constitution?

Can a people agree to ignore the US Constitution? Can the courts uphold agreements that violate the US constitution by a simplistic argument that

HOAs are private organizations and do not govern, or that they govern with the explicit consent of the community?

If so, then what does the Constitution stand for?

## ... unwise extension of rights

*(Continued from page 1)*

contract, the CC&Rs. If a person charged with a crime, for instance, pleads guilty, he must acknowledge before a judge that he understands that he is giving up certain constitutional rights. But not so with those CC&Rs with the unjust requirement to post the

CC&Rs with the county clerk's office to be binding.

CAI has filed a "friend of the court" brief that denies the applicability of the New Jersey Constitution and that the common law of servitudes (covenants) must prevail.

CAI concludes with, "In the

context of Community Associations, the unwise extension of constitutional rights to the use of private property by members [...] and serve as the preferred mechanism for decision-making, rather than members effectuating change through the democratic process". What democratic process? Just because you vote



"Are private corporate agreements superior to the Constitution? If so, then what does the Constitution stand for?"



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The Berkshire Eagle reports that the Sherwood Forest Neighborhood Association, a sleepy little voluntary homeowners' association, has produced another supreme law of the land issue with HOAs.

Attorney Carl N. Edwards got himself elected vice president last year in a stacked meeting and began working to create a sort of

### Common law vs. statutes

shadow town government.

He changed the bylaws to preclude any challenges to his power, and began issuing tax bills to finance the expanded activities of the Neighborhood Association, which included the removal of unregistered pleasure boats.

It's supposed to take an act of the Legislature to establish a government with the power to tax, but Mr. Edwards told anyone who questioned him that it was all legal under common law.

## Marines rally to protect display of flag

Jameson Cook of the Macomb Daily (Florida) writes that Marine Corps buddies have come out in support of Florida resident in his effort to display the U.S. flag in his HOA.



According to the association, "the flag is prohibited under the 'alterations in the exterior appearance' language of the bylaws and is a form of advertising."

Advertising? With the trend in many states to permit the display of the flag, it appears that Florida needs to catch up. How does flying the American flag negatively affect

property values? Want to talk about advertising, how about those flags flown from the developer's model homes site? Some are not even American flags.

Yet the trial court found against O'Brien, the homeowner. He's seeking monetary support for his appeal and has asked his fellow Leathernecks for assistance.

I guess these associations continue to exalt in their untouchable legal status as principalities