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The impact of party ideologues on the HOA legal scheme

In this context, a "party ideologue" is a true believer in his/her political party's values, beliefs, agenda, position and ideology. In today's environment, party discipline enforces obedience and conformity to its policies that include 1) making the other party look bad, 2) oppose all opposition party ideas, legislation or positions, and 3) voting along party lines rather than according to one's conscience. All regardless of the impact on and for the good of the country.¹

Those who paid close attention to the presidential campaigns bore witness to this strict partisan politics of ideology vs. the good of the country, where the party must win at all costs, and their "the politics is war" mentality. Arguments and statements were made to advance one's position that seemed to lack any rational or pragmatic basis -- just beat the other side! On the national level we still hear President Bush claiming the laissez-faire politics that no government regulation is good for the country, and it still works, while the Treasury is giving out \$700 billion to financial institutions, and while actions to regulate the industry are underway. Government help for financial institutions is OK, but not for the automakers and the millions of people dependent on their survival.

On the national level, again, we see public interest organizations like the Institute for Justice and The Goldwater Institute proclaiming their ideology of no government interference with private property rights. But, they only see abuse with respect to eminent domain issues and are blind to HOA abuse, where issues of government interference and support of private organizations are not seen as a constitutional issues. In 2002 the IJ responded to my request for intervention on behalf of homeowners with,

You are of course correct that members of homeowner associations have fewer rights than others-but only because they exercised essential rights in the first place, namely freedom of contract and voluntary association. To the extent that individuals entered into such contracts without full disclosure or appreciation of the consequences, that is a matter of contract law, not constitutional law.²

And just this November 2008, the Goldwater Institute released an article, "Constitution provides principled answers in hard times"³. I asked, *"Doesn't this apply to HOAs as well? You know, those binding constructive notice contracts that implicitly surrender due process and equal protection rights to private governments."* In response, Goldwater, having opposed this year's Arizona HOA reform legislation, SB1162, that would have provided due process protections, wrote this advocate,

If it's a genuinely contractual HOA, with CC&Rs that impose mutual and definite obligations, the bottom line is it's a private association to which the constitution does not apply.

And if it's an HOA based on an illusory contract, with CC&Rs that impose no obligation on HOAs and grant no benefit to homeowners, then any effort by the HOA to enforce the CC&Rs is a species of malicious prosecution (i.e. a frivolous lawsuit). But again, this would be private misconduct to which the constitution does not apply.

(Drani's email of November 19, 2008).

I could not miss the similarities in position with respect to private government HOA regimes that deny constitutional protections of equal application of the laws and of due process. Aren't these constitutional issues under the Fourteenth Amendment? Isn't government interference a constitutional issue under Art I, sec. 10? This fine delineation of constitutionality would be like saying that improper police interrogation procedures (in re: Miranda) is a question of criminal law violations, and they have nothing to do with violations of constitutional rights. This position by these organizations is an obvious adherence to the ideology of no government interference with HOAs, whatever. The reality that prior government interference must be corrected (the earlier adoption of special legislation to protect HOAs), and the simplistic dogmatic insistence that a constructive notice surrender of one's rights are not considered constitutional issues.

At the state level, Arizonans witnessed extreme partisanship during the final Senate session on June 27, 2008⁴. Overtired Senators, seeking to arrive at a budget and end along 2008 session, became embroiled in a highly controversial bill on banning gay marriages and the majority party "invented a new rule" to cut-off debate in order to pass the marriage bill. The integrity of the Arizona Senate was called into question. And, the HOA reform bill, SB1162, was never brought up for a final vote (floor voting is under the control of the President of the Senate, a majority party appointment). An earlier bill, HB2724, similar to SB1162, was never released from the House Rules committee (The important Rules chairman, another majority party appointment, can refuse to release a bill for a final floor vote).

And, a final example of party partisanship at work against HOA reforms is provided by the Arizona Attorney General, who is regarded as a political personage, when he refused to appeal a Superior Court decision. The decision was an appeal from an OAH decision regarding 2006 legislation that permitted the Office of Administrative Hearings (OAH) to adjudicate HOA disputes⁵. OAH came about because the Legislature failed to pass legislation in 2005 to permit Justice Courts to hear HOA complaints. With 43% of the homeowners winning against HOA attorneys, it appears something had to be done to remove the bad outcomes, that is, bad to HOA stalwarts. Many homeowners had written the AG's office over the years seeking consumer protection assistance, only to be told that they should get appropriate legislation in order for the

AG to act. With this refusal to appeal, the Attorney General is now helping to establish the *New America*.

*Qui Pro Domina Justitia Sequitur*⁶

Over my nine years as a homeowner rights advocate and activist I had to wrestle with the failure of state legislators, and the courts, to uphold individual rights and freedoms as supposedly guaranteed by the Constitution. I have been grossly disappointed by such failures and the weak and simplistic rationale for the continued protection of HOAs. The most important rationale has been "no contract interference" to a bona fide, "entered freely with fully informed consent", constructive notice binding CC&R agreement, interpreted as a contract. Yet, elements of a bona fide contract are missing or overlooked, and there are serious questions in regard to whether the surrender of homeowner's rights and freedoms can survive appropriate judicial review.

The only conclusion that would account for such a public policy in favor of private, contractual HOA regimes is the existence of a mindset of "ideology over the Constitution", as enacted by our political parties and practiced in state legislatures. It's an ideology that only sees and adheres to a "no government intervention" with respect to HOA reforms, regardless of the evidence. It is an ideology that accepts and supports constitutional violations as a result of the establishment of special laws for special organizations, HOAs, and from seeing no harm in the denial of individual rights and freedoms under so-called constructive notice surrenders.

This conclusion admits to a *New America* under the rule of man, and not of law, where the purpose of local government is the adherence to an imposed top-down legal scheme. A legal scheme where concern for urban landscaping is first and foremost and superior to the America values of individual property rights and freedoms.

Welcome to the New America!

There cannot be change without change! In reference to the policies dominating our political environment, President-elect Obama said, "You are on your own." The change necessary to restore the America of our Founding Fathers, and to stop the spread of HOA-land regimes of independent principalities, can only come from the people. Not only from those homeowners subject to these regimes, but from all Americans who truly believe in the founding principles and values of America. It must be the people who demand change from the new administration that has promised change, and from their state political machines.

It's time for all good Americans to come to the aid of their country!

References

¹ For more information see *The Second Civil War: How Extreme Partisanship Has Paralyzed Washington and Polarized America*, Ronald Brownstein, Penguin Books, 2007.

² *Establishing the New America of independent HOA principalities*, George K. Staropoli, p. 102, StarMan Publishing 2008.

³ *The Goldwater Institute Daily* email newsletter, November 19, 2008.

⁴ See video short, *What Happened at the Arizona Senate*, at <http://YouTube.com/HOAGOV>.

⁵ See superior court decision: <http://pvtgov.org/pvtgov/downloads/waugaman-unconstitutional.pdf>.

⁶ "who prosecutes on behalf of Lady Justice?", DOJ seal.