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Public Policy, Tort Law and Planned Communities

Tort Law

Before we can proceed, an understanding of the following legal concepts, simply stated, is in order:

> A **crime** is an offense against the public at large, for which the state . . . will bring proceedings in the form of a criminal prosecution;
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> **Contract liability** [as in a breach of contract] is imposed by the law for the protection of a single, limited interest, that of the having the promises of others performed;
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> A **tort** action for a wrong to a person is commenced and maintained by the injured person, and its primary purpose is to compensate for the damaged suffered, at the expense of the wrong-doer.
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> Posser & Keeton on Torts[1] at 7.
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> **Intentional infliction of mental or emotional distress,** a tort characterized by the intentional infliction of mental suffering as a result of extreme and outrageous conduct.[2]

The argument being made here is that the current public policy with respect to planned communities and homeowner associations is just bad public policy. The reasoning of the courts, and unstated intentions of state legislatures, violates accepted principles of the American system of government and the American system of jurisprudence. Furthermore, current HOA public policy is based on misinformation and on selected facts that present a false picture of the best interests of the general public at large.

Therefore, I ask the following questions to better focus on these issues of public policy and HOAs:

1. At what point does a tort or breach of contract become more than just the concern of the injured party, and one that has consequences for the public at large?

[1] *Prosser & Keeton on the Law of Torts*, (W. Page Keeton, gen. ed., 5th Ed., West Group 5th Ed. 1984)
[2] see generally, Restatement (Second) of Torts, § 46 and 43 Am Jur POF 2d 1, *Intentional Infliction of Emotional Distress*

2. At what point do the policy makers, the legislators who create the laws and the courts who enforce the laws, need to be concerned with the ethics and morality of actions by individuals and private groups that cannot in any manner be viewed as in the best interests of the public at large?
3. Must there be disapproval of certain conduct, with incentives to thwart any further acts, and by such disapproval reflects what will not be accepted as in the best interest of the public?
4. At what point does the failure of the policy makers to punish those who have wronged society create a de facto approval of such conduct? This failure reflects a public policy that such conduct is in the best interests of society.
5. Can there be bad public policy as there is good public policy? I think so.

> But the twentieth century has brought an increasing realization of the fact that the interests of society in general maybe involved in disputes in which the parties are private litigants[3].

With these questions, we enter into the realm of public policy and the realization that what the laws and statutes say, the "black letter law", is really nothing more than the attempt to state a vague and nebulous policy that serves the best interests of a fluctuating and ever changing society. "It is a simple matter to say that the interests of the individuals are to be weighed against each other . . . but far more difficult to say where the public interest may lie."[4] The law serves the interests and intents of the policy makers, and not the other way around. The government, the legislators and courts, especially in cases of "first impression", set what the law is and should be. The laws are not complete and the courts must address legal questions for the first time, thereby making new law "on the fly" without public input. The statutes created by the legislatures contain errors or are poorly worded, subject to multiple interpretations, or just have unanticipated consequences.

> "[S]ociety has an interest in the outcome because of the system of precedents on which the entire set of common law is based. . . . When the interest of the public is thrown into the scales and allowed to swing the balance for or against the plaintiff, the result is a form of 'social engineering'. A decisionmaker might deliberately seek to use the law as an instrument to promote the 'greatest happiness of the greatest number', or might give greater emphasis to protecting certain types of interests of individuals as fundamental entitlements . . . ."[5]

Public Policy

And as many homeowners have discovered, "black letter law" only serves as a point of discussion in the courts or before the legislators when seeking to revise the statutes. Putting it harshly, as one US Senator testified during the Chief Justice conformation hearings, "the law is what the judge says it is, period." Some have not discovered this important fact, and faced failure in the courts. "There is room for suspicion that the courts have tended to cite the Restatement [of Laws] when they are

[3] Bohlen, Fifty Years of Torts, 50 Harv.L.Rev. 735 (1937) in Prosser, Supra n. 1 at 15.
[4] Prosser, Supra n. 1 at 17.
[5] *Id*. at 16.

already in agreement with it, and to ignore it when they are not . . . ."[6] And, "Behind the history recorded in judicial opinions lie the historical influences of the social, economic and political forces of the time."[7]

As to the punishment of wrongs, "[T]here are still many moral acts which do not amount to torts. . . Trivialities must be left to other means of settlement."[8]

"The courts always have stood more or less in dread fear of a 'flood of litigation' involving problems which they are not prepared to handle."[9] This argument was used by the Arizona Legislature in 2004 to defeat proposed legislation that would have required HOAs to first obtain a JP Court decision before taking any action with respect to alleged violations of the governing documents. Due Process protection for homeowners was defeated when this bill failed to pass.

And finally, as to public policy and punishment, "Whether the social value of that objective [defendant's motive] is sufficient to outweigh the gravity of the interference [and harm to the plaintiff] often becomes the question of deciding influence."[10] For this reason alone, the courts and legislators have repeatedly sided with almost every action of the HOA board.

Planned Communities & the Lack of Constitutional Protections

> Unfortunately, we find that no matter how sophisticated and well administered our legal systems . . . by themselves these cannot eradicate wrongdoing. . . . Where ethical restraint is lacking, there can be no hope of overcoming problems.[11]

I've focused on tort law, the generally applicable law of wrongdoing, rather than on contract law or on equitable servitudes (not wishing to complicate the argument with fine points on covenants running with the land vs. equitable servitudes). How much emotional and mental suffering is being caused by allegations of rules violations and threats of liens and foreclosure, unaccompanied by evidence or by "evidence" that even a high school student knows would not stand up in court? And by the HOA and management firm refusing to return calls or answer questions as required by law, but keeps sending dunning letters with increasing claims of debt to the HOA? How many senior citizens, widows and single females suffer mentally by libelous and defamatory newsletters, statements made by the board at meetings, or by just plain gossip spread by board members? In many of these incidents, there is no excuse or justification for the acts by the board or the management firm except to intimidate and to cause emotional suffering -- to "get even" or to "show them who's in charge".

I chose this approach because it is a simple matter that homeowners in planned communities are being harmed and wronged by either contract violations, invalid and unjust equitable servitudes, and the failure to protect the homeowner's constitutional and civil rights and freedoms. Homeowners

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[6] *Id.* at 17 (see in general, the American Law Institute's Restatement of the Law of Torts as state recognized common law precedents).
[7] *Id.* at 21.
[8] *Id*. at 23.
[9] *Id*. at 23
[10] *Id.* At 28.
[11] His Holiness The Dalai Lama, *Ethics for the New Millennium*, pp. 25-6 (Riverhead Books 1999).

are being wronged by the use of bad public policy that promotes what is thought to be the best interests of society and the community. This public policy has resulted from the strong, misguided lobbying of the special interests -- Community Associations Institute, Urban Land Institute, HUD and its agencies, and Realtor associations, both at the state and the national level.

Current public policy can be summarized by the view of liberal economic academics and their "the greatest good for the greatest number"[12] attitude toward efficient government.[13] The fundamental principles and values upon which this government was founded have been eroded over time to such an extent that the US Constitution has become just another document for discussion, and not "the supreme law of the land." In an attempt to determine the meaning of the Constitution, or any law or contract, its meaning with respect to the issue at hand may not be discernable at times and the courts must resort to constructing the "hidden" meaning of the document in a manner that is consistent with the document. "Unlike interpretation based on original meaning, however, constitutional constructions are often open to challenge and reform,"[14] and "[C]onstitutional construction is essentially political. Its precondition is that parts of the constitution have no discoverable meaning."[15]

Private, authoritarian governments are mandated by state agencies in many areas, and aggressively promoted and encouraged by state governments[16], yet they are allowed to run amuck without any accountability to the state for its actions and violations of the law. This protection of planned communities by state governments is not balanced by an appropriate protection of the interests of the everyday people who choose to live in a planned community, and who pay the state taxes on their property.

> [N]atural rights are those that are needed precisely to protect individuals and associations from the power of others – including the power of the stronger, of groups, and of the State . . . . [L]aws that violate these rights do not advance the general welfare or common good. Indeed, they harm it[17] . . . . Natural rights . . . were the rights persons have independent of those [that] are granted by the government and by which the justice and propriety of governmental commands are to be judged."[18]

How can it be claimed that homeowners have surrendered their rights when they joined the HOA? The cases that I've seen were concerned solely with the "black letter" wording of the governing documents. That is, the actual verbiage of the "contract" contained wording to the effect that the buyer agreed to the particular restriction on his rights, such as a restriction on signage.

> A waiver of constitutional rights must be voluntary and intelligent, it must have been made knowingly, and with sufficient awareness of the relevant

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[12] Jeremy Bentham, *An Introduction to the Principles of Morals and Legislation* http://www.utilitarianism.com/bentham.htm (2004)
[13] *Vilfredo Pareto Guide*, http://www.economics.unimelb.edu.au/rdixon/pareto.html (2004)
[14] Randy E. Barnett, *Restoring the Lost Constitution: The Presumption of Liberty*, p.128 (Princeton Univ. Press 2004)
[15] *Id*. At 121.
[16] See generally, John E. Nowak & Ronald D. Rotunda, *Constitutional Law* § 12.3 (Sixth ed., West Group 2000)
[17] Barnett, Supra n. 9 at 84.
[18] *Id*. At 54.

> circumstances and likely consequences. Stated otherwise, a valid waiver connotes an intentional relinquishment or abandonment of a known right or privilege.[19]
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> In determining whether to exercise or forego guaranteed right, defendant must be unfettered by improper hindrances and must be provided full information on which to make informed choice, but need have no good or rational reason for his decision.[20]

Conclusions

My argument has been to demonstrate that our fight must be at the policy making level, the level of the decisonmaker's personal views and biases, which in the case of homeowner associations raises serious questions of constitutional law. To right these wrongs being perpetrated upon homeowners, homeowners must not accept any law or legal argument that presumes the legitimacy of the HOA's authority.

For example, arguments relating to provisions within the governing documents, such as, open meetings, access to records, voting procedures, all presume the legitimacy of the HOA's authority. Unless this authority is challenged in the areas and in the manner outlined above, there will be no satisfactory resolution of homeowner problems. Unless HOA boards and officers are held accountable to the state, as any other form of government is held, the legalized extortion will continue. In any other area, such wrongful activities as conducted by HOA boards, officers and management firms would be considered criminal or subject to civil penalties.

The consumer home buyer must be protected under the police powers of the state, as we have with Truth in Lending, Truth in Advertising, strict liability, fair housing, etc. In all of these cases the consumer had signed a contract, yet the state felt the necessity to protect the consumer from provisions that were deemed harmful to both the individual and not in the best interest of society. But, somehow, the state continues to see no evils with planned community governing documents, and in any of the onerous provisions that create an unconscionable adhesion contract.

Policy makers must be made to see the fallacies of their current views, and that the continuance of these views only serves to perpetuate these torts, these wrongs, upon innocent people.

[19] 16 C.J.S. Constitutional Law § 82 (2004)
[20] Love v. Virginia, 92 S.Ct. 1267, 405 U.S. 994