The HOA Citizen

HOA citizens are US citizens first!

September 2003

eNewsletter

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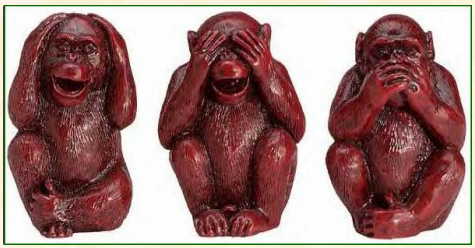
Seniors to pay for-profit firm?

The California Appeals Court rendered a tentative decision on the Desert Crest HOA suit validating an amendment to require members to pay assessments to a private, for-profit country club, not owned by the HOA but run by the developer.



Essentially, by virtue of being next to and adjacent to the HOA, the country club benefited the association and therefore, the amendment was a proper covenant running with the land.

So what if the association was found to be a voluntary HOA by the same court in an earlier appeal, and that only a majority vote was necessary for this amendment to be valid under the CC&Rs. So what if many members had voiced their opinion by not signing up with the country club on a voluntary basis.

So what if there were alleged improprieties in the election process, as we all know there has and can easily be, with no elections oversight protection by the state.

So what if an additional burden was placed upon a homeowner without his consent and agreement.

The AHRC News Service broke this story on its web site.

AHRC writes, "At issue is whether a

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AHRC leads the way

The American Homeowners Resource Center, AHRC, has been an active force in promoting and fighting for the rights of homeowners against the special interest groups. Elizabeth McMahon is the Executive Director.

This site, http://ahrc.com contains a multitude of articles, news events, court cases and the ability to post information about people and organizations for others to know.

BE IN THE KNOW!

The need to influence public policy

February 13, 2003

[Editor's note: "Mckenzie" is Evan McKenzie, Associate Professor of Political Science at the University Of Illinois at Chicago. His 1994 outstanding book, *Privatopia: Homeowner Associations and the Rise of Residential Private Governments*, is widely read as a voice against private governments.]

A lengthy discussion occurred on the HOAA email network, Shu Bartholomew, Moderator, regarding the concern about public policy and homeowner associations. Here's an excerpt.

"Clearly the industry has more influence with policy makers than the homeowner rights people. But nothing is forever."

McKenzie wrote:

"Policy is a conscious decision to pursue a particular objective using the various means that government has, such as promotion (the carrot, or rewarding people for doing what government wants), regulation (the stick, or punishing them for doing what government doesn't want), redistribution (macroeconomic policy such as the tax system and interest rates), and reorganizing the government itself."

In a second email , McKenzie adds:

"We could have laws made in any of four ways: legislation, judicial mandate, bureacratic rule-making, and executive order. We call all these officials policy makers.' Public policy is a guiding principle in all four, meaning that in most cases you can find an underlying objective that the law is intended to serve--some effect that it was intended to produce that somebody thought was a good thing."

This is our task - to shape public policy by influencing all of the above.

I, and others, chose to use our fundamental democratic principles and values that formed this country as guide posts and models in creating public policy. Land usage and values goals are sub-goals and must be consistent with the broader American principles.

I chose to attack the HOA trade group since it has the most outspoken and misleading half-truths that lend themselves to valid opposing facts and opinions. Its influence and credibility before the state legislatures and media had to be challenged in order that we advocates be viewed as NOT being amateurs, rogues and disgruntled homeowners. It has had its successes with the help of others like Shu, Elizabeth and Jan B.

McKenzie continues in the second email ,

"With HOA issues, clearly there is an industry advocacy coalition that wants minimal regulation of CIDs, at the state level only (no federal regulation), along with continued promotion of new ones by local governments. Look at CAI's website and you can see their entire list of policy positions clearly spelled out for any-

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… pay fees to a for-profit firm?

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homeowner association can change its CC&Rs without the consent of all the homeowners to impose a burden on its members, even if some of them do not want it. "

"Desert Crest is a mobile home park in Desert Hot Springs near Palm Springs. It contains 578 residential lots, and is predominantly inhabited by retirees - residents must be 55 years or older to live there. Many of them are widows over the age of 70, live on fixed incomes, primarily social security. The trailer homes are priced between $40,000 to $70,000. They say that the banks do not give loans on these homes as they depreciate.

The developer, OSCA Development Company, built a club house, swimming pool and 9 hole golf putting facility adjacent to the development. It is not part of the homeowner association.

"Many seniors questioned whether the membership fees for the country club were mandatory or optional. When some of them refused to pay the $71.50 per month - a sizeable amount for many of them - Osca sued them and lost in 1998. Osca appealed, but the appellate court upheld the judgment against Osca. "

The AHRC article goes on to report homeowner reaction:

"Many of the affected homeowners are devastated. One said that he has lost all faith in the judicial system after this decision. Another said that the decision boggles the mind. In effect, he said, the appellate court is saying that membership in the country club is a benefit to those homeowners who do not want to belong to it or use its facilities. Many homeowners are in their 80's and 90's. He said that for the court a burden is apparently a benefit.

"Some observers note that if this decision stands, its potential impact is explosive. Homeowner associations would now be able to amend CC&Rs to impose significant financial burdens on all members with only a majority vote."

In an ***On The Commons*** interview with Shu Bartholomew, Trevor Sheehy made the following comparison. He said if three people owned a property, any one or two acting together could not bind the third party without his consent.

Yet, because the CC&Rs contained this amendment provision, all members have been deemed to agree to any such future obligations as a majority of their neighbors so vote. But, and a big but, the CC&Rs are a contract and not a municipal government that is subject to a referendum or initiative that will become a law. It's a contract, as the courts have upheld repeatedly against homeowners.

But now, it's a different sort of contract, one that is satisfied by constructive notice —

Advocate advice on fixing HOA problems

[Editors' Note. From an article in the Arizona Capitol Times}

One local HOA critic is George Staropoli, president of the Citizens Against Private Government HOAs, based in Scottsdale. Mr. Staropoli, who has served on HOA boards in Pennsylvania and New York, says he was opposed to S1151, an omnibus bill that targeted HOAs, because "the language was vague and it would have hurt homeowners."

"He says members of HOAs are second-class citizens with less protection than minorities, women, the handicapped and even gay people."

"They had three years to work on the bill and they still didn't get it right," he says. "They haven't done their homework. It was too big. They need to cut it down to a smaller bill."

Mr. Staropoli says his nonprofit organization (www.pvtgov.org) provides "full and material disclosure of all the factors that can have profound effects on your decision to buy into an HOA controlled property." He notes that an HOA is a private, nonprofit corporation that is subject to corporation laws and not municipality laws.

On his Web site, Mr. Staropoli says, "The HOA is allowed to bypass fundamental governmental protections, including due process against arbitrary actions and the equal protection of the law for homeowners who have grievances against their board of directors." He says members of HOAs "are second-class citizens with less protection than minorities, women, the handicapped and even gay people." Asked to recall a "horror story" related to an HOA, Mr. Staropoli says, "There are so many."

He tells of a case in which a lawyer sent dunning letters to a condominium owner whose hot water tank was alleged to have caused damage to a condo on the floor below. The lawyer wanted $5,000 to cover the insurance deductible, but the owner of the faulty hot water tank says he never saw any repair work being done or written documentation of the work, Mr. Staropoli says. Eventually, Mr. Staropoli says, he intervened and the lawyer backed off. "Without proof, that was extortion," he says. Three fixes are needed to better serve homeowners, he says. They are:

- Restore homestead protections.
- Get rid of or restrict foreclosures
- Require full disclosure of documents. "There is nothing in the CC&Rs that tells you the impact, that you lose your constitutional rights," Mr. Staropoli says.

CC&Rs are interpreted as a contract.

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Unconscionable contracts and public policy

Other topics in this issue raise the question of good public policy and "in the public interest" concerns. Just what is good public policy? With respect to the CC&R binding contract, valid arguments have been made that these so-called contracts are adhesion contracts heavily weighted in favor of the HOA and are unconscionable. What does this mean?

A very good opinion on the use of adhesion contracts is given in Pardee vs. Rodriquez, D039273, California Court of Appeals, that relates to "hidden clauses" that involve the surrender of a buyer's right to trial by jury. This instance involves a purchase and build out of a home. The court said,

"The first is that such a contract or provision which does not fall within the reasonable expectations of the weaker or 'adhering' party will not be enforced against him. The second — a principle of equity applicable to all contracts generally — is that a contract or provision, even if consistent with the reasonable expectations of the parties, will be denied enforcement if, considered in its context, it is unduly oppressive or "unconscionable. Subsequent cases have referred to both the 'reasonable expectations' and the 'oppressive' limitations as being aspects of unconscionability.

"And the agreements in their entirety were contrary to the public policy against compelling homeowners to submit construction defect claims to alternative dispute resolution."

We also find in the special interest groups' efforts to make the Uniform Common Interest Ownership Act, UCIOA, Section 1-112, Unconscionable Agreement or Term of Contract. It says,

"**(a) The court, upon finding as a matter of law that a contract or contract clause was unconscionable at the time the contract was made, may refuse to enforce the contract ...**

(b) Whenever it is claimed, or appears to the court, that a contract or any contract clause is or may be unconscionable, the parties, in order to aid the court in making the determination, must be afforded a reasonable opportunity to present evidence as to ...."

In short, the special interests well knew about unconscionable CC&Rs and acted to protect CC&Rs from such a categorization.

… pay fees to for-profit

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filing with the county clerk — without the need for your signature. And it's binding if it benefits the land! That's a "covenant running with the land" contract. Did you know that??

Well, what are innocent homeowners without the skills and knowledge of attorneys and appeals and supreme court judges bound to? Can anyone tell me?

Article VI, the US Constitution

"The ratification of the conventions of nine States shall be sufficient for the establishment of this Constitution between the States so ratifying the same".

If this ruling holds, its "anything goes" that the board can get passed by the homeowners, using an election and political process that is unsupervised and regulated by any state agency. And by a governing body that is not democratic and has a corporate form of constitution without any protections for homeowner rights and freedoms.

Something is fundamentally wrong here! Dead wrong! **The courts are still defining and redefining the legal obligations of CC&RS** while millions of homeowners are paying the price and being held obligated for things that they have little awareness of, and may in the future, be bound to.

And the stink goes further with the refusal of the state legislatures and responsible agencies to so inform the home buying public of this vague and changing legal environment, but one they are expected to have knowledge of and will be held to, many times with their feet held to the fire!

In regard to the right to bind non-signees to a contract, as these judges have allowed, even our Founding Fathers understood this very important legality of a contract, when they wrote Article VI the US Constitution. It reads:

"The ratification of the conventions of nine States shall be sufficient for the establishment of this Constitution between the States so ratifying the same".

So, with Desert Crest where there were decidedly less than 100% owners paying fees to use the country club, they cannot bind the non-signees. Essentially, any such amendment without 100% vote cannot bind others and is meaningless.

My home is my castle!

HOAs should be?

In her book, Membership & Morals, Princeton Paperbacks, 1998, political scientist, Professor Nancy L. Rosenblum of Brown University deals with membership organizations and includes Chapter 4, "Corporate Culture and Community at Home", on homeowner associations.

Here are some of her opening statements:

"Their [HOAs] freedom is also more vulnerable to how they are defined; they are messier hybrids. Since one form or another of governmental intervention or regulation (or immunity from the state) follows from how the group is classified, identifying RCAs [residential community associations or HOAs] as a property arrangement, corporation, voluntary association or functional equivalent to a local government is crucial.

"It determines whether government should intervene in these associations, and if so, whether standards drawn from contract law, civil liberty and tort law, corporate or constitutional law apply".

In our current state of affairs, homeowners have been abandoned by their government and strongly need its protection against the special interests and their money.

... public policy

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body to read.

"There is also a homeowner rights advocacy coalition, obviously, that wants much more regulation, restrictions or bans on creating new ones, etc., but this coalition is much less unified and less organized. (That's not unusual. Producer groups are always better organized and more active than consumers, who are nearly impossible to organize.) But right now these two advocacy coalitions are competing in various arenas, mainly state legislatures, courts, and the press.

"Clearly the industry has more influence with policy makers than the homeowner rights people. But nothing is forever."

... advocate HOA fixes

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Mr. Staropoli says it's an "adhesion contract ..." Such contracts, he says, give one party tremendous power over the other party. "It's unconscionable and against public policy."

What do the polls say? What did the AOL poll say?

Over the years, the special interests seeking to maintain the status quo with respect to the rights of homeowners have made several claims. Some are not supported, like "HOAs maintain property values" and other housing cannot. Another has been that "HOA problems are nothing more than the rabble of a minority of disgruntled homeowners who just can't conform."

As an example, from out of the blue "95% of the associations are good and the laws shouldn't be changed for a 5% minority" was repeatedly said before the Arizona Legislature.

In 1999, CAI conducted its survey of homeowner satisfaction, again making some strong and unsupported claims, even from the survey results. Answers to some important questions were not provided (See a critique in the July 2003 issue of ***The HOA Citizen***).

In January 2003, an internet poll was conducted by a coalition of homeowner rights groups that attempted to correct the claims of the 1999 CAI survey, and to bring out other important issues not covered by the CAI survey. (See the July issue of ***The HOA Citizen***).

More recently, over the past two months more internet polls were conducted on HOA issues raised by the homeowner advocate groups. These polls supported the issues and arguments of the so-called disgruntled minority, much to the surprise of the special interests.

CAI polls

In general, would you recommend community association living to a friend?

Yes [9.1%] No [86.9%]
Depends on the friend [4.0%]

Did you read governing documents BEFORE you bought your first home in a community association?

Thoroughly [35%] Partially [34%]
Not at all [31%]

AOL poll:

YES, I've had problems	45%
YES, I've had a horror story	23%
Subtotal of HOA owners	68%

StarMan Publishing, LLC

Scottsdale, AZ

Phone: 602-228-2891
Fax: 602-996-3007
Email: pvtgov@cs.com

George K. Staropoli, Manager
Liz Pinson, Editor