Citizens for Constitutional Local Government, Inc.
supporting principles of democratic government

5419 E. Piping Rock Road, Scottsdale, AZ 85254-2952
602-228-2891 / 480 907-2196 (efax)
info@pvtgov.org http://pvtgov.org

October 16, 2009

by: George K. Staropoli

Property lawyers promoting HOAs do not reognize constitutional law

What more is necessary to convince our legislators and elected government officials that their continued support of homeowners associations reflects an anti-American posture, a betrayal of the US Constitution and the American democratic system of government? That they are permitting private parties to contract to circumvent the Constitution?

I have written about the national lobbying group, Community Associations Institute (CAI), a business trade group, that actively and vehemently opposes constitutional protections of homeowners' rights: *"In the context of community associations, the unwise extension of constitutional rights to the use of private property by members . . . "* (CAI amicus brief to NJ Appellate Court, Twin Rivers free speech case). I have also written about the comments of the property lawyer "legal-academic aristocrats", the would-like-to-be philosopher-kings in the *Restatement Third, Property: Servitudes*, recommending that servitudes law should dominate constitutional law: *"The question whether a servitude unreasonably burdens a fundamental constitutional right is determined as a matter of property law, and not constitutional law"* (§ 3.1, comment h), and,

> Professor Susan French [Reporter (chief editor/contributor) for this Restatement] begins with the assumption . . . that we are willing to pay for private government because we believe it is more efficient than [public] government . . . . Therefore this Restatement is enabling toward private government, so long as there is full disclosure . . . . (Forward).

Note the above reference to the HOA as a government, a recognition of its de facto status although not legally recognized as such by any state government.

A few years ago there was a strong outcry by homeowner rights advocates seeking to redress the second class citizen status of homeowners living in HOAs. AARP joined in with its 2006 policy statement, *A Bill of Rights for Homeowners in Associations*, and the California Law Review Commission (CLRC), in its planned rewrite of the Davis-Stirling Act that governs HOAs/condos, added *Chapter 2, Member Bill of Rights*, but it was a blank entry marked "reserved." CLRC declared that it would deal with homeowner rights at a later time. The massive rewrite was dropped in late 2008 -- no homeowners bill of rights.

Around that same time, 2006, Texas real estate lawyers sought to have Texas adopt a modified version of the national model of the Uniform Common Interest Ownership Act

(UCIOA), called TUPCA in Texas. Criticisms of a lack of a homeowners bill of rights was loud and clear, that cause a reply in defense that NCCUSL (Nat'l Conf. of Commrs. on Uniform State Laws) was working on a revision of UCIOA to include these rights. This writer, in 2007, called this proposed bill of rights a mockery (*UCIOA amendments: a pretend homeowners bill of rights*). By 2008, the revised UCIOA model was adopted, but the homeowners bill of rights was relegated to a new, separate Act: *"The free-standing Act is known as the Uniform Common Interest Owners Bill Of Rights Act or 'UCIOBORA.'"*

It should be noted, first, that one of the two advisors to the Commissioners is a long-term CAI member and member of its College of Community Associations Lawyers, and a Florida activist and lobbyist, Gary A. Poliakoff. Mr. Poliakoff recently published an "all you need to know" guidebook to association living, *New Neighborhoods*, which this writer reviewed to his dissatisfaction: the book failed to present the untold, downside loss of individual homeowner rights and protections. (See *Book review of CAI attorney's "New Neighborhoods"*).

Why make a separate law that seems to contradict the commission's mandate of creating uniform laws? Simple: the Uniform Law Commission (ULC) was concerned about the lack of acceptance of UCIOA since its inception in 1983, *"By 1994, UCIOA had become the law in at least five States, while the Uniform Condominium Act, or substantially similar laws, exist in 21 States. The Uniform Planned Community Act is the law in one State."* (UCIOA, 2008, p.3). In a rather frank statement of the reasons to split-off the bill of rights, the 2008 UCIOA states (emphasis added),

> ULC promulgated a free-standing and relatively short Uniform Act that addresses all of the 'association versus unit owner' issues . . . . The free-standing Act is known as the Uniform Common Interest Owners Bill Of Rights Act or "UCIOBORA".
>
> ULC believes that in a state that had already adopted UCIOA, the better choice for that State would be to adopt UCIOA 3.0, rather than the UCIOBORA.
>
> However, in states where none of these Acts has been adopted, or where only an early version of the Condominium Act had been adopted . . . . This outcome [the split-off] would forego the considerable benefits that the more comprehensive statutes afford; however, it would provide the legislatures in the several states a ready means of addressing these currently controversial political issues, without engaging the other stakeholders who might be inclined to resist adoption of the more comprehensive Acts. (p. 2).

With the above approach taken by these real estate-property philosopher-kings, it is not too surprising not to find any section devoted to the unalienable Rights of the Homeowner, rights that no government, nor private contract, can remove, and which would hold the association subject to the 14th Amendment as any other government entity is held. Or a section on HOA prohibitions. As an example of the deficiencies of UCIOCOBRA, I looked for restrictions on ex post facto amendments, HOA amendments nullifying prior CC&R binding contracts without the affected member's consent. These amendments are prohibited under our Constitution. I could not find any prohibition against these retroactive amendments that mock the "sacrosanct" agreement. Not in UCIOA itself, nor in the so-called bill of rights, UCIOBORA.

The closest to addressing this issue are Section 1-206 in UCIOA and Section 5 in UCIOBORA. (emphasis added).

> **UCIOA SECTION 1-206. AMENDMENTS TO GOVERNING INSTRUMENTS.**
> 2. This section does not address the issue of contract rights of unit purchasers which may be affected by amendments under the new Act. Whether an amendment is effective against unit owners who purchased their units prior to the effective date of the Act and prior, therefore, to the amendment in question is controlled by the contract and constitutional law of the State.
>
> **UCIOBORA SECTION 5. APPLICABILITY TO NEW COMMON INTEREST COMMUNITIES; EFFECT OF AMENDMENTS**
> On the one hand, it is desirable, for reasons of uniformity, for the Act to apply to all common interest communities located in a particular State, regardless of whether the common interest community was created before or after adoption of the Act in that State. To the extent that different laws apply within the same State to different common interest communities, confusion results in the minds of both lenders and consumers. Moreover, because of the inadequacies and uncertainties of common interest communities created under prior law, if any, and because of the requirements placed on declarants and unit owners' associations by this Act which might increase the costs of new common interest communities, different markets might tend to develop for common interest communities created before and after adoption of the Act. (comment 1, ¶ 2).

The UCIOA section above does an end run around the issue and punts to state contract and constitutional laws. It does not explicitly prohibit these not infrequent amendments. The bill of rights section 5 above simple discusses the hardship of grandfathering homeowners, which is the relevant public legal doctrine. This is communalism, and not at all a respect for the rights and freedoms of individual that are highly valued by Americans. This is a convenience to the HOA government, and not a necessity as required under judicial scrutiny for the denial of fundamental rights and freedoms. But, then again, the legal-academic aristocrats were property lawyers, and not constitutional lawyers who would have known better.

Has it ever occurred to the legislators that people who are "getting away with something" are not going to complain loudly? How long will legislators continue to close their eyes to this betrayal of American values? How long will they accept the personal agenda propaganda that HOA regimes are good for America, and that the people, of their own free will with explicit consent, agreed to be so governed and to have openly surrendered their individual rights and freedoms? How long will they follow the path of these self-proclaimed property lawyer philosopher-kings, these legal-academic aristocrats, who believe that that have found the utopian society for land use? And, in doing so, have subverted the US Constitution!

Have these legislators ever thought about whether there exists an ideal HOA constitution that is compatible with the Constitution? Well, there can be, as I have explored in *Part 1 – Is there an ideal HOA constitution?*.