National Lobbyist

for

HOA Principalities

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Community Associations Institute: Dominating the Emergence and Acceptance in America of a Quiet Political Revolution in Authoritarian, Contractual Private Local Government.

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Community Associations Institute: Dominating the Emergence and Acceptance in America of a Quiet Political Revolution in Authoritarian, Contractual Private Local Government.

In the late 1950s, a well-known commentary on Communist Russia related to its Five Year Economic Plans. As the story goes Communist Russia was viewed by some as a democracy, because its people could vote, and because they had freedom of choice. You could buy any color of shoe in Russia so long as it was black. Why? Because that's the only color of shoe that the government allowed to be made.

Jump some 60 –70 years to the America of today, the bastion of democracy that is being expounded to countries all over the world. In America today, people can live in any type home that they choose, so long as it's in a homeowners association. Why? Because that's the only type of home the government will permit for new housing. Couple this requirement with state statutes that echo provisions of the unconscionable[1] adhesion contract, the CC&Rs, a "contract" that a home buyer is not even required to sign as evidence of his voluntary and fully informed consent[2], the difference between Communist Russia and the United States becomes somewhat blurred.

State statutes that have removed civil and constitutional rights and freedoms, freedoms that Americans not living in homeowners associations continue to enjoy, contribute to and "validate" the oppressive nature of these authoritarian governments.[3] There is no accountability by the HOA to obey the laws of the land that is required of every other government body in this country under the 5th and 14th Amendments. These statutes have no enforcement provisions, or very weak enforcement, to make them quite plainly "policy statements", yet the homeowner, by statute echoing the CC&Rs, can suffer severe financial consequences from liens and foreclosure on his home for amounts far in excess of the debts owed to the HOA. Nor can damages be shown that would meet the US Supreme Court's tests for excessive punishment as pertaining to punitive award damages in civil cases.[4]

What has happened to America? How did this sad state of affairs come to be, here in America?

Homeowner associations and planned communities, in their current form, date back to the 1950s and 1960s. This land usage policy was backed and promoted by the Urban Land Institute, the National Real Estate Board and the national Association of Home Builders, with early stage financial support provided by HUD.[5] The history of planned communities and HOAs clearly reveals as business undertaking that was sold under public policy arguments of "affordable housing" and efficient land usage since "the land was getting scarce." Only lip service was given to concerns for democratic governance, and the

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[1] See general discussion, *Maxwell v. Fidelity Financial Services., Inc.*, 907 P.2d 51 (Ariz. 1995) (sale of solar heater under unconscionable contract)

[2] Under the equitable services and covenants running with the land doctrines, constructive notice, or filing CC&Rs with the county recorders office, is accepted as meeting proper notice requirements in real estate transactions.

[3] The debate over the status of HOAs as a government or private corporation, or whether or not HOAs are state actors, is avoided here. There are numerous discussions on this issue, the latest statement being the New Jersey Appellate court, infra n. 24 and the US Supreme Court tests for state actors, other than the "public functions" test, in *Brentwood Academy v. Tennessee Athletic School,* 531 US 288 (2001).

[4] Cf, *State Farm v. Campbell*, 538 U.S. 408 (2003) (excessive punitive damages violate 14th Amendment)

[5] See *Privatopia: Homeowner Associations and the Rise of Residential Private Government*, Evan McKenzie, p. 113 (Yale Univ. Press 1994); *Community Associations: The Emergence and Acceptance of a Quiet Innovation in Housing,* Donald R. Stabile, p. 90-92 (Greenwood Press 2000)

necessity of mandatory membership with compulsory dues in order to make this model work was obvious from the very beginning. This was big business, and was it BIG![6]

The answer can be found in the words of a Texas real estate attorney proposing a new HOA act, TUPCA, before the Texas House Business & Industry hearing on March 31, 2006, which met to examine what should be done with HOA statutes. In answer to questions about the provisions and protections of the HOA, she replied, "There's really an entwined relationship between HOAs and cities. They do that to protect the finances of the association. That was considered a progressive thing 25 years ago."[7] That was a revealing response since the Community Associations Institute, CAI, was formed only 33 years ago as a result of problems, even then, with homeowner associations. The progressive movement dates back to the 1920s and 1930s, some 70 – 80 years ago. No, her response better reflects a state protection of a private industry that had no interests in the American system of government and its values and cherished freedoms.

A National Lobbying Organization

CAI was formed in 1973 by several real estate/land usage special interest groups: Urban Land Institute, National Association of Home Builders, National Real Estate Board with financial support from HUD/FHA.[8] In 1992, less than 20 years later, with strong criticism of HOAs continuing, CAI restructured itself to no longer be an educational tax exempt nonprofit organization, but a business trade group in order to focus on extensive lobbying efforts. Based on its own data, CAI has some 26,000 members or just some 9% of all the HOAs, 274,000, in the country. If the percentage of homeowners/HOA members, 60%, is factored in, then CAI has only some 6% of the HOAs or HOA members for the entire country. In comparison, the Arizona Association of Realtors boasts over 20,000 agents in Arizona alone.

McKenzie writes that "CAI shifted its emphasis toward legislative advocacy and other forms of political action, including grassroots mobilization of its thousands of members at the national, state, and local levels."[9] CAI Founder, Byron Hanke, wrote in 1992 of his concerns for the change in direction of CAI, stating that CAI's funding was based on it being "a research and education institute, not a lobbying/political organization, trade association or professional society with a narrow focus."[10] Today, CAI requires:

> Every dollar of the mandatory $15 Advocacy Support fee goes directly to states with Legislative Action Committees and supports the efforts of CAI to represent and protect our members on state legislative and regulatory efforts.[11]

Viewers to its web site are told,

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[6] Community Associations Institute, Data on U.S. Community Associations, http://caionline.org/about/facts.cfm (April 7, 2006); web site shows the growth from some 10,000 HOAs with 2.1 million residents in 1970, to over 274,000 associations with 54.6 million residents in 2005, in just 35 years.
[7] Sharon Reuler, in *Homeowner Rights Advocates 2006 Texas Campaign*, Vol. 1, part 1 (April 7, 2006) (privately published DVD, StarMan Publishing, LLC, Scottsdale, AZ); excerpts from the video CD of Texas House Business & Industry hearing on March 31, 2006.
[8] See supra n. 4.
[9] Privatopia at 116, supra n. 4.
[10] Community Associations at 141, supra n. 4.
[11] Community Associations Institute, *CAI Community Association Leader and Homeowner Application*, http://caionline.org/shop/join/volunteer.pdf (April 8, 2006).

> CAI also advocates for legislative and regulatory policies that support responsible governance and effective management. We represent the interests of our members before the U.S. Congress, federal agencies, and other policy-setting bodies on issues such as taxes, insurance, bankruptcy reform and fair housing. In addition, state Legislative Action Committees represent CAI members before state legislatures and agencies on issues such as assessment collection, foreclosure, and construction defects.[12]

CAI maintains detailed information on legislative activities affecting planned communities and homeowner associations in all 50 states, and supplies such information with its current (2004) Legislative Action Committees established in 27 of its state chapters.[13] (See Appendix A for a copy of the first page of the detailed list). The extent to which the California chapters are involved in lobbying activities is shown in Appendix B (note that CAI is still claiming that it represents homeowners, consumers, although it's a business trade organization).[14] Less strident is the Texas LAC (http://tlac.org), but the New Jersey LAC had a lot to say,

> Finally, in early March the New Jersey Assembly passed the Uniform Common Interest Ownership Act (A 798) (UCIOA) by a vote of 55 to 17, with 6 abstentions. Congratulations to the members of the UCIOA task force for their unending efforts and thanks also to those who took the time to write and appear and make their positions known. UCIOA now heads to the New Jersey Senate for further consideration. Stay tuned.[15]

Public Policy Contradictions

CAI is a highly political organization and skilled in the effective use of propaganda to achieve its political objectives. To the legislators and policy makers it speaks with one voice, and to the local HOA homeowners its chapter members speak with a completely contrary voice. There is substantial evidence of the direction and the actual CAI intention behind these broad policy statements.

First, as an example, an examination of its much-publicized "position paper" on how people in HOAs should conduct themselves is provided in its "Rights and Responsibilities for Better Communities" reveals a disclaimer:

> Rights and Responsibilities was developed as an ideal standard to which communities could aspire, a goal-based statement of principles designed to foster harmonious, vibrant, responsive and competent community associations. The principles were not designed to be in complete harmony with existing laws and regulations in 50 states, and in no way are they intended to subsume existing statutes.[16]

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[12] Community Associations Institute, *About CAI*, http://caionline.org/about/index.cfm (April 8, 2006).
[13] Community Associations Institute, *CAI Political "Heads Up"*, http://caionline.org/govt/news/legislative_trends.pdf*;* *About Government & Public Affairs*, http://caionline.org/ govt/about.cfm (April 8, 2006).
[14] Community Associations Institute, *California Legislative Action Committee*, http://clac.org/ (April 8, 2006).
[15] Community Associations Institute, *New Jersey Legislative Action Committee*, http://www.cainj.com/ Legislative/index.htm (April 8, 2006).
[16] Community Associations Institute, *Rights and Responsibilities for Better Communities,* http://caionline.org/ rightsandresponsibilities/index.cfm (April , 2006).

In spite of its inference of addressing the larger society, “those of the community as a whole”, the document pertains only to the HOA community alone, and not the town or city within which the HOA exists.[17] It treats the HOA community as an independent principality with its own constitution and existing outside the laws of the greater political body, the town or state. There is no mention of the greater political environment of the HOA.

Furthermore, reflecting the continued misrepresentation of its true intentions and status to the unsuspecting public, this statement of principles contains the following footnote: “Community Associations Institute (CAI) is a national, nonprofit 501(c)(6) association created in 1973 to provide education and resources to America's estimated 274,000 residential condominium, cooperative, and homeowner associations and related professionals and service providers.”[18] As mentioned above, CAI has been a business trade group, 501(c)6 tax exempt, focused on lobbying efforts since 1992, some 14 years ago, but the average viewer would not realize that CAI was a trade group on the basis of the above statement. How can it represent consumer organizations like HOAs or their constituent consumer members, the homeowners? CAI prefers to equate the nonprofit corporate entity with its members, while, as is the point of this discussion, really supporting positions contrary to the best interests of the homeowners themselves. It well beyond a reasonable time for CAI to make true and accurate statements to the public, the media and the legislators.

Bankruptcy law changes elevating Assessments to a tax status

Finally, Why would an HOA seek to excude assessments from bankruptcy for HOAs? Homeowner must be out of their minds if, indeed, they actually voted to have their board represent them in this way. Such activity by CAI is a striking demonstration of the rift between corporate board obligations and a representative democracy where the people come first. This exclusion raises assessments to the same level as federal and state taxes, and without maintaining that delicate balance to protect homeowner rights. Where are those protections against HOA government abuse that we have in place for public government abuse?

CAI really doesn't provide any legitimate government interest to support another unequal application of the laws against homeowners. Notice the mantra in the last sentence, "while all other association residents are left to pick up the tab."

CAI's public policy web age, on bankruptcy law changes, states

> In particular, Section 523(a) (16) should be amended to include homeowners associations and commercial condominium associations because homeowner associations, condominium associations and cooperatives are all just different types of community associations.
>
> Without these changes, bankrupt owners in all types of community associations will continue to avoid their assessment obligations whenever their units are vacant or occupied by people who do not pay rent – while all other association residents are left to pick up the tab.

[17] Community Associations Institute, *Rights and Responsibilities for Better Communities,* http://caionline.org/rightsandresponsibilities/rights.pdf (April 9, 2006).
[18] Community Associations Institute, *Community Associations Institute Press Room: Questions and Answers for Media* http://caionline.org/news/faq.cfm (April 10, 2006).

See note 19 at 17.

Government Regulation of HOAs (emphasis added)

Second, here are CAI's public policy statements on three important issues: the regulation of HOAs, UCIOA, and homeowner rights. The statements must be read carefully and applied to the activities of CAI, both at the national and chapter levels.

In regard to the government regulation of HOAs,

> Community Associations Institute supports effective state legislation – when it is deemed necessary for consumer protection, conversion limitations, protections for ongoing operations or other additions to existing statutes or common law to ensure that community association housing is developed and maintained consistent with legitimate public policy objectives **and standards that protect individual consumers, balancing the legitimate rights of the development industry**.
>
> **Local legislation concerning the creation or governance of community associations is antithetical to a balanced,** well-considered assessment of all issues and interests affecting community associations. It also encourages a patchwork of regulations within an individual state and is, therefore, better dealt with at the state level. [19]

In the following CAI statement from it Rights and Responsibilities policy, one can see its real purpose in urging HOAs to adopt this policy,

> By adopting Rights and Responsibilities, communities will help prevent unnecessary or unduly restrictive legislation and regulation. As more and more communities adopt the principles, we will be able to say with increasing confidence and effectiveness that community associations are addressing many issues through self-regulation.[20]

The only interpretation that can be given to these two position statements is that CAI desires to set statewide laws, like the Uniform Common Interest Ownership Act, UCIOA, in which it can maintain its control over the agenda.

> It is the policy of CAI to recommend that when state governments amend their basic community association development laws they consider the need for updated and comprehensive legislation to regulate the development of community association housing consistent with the above goals. **Moreover, in undertaking such review, state governments are urged to consider and give favorable treatment to one or more of the Uniform Community Association Acts.**[21]

Each state will adopt its own version of the model act, and that's where CAI's domination of HOA public policy subverts the application of homeowner protections. There are no protections of fundamental homeowner rights, no bill of rights, in any of the versions of UCIOA, or in any of the numerous private contractual constitutions called CC&Rs.

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[19] Community Associations Institute, GOVERNMENT REGULATION OF COMMUNITY ASSOCIATIONS http://www.caisecure.net/public_policies.pdf, p. 46 (April 8, 2006).
[20] Supra n. 15.
[21] Supra n. 18 at 47.

Uniform Common Interest Ownership Act, UCIOA

Is it clear that there is a movement to adopt the undemocratic, authoritarian private constitutions as state imposed constitutions or charters, not subject to the states' municipality laws, and being promoted as uniform association laws under the model Uniform Common Interest Ownership Act (UCIOA)[22]?

Is it clear to all that when these associations of associations, and the national lobbying trade group, CAI, contact the government they are not speaking for the homeowners, but a distinct class of HOA membership, and as a vendor, a hired-hand? Is it clear that no membership meeting was conducted electing representative and platforms to take before the various governmental commissions and agencies? As we would expect in a truly democratic process that takes place with our public elections? Is it clear that association board members are not the representatives of the homeowners, especially when those CC&Rs do not grant the boards any such powers? To presume that these powers are "implied powers" stretches the imagination; after all, the homeowner still thinks he bought a private home, period.

UCIOA does not require constitutional protections for these de facto territorial governments! The legislatures in the states of New Jersey, Texas, Colorado, Maryland and Nevada, just to name a few, are considering imposing what is not just a real estate issue, as the promoters would have you believe, but constitutional government and the application of the US Bill of Rights issues. Not one promoter of planned communities or homeowners associations is an authority on political science or government, but just have land planning and real estate backgrounds. And this is not just an accidental oversight, but the deliberate and planned marketing of a defective concept under the American system of government.

And, to repeat CAI's position, "*Moreover, in undertaking such review, state governments are urged to consider and give favorable treatment to one or more of the Uniform Community Association Acts",* we see that CAI has no desire to create truly democratic governments of the people, for the people, by the people.

Homeowner Bill of Rights

The Preamble to the US Bill of Rights reads,

> THE Conventions of a number of the States having at the time of their adopting the Constitution, expressed a desire, in order to prevent misconstruction or abuse of its powers, that further declaratory and restrictive clauses should be added: And as extending the ground of public confidence in the Government, will best insure the beneficent ends of its institution.[23]

In regard to a homeowner bill of rights (author's emphasis),

> Community Associations Institute (CAI) supports a balance of the rights of an individual owner in a community association with the need for effective management

[22] Model UCIOA, http://www.law.upenn.edu/bll/ulc/fnact99/1990s/ucioa94.htm (1994) (after amending portions of the Act, only 7 state legislatures have adopted the model.)
[23] *The Original United States Bill of Rights*, http://www.geocities.com/capitolhill/senate/9526/bor005.html (April 9, 2006).

> of the affairs of the association for the benefit of all owners. Reasonable association procedures which empower the board of directors and staff of the community association to perform their obligations efficiently must take into account the rights of an individual owner to privacy, enjoyment of his or her home, and full participation in the community association.[24]

Yet, in its amicus curiae brief in the Twin Rivers case[25], CAI cautioned against the application of constitutional rights and the democratic process:

> In the context of community associations, the unwise extension of constitutional rights to the use of private property by members (as opposed to the public) raises the likelihood that judicial intervention will become the norm, and serve as the preferred mechanism for decision-making, rather than members effectuating change through the democratic process.[26]

CAI appears to be arguing a "hands-off" policy and non-interference in HOA matters, seeking no accountability under the laws of the land, unless CAI approves of it. How can vibrant communities be accomplished by refusing to apply the US Constitution to protect the rights of homeowners who where taught from grade school that the Constitution protected all Americans?

CAI doesn't address these issues and appears to not really care. It is more interested in the effective and efficient use of government as reflected in a blog entry relating to the Twin Rivers case: "Second, treating an association as a government is not the path to efficiency and effectiveness. The reality is that corporations are inherently more efficient than governments." (See Appendix E for the complete entry).[27] In this blog, CAI warns against board members release of public information if they were public figures, and it asks, "Will we have the nation's partisan political atmosphere infect our associations?"

Furthermore, CAI's own CEO makes t clear that associations are businesses and not social or political communities in his "Critical Mass" blog entry, reacting to homeowner advocates criticism. Notice the contradiction in his statements about democracy at a local level, which can only be rationalized as homeowners have openly and voluntarily subjected themselves to association governance, and openly and knowingly surrendered their fundamental democratic rights and freedoms.

> Others though, hate (and I don't think hate is too strong a word here) the very premise of associations, revolt at democracy at its most local form, and frequently can't understand why the rules have to apply to them and not just to everyone else.
>
> Because that is what associations are - businesses. They have assets and liabilities, governance and leaders, and shareholders/owners - just like Apple Computer or the local bakery. They aren't governments, they aren't personal private clubs, and they

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[24] Community Associations Institute, COMMUNITY ASSOCIATION MEMBERS' & COMMUNITY ASSOCIATIONS' RIGHTS AND RESPONSIBILITIES, http://www.caisecure.net/public_policies.pdf, p. 26 (April 8, 2006).

[25] Comm. For Better Twin Rivers v. Twin Rivers Homeowners Assn., A-4047-03T2 (N.J. Super. App. Div. 2006) (opinion on constitutional rights and quasi-government).

[26] Citizens for Constitutional Local Government, *Community Associations Institute Amicus Curiae*, p. 19, http://starman.com/hoa/cai_brief_rev.pdf (April 9, 2006).

[27] Community Associations Institute, *Welcome to Ungated,* http://cai.blogware.com/blog/_archives/ 2006/2/15/1764675.html (April 10, 2006).

certainly aren't fascist states created to deprive poor, unsuspecting homeowners of their rights. They are businesses that need to be run in a professional and business-like manner.[28]

It appears that CAI does not want homeowners in planned communities to have the same Constitutional protections that all Americans are guaranteed, and does not want the HOA government to be held accountable as all other public government bodies are held accountable to the people. James Madison reminded the people that, "If angels were to govern men, neither external nor internal controls on government would be necessary".[29] It appears that CAI believes that any homeowner rights that interfere with its attainment of this goal cannot be allowed.

The history of planned communities and homeowner associations clearly reveals the intent to deliberately restrict liberties and freedoms in order to mass merchandise associations and make them viable. See McKenzie's *Privatopia*[30] and Stabile's *Community Associations*[31]. See also the ULI "bible" on planned communities with mandatory associations, *The Homes Association Handbook, Technical Bulletin #50*, 1963, from which flows all our problems with HOAs.

On the basis of the above materials depicting the legal structure of HOAs, homeowner advocates ask whether HOAs can survive as a democracy? CAI, and the industry supporters, have already answered the question with a resounding, NO, which is why CAI vehemently resists any encroachment on the absolute sanctity of the CC&Rs, holding them above the laws of the land. And why all of the supporters of HOAs, those lawyers and supposedly land planners and real estate interests, avoid any discussion of democratic principles like the plague.

In what direction has CAI taken these private government communities? Understanding that the intent of planned communities was not to establish a better democratic government, or a democratic government at all, it is important to ask: How democratic are they? Madison states that, "Justice is the end of government. It is the end of civil society."[32] Professor Robert A. Dahl[33] set five criteria for measuring the performance of a democracy. He asks, "To what extent, if at all, do constitutional arrangements help to":

maintain the democratic system;
protect fundamental democratic rights;
ensure democratic fairness among citizens;
encourage the formation of a democratic consensus; and
provide a democratic government that is effective in solving problems?[34]

It is quite apparent that the governance of planned communities fails in everyone of the above criteria.

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[28] Critical Mass, Tom Skiba, *Welcome to Ungated*, http://cai.blogware.com/blog/_archives/2006/5/22/1967695.html (June 19, 2006).
[29] *The Federalist Papers*, No. 51.
[30] Supra n. 5.
[31] Id.
[32] Supra n. 28.
[33] Sterling Professor Emeritus of Political Science at Yale University, and past president of the American Political Science Association.
[34] *How Democratic Is the American Constitution?,* Robert A. Dahl, p. 92-93 (Yale Univ. Press 2002).

At the state level, there are further examples of the real intent of CAI with respect to the protection of homeowner rights. The Arizona chapter of CAI circulated an emails[35] (excerpts are provided in Appendix C) to oppose the restoration of the homestead exemption for HOA liens that was removed by HOA promoted legislation in 1996, and against appropriate due process protections for homeowners against abusive allegations of violations. The homestead exemption allows all residents the right to keep the first $150,000 of equity in their homes except for liens agreed to by the homeowner. The email avoids any discussion of the unjust and unequal application of the laws to a class of people who live in HOAs. The state has not shown the necessity to protect private organizations that cannot show actual damages for unpaid assets to warrant the sale of a person's home. Additionally, reflecting CAI's lack of support for homeowner constitutional rights, note the opposition to HB2824 (which was passed at that time, but has since been held in the Rules Committee) that provides for an independent tribunal to adjudicate disputes between HOA boards and its members. (Rules committees are 99% rubber stamps and bills are passed within days).

In California, the CAI California Legislative Action Committee, CLAC, has repeatedly acted to protect the fictional person of the HOA against the interests and rights of the HOA members. Again, with respect to foreclosure protections, what homeowner would willingly, with full knowledge and information, agree to surrender his homestead exemption or not seek a limitation on the HOA from taking his home for amounts of unproven damages, that can be only 10% owed to the HOA? CLAC seems to think homeowners are willing to offer such largess, such gifts to the HOA as witnessed by its opposition to a foreclosure limitation bill, SB137.[36] One can easily raise the argument of excessive punishment in violation of the 14th Amendment, since the only reason for foreclosure rights and loss of homestead protections, supported by statutes, is the punishment of offenders.[37]

CAI would have everyone believe that the HOA form of community governance was the only means whereby property values could be maintained, because you cannot trust your neighbor. He must be spied upon and watched diligently, and any infraction of the rules, however minor, must be dealt with swiftly and severely. Otherwise, these neighbors would actively seek to reduce their own property values, homes of which can be quite costly to them, by inadequate landscaping, painting house in purple polka-dotted paint, and even turning their homes into auto repair yards. So much for working toward harmonious and vibrant communities, unless of course, CAI actually believes that the absolute and wholehearted adherence to the HOA governing documents will accomplish these objectives.

The Myth of Vibrant Communities

Homeowners vs. HOAs

The June 11, 2006 issue of The Arizona Republic surfaced this important aspect of association living in its subtitle, "*HOA warriors make some progress in defending owners from associations",* which leads to the question: Aren't HOAs supposed to be healthy, vibrant and responsive communities of people? Aren't HOA boards supposed to represent the interests of the homeowners, its member-owners in an excellent example of grassroots democracy in action, as the special interests have been promoting for over 40 years? Or are there other dynamic and structural factors at play here that account for all these

[35] E-mail from member of HOANET listserv*, SB1158 and the CAI*, http://groups.yahoo.com/group/hoanet/ message/25427 (April 9, 2006). Excerpt discusses HB2352 (homestead exemption) and HB2824 (due process).
[36] California Legislative Action Committee, *CLAC Corner*, http://clac.org/2-5.htm (April 9, 2006).
[37] See supra n. 3, US Supreme Court opinion on excessive punitive damage awards.

years or strife, hostility, and an "us against them" attitude reflected in opposing views on association reform legislation?

I still cannot understand that a homeowner, and a board member who is also a homeowner, would want to forego homestead exemption protections for the benefit of the nonprofit association to the tune of hundreds of thousands of his own dollars. Or openly, knowingly and willing surrender his due process protections and his right to have the association be held accountable before the state as any other municipal government is held? Or to pay for an attorney who will represent his adversary, the association, and will not even return his calls in many instances. Or wholeheartedly support foreclosure and loss of all his equity in his home in a legally accepted, but unconstitutional act of excessive and unusual punishment, for amounts often less than $1/10^{th}$ the amount owed the association. The association has no hard cash at stake, as a bank or mortgage company may have.

Yet, state legislatures and government agencies and commissions are besieged with pro-association arguments by not only the business trade group, CAI, but by many individual board members and associations of board members. Several of CAI attorney members repeatedly contact legislators and agencies with position papers without identifying their membership in the CAI College of Community Association Lawyers (CCAL): Perl, McNulty, Ramsay, Poliakoff, Berger, Sproul, Grimm, and Rosenberry, to name a few. But the positions of the association associations and board members raises many questions as to why this opposition, and the answers are not simple to understand.

First, Mr. Skiba's revelation that homeowner associations are businesses[38] is a surprise since nowhere can a person find this bold statement in any of CAI's numerous promotional materials to those interested in understanding community associations. Its much publicized, *Rights and Responsibilities*[39] guidelines clearly proclaims,

> More than a destination at the end of the day, a community is a place you want to call home and where you feel at home. There is a difference between living in a community and being part of that community. Being part of a community means sharing with your neighbors a common desire to promote harmony and contentment.
>
> This goal is best achieved when homeowners, non-owner residents and association leaders recognize and accept their rights and responsibilities.

But, legally and upheld many times by the courts, associations are indeed businesses run by undemocratic boards, as compared to public municipal governments, with constitutions lacking any of the American protections of a person's fundamental rights and freedoms – no bill of rights. Interestingly, still, after 40 or so years in operation, CAI and these association associations, continually oppose reforms as we see in California's SB551 (enforcement against board violations), Arizona's HB2824 (homeowner due process) and other bills.

The law states that, as such, the fiduciary duty of the board is to this fictitious person, the HOA, and not to the homeowners. And if the purpose of the association is to maintain property values, then whatever the board believes to be consistent with this goal is valid. No matter if an individual is made to suffer emotional stress, financial hardship or loss of a home, these are not part of the objectives of the

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[38] Supra n. 28.
[39] Supra n. 24.

association so the board has no interest in these matters. In fact, the basis of the board's authority, the CC&Rs, are well grounded in validity as a covenant running with the land if it benefits not the individual, but the community as a whole. That's all the board needs as a basis for its actions. So, not allowing deadbeats to get away with not paying their assessments and the use of legitimatized extortion laws, the homeowner will lose his home no matter what.

CAI and the various associations supporting homeowner associations, like CALL in Florida (a Becker & Poliakoff sponsored nonprofit whose Exec. Director is a member of CAI's CCAL, along with other Poliakoff attorneys) and ECHO in California (which is a misrepresentation of the organization's mission since it supports the association and not the homeowners, and should be renamed ECHOA) clearly understand this difference; yet continue to exploit the confusions and misunderstandings promoted by its redefinition of the everyday meanings of words and concepts. But the homeowners do not understand this difference. They are led to believe, by currently available promotional and "explanatory" materials, and by the absence of cautionary and warning notices that all is not as it appears when living in an association. They still believe that they are buying their private home, with some rules attached. They do not understand, and lack the appreciation for, the consequences and impact on their lives by living in an association until it is too late.

The result is this class division between management and owner-members who are treated as employees of the association with its hostility, anger and abuse as we have seen with the labor union movement of our past history. And the homeowners, like those early days of management-labor disputes, lacks the powers and means to adequately protect his individual property rights and fundamental American freedoms.

Second, do the homeowners have any rights at all? Is there a board fiduciary duty to those mandatory members, with compulsory assessments, that supply the revenues for the association to function and to even exist? Do these same requirements of a fiduciary apply to the members themselves? Of fair dealing? Of reasonable actions? Of loyalty? And how about duties to uphold the US and state constitutions? Don't the homeowner-investors have this right, this reasonable expectation that the laws of the land apply to homeowner associations as well as to anybody else? If not, then what is community association living all about?

Is it clear to all that when these associations of associations, and the national lobbying trade group, CAI, contact the government that they are not speaking for the homeowners, but a distinct class of HOA membership and as a vendor, a hired-hand? Is it clear that no membership meeting was conducted electing representative and platforms to take before the various governmental commissions and agencies? As we would expect in a truly democratic process that takes place with our public elections? Is it clear that association board members are not the representatives of the homeowners, especially when those CC&Rs do not grant the boards any such powers? To presume that these powers are "implied powers" stretches the imagination; after all, the homeowner still thinks he bought a private home, period.

Is it clear that there is a movement to adopt the undemocratic, authoritarian private constitutions as state imposed constitutions or charters, not subject to the states' municipality laws, and being promoted as uniform association laws under the model Uniform Common Interest Ownership Act (UCIOA)? UCIOA does not require constitutional protections for these de facto territorial governments! The legislatures in the states of New Jersey, Texas, Colorado, Maryland and Nevada, just to name a few, are considering imposing what is not just a real estate issue, as the promoters would have you believe, but constitutional government and the application of the US Bill of Rights issues. Not one promoter of

planned communities or homeowners associations is an authority on political science or government, but just have land planning and real estate backgrounds. And this is not just an accidental oversight, but the deliberate and planned marketing of a defective concept under the American system of government.

CAI, the various associations of associations, and other board members clearly believe in the strict corporate, business, structure of the HOA, which is why they vehemently oppose any application of accountability of the HOA to the state or any protections of homeowner rights. And this is the primary reason why problems will continue in spite of the repeated interference in the day-today affairs of associations while substantive reforms, as we have witnessed in Arizona this session, go unaddressed.

Planned communities and Social Capital

The issue of apathy among homeowners has been raised many times by CAI, the national lobbying organization supporting private governments, or those businesses acting as de facto governments, to counter arguments by homeowner advocates that they lack a real voice in the HOA. "Get involved", "participate", etc are the mantras issued, even this past week by the CEO of CAI in its *Welcome to Ungated*[40] blog resorting to a 1992 in *Board Briefs* article, apparently oblivious to the trends in American society of the past 30 to 40 years -- the same period in which we see the rapid growth of planned communities across the country with their governing body organizations described as "community associations". Based on this identical time period, a legitimate question can be asked:

To what extent has planned communities with their private, nongovernmental approved, constitutions contributed to this change?

First, let's discuss the notion of "social capital" as stated by Robert D. Putnam in his book, *Bowling Alone*[41]. Putnam is a political scientist and not a real estate specialist.

> The core idea of social capital theory is that social networks have value. ... Social capital refers to connections among individuals – social networks and norms of reciprocity and trustworthiness that arises from them. … 'Social capital' calls attention to the fact that civic virtue is most powerful when embodied in a dense network of reciprocal social relations. A society of many virtuous but isolated individuals is not necessarily rich in social capital.

And he writes about community involvement:

> Social connections are also important for the rules of conduct that they sustain. Networks involve (almost by definition) mutual obligations; they are not interesting as mere 'contracts.' Networks of community engagement foster sturdy norms of reciprocity: I'll do this for you now, in the expectation that you . . . will return the favor.
>
> The Golden Rule is one formulation of generalized reciprocity.

The author warns about the application of social capital to the goals of the community:

[40]Pearls of Wisdom - Ways to Destroy Your Association, *Welcome to Ungated*, Tom Skiba, http://cai.blogware.com/blog/_archives/2006/6/15/2034476.html (June 19, 2006).
[41] *Bowling Alone: the Collapse and Revival of American Society,* Chapter 1, Thinking About Social Change in America, Robert D. Putnam (Simon & Schuster 2000).

> Similarly, urban gangs, NIMBY ('not in my backyard') movements and power elites often exploit social capital to achieve ends that are antisocial from a wider perspective. Indeed, it is rhetorically useful for such groups to obscure the difference between the pro-social and antisocial consequences of community organizations.

The "dominant theme" of recent social change, according to Putnam, occurring at the same time as the "quiet innovation in housing" (a quote from part of the title of the Stabile book on Community Associations) is:

> For the first two-thirds of the twentieth century a powerful tide bore Americans into ever deeper engagement in the life of their communities, but a few decades ago – silently, without warning – that tide reversed and we were taken by a treacherous rip current. Without at first noticing, we have pulled apart from one another and from our communities over the last third of the century.
>
> Strikingly, the forms of participation that have withered most noticeably reflect organized activities at the community level. . . . These activities can be undertaken only if others in the community are also active. . . . The more my activities depend on the actions of others, the greater the drop-off in my participation.

In order to answer the question posed above, I will focus on how the planned community model with its mandatory membership, compulsory assessments and lack of homeowner protections, as one would expect in any other community environment in America, has affected the social capital, reciprocity and trustworthiness, community and social interrelationships, and communal or joint participation of homeowners living in these associations. These are the aspects of 'community", and not those relating to the landscaping, or swimming pools, golf courses, tennis courts or community centers, which are just the material and physical aspects of a community. A community, everyone will agree, starts and ends with the people. The people make the community, and it is they who care for its physical aspects.

Looking into earlier research on the community and political aspects of homeowners associations, even one-third back some 12 years to the 1994 publication of *Common Interest Communities*[42], which included earlier studies as far back as 1967, is revealing. In Chapter 6, Barton and Silverman write:

> As one board president put it: 'Apathy reigns supreme – most owners want some unpaid volunteer to make decisions for them rather than attending board or annual meetings. We are running out of fools who will volunteer their time.
>
> Since the writings of Jefferson and de Tocqueville, citizens . . . have been extolled as . . . working in voluntary associations to accomplish civic ends. It is misleading to consider the common interest development as another example of this. The CID highlights individual property interests rather than common purposes. . . . Disagreements typically are not over the best direction for the association as a whole but rather over what are perceived as individual private property rights.

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[42] *Common Interest Communities*, Part IV: Community and Political Life in a Private Government, Stephen E. Barton & Carol J. Silverman, eds. (Institute of Government Studies Press, Univ. of Calif., Berkeley 1994).

> The use of common ownership as a vehicle for meeting public needs violates peoples' understandings of ownership. . . . In the common interest development . . . the common good is less well understood [than in the public arena]. As in the case where only some roofs leak yet all have to pay for repairs, people do not see why they should pay.
>
> The idea of neighbors policing neighbors is not only in contradiction to cultural understandings of ownership, but also fails to provide the internal checks and balances that people associate with fairness in the U.S. system of government. . . . The absence of separation of powers leaves associations boards vulnerable to both perceived and actual favoritism and abuse of powers.

In chapter 7, Gregory Alexander writes:

> The owners were frustrated; some were acutely angry. Yet they haven't responded to their disappointment by expressing their frustration. Rather, they choose passivity. Some feel that the board has intruded on the private sphere of their property ownership with zealous policing tactics.
>
> Passivity and apathy are expressions of experience in which living within a group lacks meaning for individuals. Others who would cooperate through active participation if they didn't feel stonewalled.

What one sees from these studies of some 13 years ago is that the same problems still exist and the national lobbying organization has not been able to make the homeowners association model of communal ownership and private governance acceptable and without serious problems. The answer to the question posed above is that the model, concept, structure and legal basis are contrary to American understandings, beliefs, expectancies and behavioral attitudes, and have contributed to the loss of participation and civic virtue. And that these associations do not create positive social capital of social networks and connections with reciprocal relationships, social interactions, trustworthiness and mutual obligations between the powerful boards and the rank and file homeowners.

CC&Rs: The Non-legitimate Social Contract

The basic foundations of our American system of democratic government can be found in many of the leading political theorists of that time, and in particular the works of John Locke, *The Second Treatise of Government* (1690), and of Jean-Jacques Rousseau, *The Social Contract* (1762). Both speak of those natural rights of man are present before the formation of any government, and as such, are unalienable by any government, even one based on majority rule. Both speak of a "contract" between each individual and the government is a clear understanding of those rights surrendered to the government **in exchange for certain guarantees and protections.**

Today, being so removed from those events and times of the foundation and formation of republics, Americans have lost sight of these important principles upon which this country was founded. Not since the founding of this country over 230 years ago has the need for everyone to understand the basis for this concept of a social contract between the people and the governance of the people. Today, there is a new social contract that is ever increasingly dominating the American social order and changing the very structures of our political system. A new social order that is totally at odds with the principles, beliefs and values upon which this country was founded. They are known as Covenants, Conditions and

Restrictions, or CC&Rs for short. And they are written not based on the beliefs and views of the leading political scientists that founded this country, but upon profit motivated housing developers who mass merchandised the CC&Rs to the unsuspecting public as the foundation leading to harmonious, vibrant communities.

Rousseau wrote,

> But the social order is a sacred right which serves as a basis for all other rights. And as it is not a natural right, it must be founded on covenants. The problem is to determine what those covenants are.[43]

Throughout Locke's *Second treatise* the reader discovers those concepts of "in the state of nature" (not subject to any political entity) and those "natural laws" (those that every person possesses), and those "unalienable rights" of the Declaration of Independence that are not and cannot be surrendered to a political government by a social contract or "compact" (emphasis added):

> Political power is that power which every man having in the state of Nature has given into the hands of the society . . . **with this express or tacit trust**, that it shall be employed for their good . . . . And this power has its original only from [is based on] **compact and agreement and the mutual consent** of those who make up the community."[44]

The national lobbying organization, Community Associations Institute (CAI), promotes planned communities with their HOA governance as the means to better communities and community governance. It's promotional brochure, *Rights and Responsibilities for Better Communities*[45] clearly reflects the position that the CC&Rs are a community social contract regulating and controlling the homeowners, and not a business arrangement:

> More than a destination at the end of the day, a community is a place you want to call home and where you feel at home. There is a difference between living in a community and being part of that community. Being part of a community means sharing with your neighbors a common desire to promote harmony and contentment.

In general, CC&Rs mandate membership with compulsory assessments (taxes, for the HOA does not sell any individual products) as if the homeowner were living in some bona fide civil government body of the state; must comply with rules and regulations (community ordinances with less protections for homeowners than provided by the municipality); are subject to fines (equivalent to community crimes for violations of said "ordinances"); and liens are granted for the fines; are governed by a corporate form of a board of directors, with less protections for fair and open elections; with a disenfranchisement if late in any payments to the HOA, including inability to use the "public" amenities; and there are other features of the control and regulation of the people within the territorial community.

These CC&Rs are not the result of a bargain and exchange process resulting in a meeting of the minds and a mutual consent of the homebuyer to be governed by the HOA. The CC&Rs can easily be

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[43] Jean-Jacques Rousseau, *The Social Contract*, Book 1, Ch. 1 (1762).

[44] John Locke, *The Second Treatise of Government*, § 171 (1690).

[45] *Rights and responsibilities*, Community Associations Institute, http://caionline.org/rightsandresponsibilities/ index.cfm (July 2, 2006).

interpreted and viewed as meeting the criteria for an unconscionable adhesion contract under current statutory and case law.[46] The CC&Rs have not been subjected to a vote of the affected community nor approval by a state or other government entity as to conformity with the general requirements to establish an incorporated town or village. No, not at all, and one wonders why not? Why has our government permitted, supported and protected a private contract that creates a corporate form of community government that is outside the laws governing all other government bodies? Why has our government permitted constructive notice to meet the necessary and sufficient conditions to deny constitutional rights? Since "all legitimate authority among men must be based on covenants" and "might does not make right, and that the duty of obedience is owed only to legitimate powers[47], do the CC&Rs create a legitimate government?

Do existing laws create a duty and obligation to obey the CC&Rs, or do they represent the might and force of civil government to coerce homeowners into compliance and obedience to the CC&Rs? Does the existing legal doctrine of constructive notice, as outlined above, meet the necessary and sufficient conditions for proper due process protections of a citizen's rights, freedoms, property and home under the US Constitution?

Rousseau's opening words, "*Man is born free, but everywhere he is in chains. Those who think themselves the masters of others are indeed greater slaves than they*"[48], emphatically applies to this present day social contract for private communities known as the CC&Rs. These covenants, this new social contract, have created a new social order that has been referred to as "a quiet innovation in housing" by its promoters, avoiding any connection with an undemocratic, authoritarian form of government right here in the US of A. A social order where property values dominate all other objectives, and where the Bill of Rights is relegated to an inferior position as to the protections and guarantees of these fundamental rights.

Application of the Social Contract

First, an important diversion. It may be insisted by the real estate special interests that the social contract view of planned communities and common interest properties does not apply since these organizations are not governments and that they do not govern the community. Well, who then governs the community? Is it the municipality? The county? Or are planned communities stateless entities without a government? Isn't it really the HOA? This fact has been well accepted and become widespread case law: the HOA governs the community. But, somehow it's not a government entity; they are not part of the political body of the state and country. Therefore, they must be de facto governments[49] or principalities, political bodies unto themselves with their own laws and sovereign law-making bodies, dependent on a greater political entity for support and protection, like the Principality of Monaco in France.

The basis for this state of affairs has been the effective use of the public functions test dating back to a 1946 Supreme Court opinion[50] relating not to planned communities, but to company towns, those employer built and operated towns used to provide a place to live for their employees, usually miners.

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[46] See generally, *Harrington v. Pulte Home Corp.*, CA-CV 04-0576, Ariz. App. Div. 1 (2005); *Maxwell v. Fidelity Fin. Srvcs. Inc.*, 907 P.2d 51 (Ariz. 2005); Restatement (Second) of Contracts, § 211 (1981).
[47] Rousseau, supra n. 43, Book 1, ch. 4.
[48] Supra n. 43.
[49] "An independent government established and exercised by a group of a country's inhabitants who have separated themselves from the parent state", Black's Law Dictionary (Seventh ed. 2003).
[50] *Marsh V. Alabama*, 326 US 501 (1946).

The result has been to apply these "public functions" to determine whether or not a planned community functioned as a government. This is the most egregious example of the blindness of the stare decisis, or precedent, doctrine of the American legal system. Currently, and for many, many years, towns and villages were incorporated under state laws that did not specify any of the functions used in the Marsh decision, yet no one held that these towns and villages did not meet the criteria of a public government.

We can now safely and confidently bypass this blindness by the Supreme Court, and the pugnacious insistence that Marsh is the law and must apply to planned communities. We can no follow the path of overzealous special interest attorneys who make a living from mincing words and playing word games in their efforts to micro-analyze every aspect of legal concepts and rulings, ignoring the need for generality and some vagueness in the laws so judges can apply the intent of the laws to specific case instances. To define what a government is, it is quite appropriate to adopt the rational approach of Justice Potter Stewart: *"I shall not today attempt further to define the kinds of material I understand to be embraced . . . [b]ut I know it when I see it . . . ."*[51] And HOAs are equivalent to civil governments and must be so recognized by the legal system.

Second, the most immediate question to be resolved is that of the legitimacy of the CC&Rs and, consequently, that of the HOA private government. Since the legal basis of CC&Rs reside not in constitutional law or politics, but in real estate and commercial laws, the explicit and mutual consent of the people to be governed by any government[52], including the HOA form of government, has been relegated to the simple posting at the county clerks office. And as such, constitutes the lowest level of legal notice for it does not require a fully informed and voluntary consent that can only result from knowledge of all the material facts.

It has been argued by homeowner advocates that the various state disclosure laws pertaining to simply providing copies of the governing documents – CC&Rs or the Declaration (the only document required to be posted at the county clerks office, the bylaws and any written rules and regulations – are totally inadequate in serving to fully inform home buyers as to the undemocratic, private government HOA governance of the subdivision to which the Bill of Rights do not apply.

In spite of the above, supporters and proponents of HOA governance repeatedly use the simplistic argument: If you don't like it or can't accept the HOA, move out. That's equivalent to saying, "If you don't like the President, then move out of the country". This argument by the proponents was addressed quite intelligently and with sound reasoning, more than 250 years ago in *The Social Contract*, where Rousseau states, *"After the state is instituted, residence implies consent: to inhabit the territory is to submit to the sovereign",* but cautions in his footnote that,

> This should always be understood as . . . [not referring to conditions affecting] family, property, lack of [housing], necessity or violence [that] may keep an inhabitant in the country unwillingly, and then his mere residence no longer implies consent either to the contract or to the violation of the contract.[53]

It is quite evident that CC&Rs are not a legitimate social contract binding on the residents of the community, as used in the generally accepted political beliefs upon which this country was founded? If CC&Rs are not legitimate, then homeowners have no duty or obligation to accept the authority of the

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[51] *Jacobellis v. Ohio*, 378 US 184 (1964) (relating to a definition of hard-core pornography).
[52] See generally, *The Declaration of Independence; The Second Treatise*, supra n. 44; *The Social Contract*, supra n. 43; Randy E. Barnett, *Restoring the Lost Constitution: The Presumption of Liberty*, Chs. 1, 2, (Princeton Univ. Press 2004).
[53] Rousseau, supra n. 43, Book 4, ch. 2.

HOA, and the state is grossly remiss when it attempts to legislate compliance with these illegitimate governments.

Legitimacy of board actions

Given this state of affairs, an examination of the actions of the HOA can now be conducted to determine whether the actions of the board under the CC&R social contract, offensive as it is to the individual interests of the members, truly reflect the views of the majority -- the general will of the community. This statement goes to the heart of HOA problems: the difference between what the sovereign may view as the majority view, and its obligations to the fictitious person, the state (the HOA in our instance). However, the goals of the HOA, as contained in the CC&Rs, cannot be anything other than the general will of the people. If it is not, then, the contract is without force or authority.

But this has been the state of affairs over the years: the conflicts between the board (sovereign) and the will of the people with legal contractual enforcement of the CC&Rs against individual interests in the name of the general will to maintain property values. **Or is there more to a community than just maintaining property values that is not reflected in the CC&Rs, but is indeed in the best interests of the common good?** For example, is the lack of any enforcement and penalties for board violations, while the board can take a homeowner's home, in the best overall interest of the community, or of any community?

In the chapter, "The Limits of Sovereign Power", Rousseau points out the very weakness of the HOA government and the oppressive CC&Rs when he speaks of the limits of powers and rights retained by the people. **It is because the promoters and supporters of HOAs do not admit to any allegiance to the US and state constitutions or Bill of Rights that the HOA model of governance is defective and decidedly un-American.**

> The nation is nothing other than an artificial person the life of which consists in the union of its members . . . . Hence we have to distinguish clearly the respective rights of the citizen and of the sovereign [the HOA], and distinguish those duties which the citizens owe as subjects from the natural rights which they ought to enjoy as men.[54]

Rousseau further informs the reader of additional issues of difference within society: the basis of the general will, how that can differ from the will of a group of individuals, and the obligation and duty of the sovereign (the HOA board in our instance) under the contract:

> The general will alone can direct the forces of the state in accordance with that end which the state has been established to achieve – the common good. . . . And it is the basis of this common interest that society must be governed. . . . Sovereignty, being nothing other than the exercise of the general will . . .
>
> There is often a great difference between the will of all [what all individuals want] and the general will; the general will [focuses] on the common interest while the will of all [focuses] on private interest . . .55

[54] Id, Book 2, ch. 4.
[55] Id, Book 2, ch. 3.

> And when factions or cliques form within the community,
>
> We might say, that there are no longer as many votes as there are men but only as many votes as there are groups. . . . When one of these groups becomes so large [or so powerful as the board in HOAs] that it can outweigh the rest . . . then there ceases to be a general will, and the opinion which prevails is no more than a private opinion."56

And this has been the general experience with HOA governance: the division between the interests of the board, management, and those of the owner-members of the HOA who are treated as if they were mere employees of the HOAs. This division, this opposing interest, is not surprising given the legal sanction of constructive notice as sufficient due process notice for the surrender of fundamental rights and liberties; given the failure of the state to hold HOA boards accountable for violations of the governing documents and state laws; and given the failure of the state to regulate and approve these private constitutions, these new community social contracts, and to declare them to be unconscionable adhesion contracts, unenforceable as any other such contract.

It must not be forgotten that the Uniform Common Interest Ownership Act, UCIOA, is nothing more the a state imposed constitution designed and promoted by the real estate and land planning special interests, and the national lobbyist, CAI, totally ignoring any input from political scientists. There are no concerns for guaranteeing 14th Amendment protections; no concerns about complete and open dissemination of information that a corporate form of private government will be imposed on the homeowner; no Homeowner Bill of Rights; and just obligations to obey the rules and pay the assessments regardless of any dispute relating to the payment of these assessments. UCIOA is a state imposed social contract sanctifying the CC&Rs. It, like the CC&Rs cannot be accepted as a legitimate social contract requiring the obedience of homeowners. It is for this reason that the state must impose these UCIOA laws to coerce the obedience to the illegitimate political authority of the HOA.

Conclusions

Across the country, for years now, a pattern has evolved with respect to solving the problems with planned community governance and its homeowner association form of authoritarian government. Local residents in each state, seeking justice and the vibrant communities advertised to them in regard to HOAs, present to their state legislatures the same grievances with respect to oppressive, unaccountable HOA governance; and CAI, at the national and state levels, argues the same rebuffs and opposition to reforms. CAI has been actively seeking to protect, through an intense national and statewide lobbying organization, the defective HOA model of community governance that for over 33 years has failed to reach those ideals of "harmonious, vibrant, responsive" communities.

Nowhere in the Preamble to the US Constitution[57] can the goal of protecting private property values be found. "Justice", "domestic tranquility" (harmonious and peaceful society), "general welfare" (orderly and functional society for the people as a whole), and "liberty" are there, but not "maintaining property values". While many CC&Rs may refer to "promoting the general welfare", there are no Bill of Rights to protect homeowners and neither is there any effective enforcement of state laws designed to protect homeowner rights. Homeowners associations cannot be viewed in any manner whatsoever as a government "of the people, by the people, for the people." CAI would have one believe that the

[56] Id.

[57] "We, the people of the United States, in order . . . to establish justice, insure domestic tranquility . . . promote the general welfare, and secure the blessings of liberty . . . ."

protection of planned communities is so vital to the national security that it warrants restrictions on the rights and freedoms of Americans.

The evidence is unmistakable that the Community Associations Institute has mislead and dominated state legislatures with respect to its true purpose, and that has been the quiet, insidious subversion of the American system of government by means of undemocratic, authoritarian community governments whose purpose is not to uphold those fundamental rights and freedoms cherished by Americans, but, first and foremost, the Progressive economic goal of "better property values make a better America."

In short, CAI has been setting itself up as the national private authority, a sort of Board of National HOA Governors, on local community governance through the adoption of uniform planned community acts that perpetuate the current anti-American HOA governments. In effect, the super, privatized agency to replace the US Constitutional system of government.

Appendix A.

About Government & Public Affairs

Working for You

CAI is your link to legislatures, regulatory bodies, and the courts. CAI's Government & Public Affairs Department promotes the organizations' public policies and represents the interests of community association residents and professionals before the United States Congress, federal agencies, and a multitude of other policy setting bodies.

Additionally, as state and local governments grow more active, your staff works in close coordination with CAI's state Legislative Action Committees (LACs) and local chapters to protect members' interests before law and regulation makers closer to home.

CAI is also very active in preparing *amicus curiae* (friend of the court) briefs (see Legal Activity below) in federal and state cases that pose questions of significant importance in community association law. This aspect of CAI's overall government and public affairs program is vital to preserve the legal rights of community associations and their homeowners.

SELECT TRENDS --- 2005 LEGISLATION & 2006 PREVIEW (page 1 of 16)

CAI Government & Public Affairs Department
October 17, 2005

Looking back to the beginning of 2005, pre-Hurricanes Katrina and Rita, changes in the Supreme Court composition, and increasing gas prices, state legislatures began the year considering how the 2004 elections and the re-election of President Bush would impact state agendas. By year's end, with most state legislatures adjourned and/or in recess, state lawmakers can only be hopeful for a better 2006.

50-STATE SESSION SUMMARY (from State Net tracking service)
Week of 10/17/2005

IN SESSION
There are 5 states and DC in Regular Session; there is 1 state in Special Session.
In Regular Session: DC, MA, MI, OH, PA, WI
In Special Session: PA "a"

CONVENING:
No Regular Sessions are scheduled to convene this week.
LA "a" regarding Hurricane Recovery Measures convenes 11/06/2005. ME "c" regarding Budget Tax and Revenue Issues is projected to convene 10/24/2005.
MN "c" regarding Pensions/Maple Grove Hospital is projected to convene 10/24/2005.

IN RECESS: PREFILING:
IL until 10/19/2005 DE - Prefiling began: 07/02/2005 OK "a" until 10/24/2005 FL - Prefiling began: 06/24/2005
DE "a" until 11/08/2005 KS - Prefiling began: 09/19/2005 NY until 11/09/2005 KY - Prefiling began: 04/14/2005
NJ until 11/10/2005 NH - LSR filing began: 09/12/2005 CA until 01/04/2006 OK - Prefiling began: 09/23/2005
CA "a" until 01/04/2006 TN - Prefiling began: 06/29/2005

ADJOURNMENTS: No sessions are scheduled to adjourn in the next 30 days

Appendix B

What is CLAC?

- The California Legislative Action Committee (CLAC) is a committee of the Community Associations Institute (CAI). It is the largest advocacy organization in America dedicated to monitoring legislation, educating elected state lawmakers, and protecting the interests of those living in community associations in California. CLAC also...

- Is a non-profit committee comprised of 28 Delegates from ten CAI California chapters and elsewhere around the state.

- Represents six million homeowners residing in 30,000 associations throughout California.

  - Is comprised of association homeowners, directors, and professionals.

What does CLAC Do?

- CLAC reviews proposed legislation monthly and takes positions on all bills affecting homeowners associations (HOAs).

- CLAC lobbies lawmakers, key staff, other trade groups, and testifies in committee.

Appendix C.

HOANET email list post excerpt

From: Michae lxxx
Date: 04/04/06 14:23:33
To: CAI
Subject: CALL TO ACTION!

CALL TO ACTION

Community Associations Institute
Arizona Legislative Action Committee
We need your help!

____

First let me thank the many of you who called, emailed and came down to the Legislature to help defeat HB2352 (homestead exemption) and ***HB2824 (administrative law judge)****. We were successful in defeating HB2352 by a 4 to 2 vote, but unfortunately HB2824 passed.*

Today, we discovered that Senator Barbara Leff has agreed to release one of her bills for a Striker Amendment in the House Appropriations Committee which will bring back HB2352 (homestead exemption). This bill has been defeated several times, most recently last Thursday, but the sponsors keep finding ways to keep it alive.

WE NEED YOUR HELP AGAIN!

Please contact the members of the House Appropriations Committee and ask them to

VOTE NO on SB1158
. . . .

Click here for the latest fact sheet for SB1158 (formerly HB2352)

PLEASE ACT NOW!

Executive Director
Community Associations Institute
Central Arizona Chapter
2702 N. 3rd St. Ste. 2040
Phoenix, AZ 85004

From: Michael Lerch

To: CAI

Sent: Monday, June 05, 2006 11:34 AM

Subject: Arizona Legislative Action Committee - CALL TO ACTION!

CALL TO ACTION

Community Associations Institute

Arizona Legislative Action Committee

We need your help!

It has been a long and difficult Legislative session, and our grassroots efforts have been very successful. We need your help one more time!

HB 2824 (the administrative law judge bill) is currently awaiting House adoption and a final vote in both chambers. There is a possibility that the Senate President, Ken Bennett at kbennett@azleg.gov, may be willing to hold this bill if enough senators ask him to do so.

We need your help in contacting President Bennett to request that he hold HB 2824. We also need your help in contacting the senators to request their assistance in asking President Bennett to hold the bill or to vote no if it does come to a vote. Below are the reasons why this is a bad bill:

This bill will cause:

1. 1. More disputes in which associations and board members get dragged into a judicial proceeding;

2. 2. An extra layer of litigation since many decisions of the administrative law judge (ALJ) will be appealed to Superior Court;

3. 3. More expense in the form of attorneys' fees;

4. 4. More time spent by managers preparing for and appearing at hearings;

5. 5. More time spent by board members preparing for and appearing at hearings;

6. 6. Increased and open-ended liability for associations because the ALJ will have the ability to

fine with no limits;

7. 7. Increase and open-ended liability for board members;

8. 8. Increased and open-ended liability to managers;

9. 9. More insurance claims which will result in higher premiums;

10. 10. Disputes about the timing of the ALJ process and the ALJ's authority.

Appendix D.

CLAC Corner

"CLAC CORNER"
NOVEMBER 2005
By xxx, PR Chair

2006 is coming and what's in store? More than you know. More than we know. But we are ready. Are you?

CLAC is the only legislative organization in California that has delegates from all over the State and caters to (meaning battling the powers that be in Sacramento to engender less or better legislation) HOAs all over the State of California.

. . . . .

SB 137 Ducheny -- Collections and Lien Process: This bill is here to stay. HOAs will be prevented from foreclosing on assessment debts that are less than $1,800 (counting assessments only) or one year of delinquency, whichever comes first. And the lien process is not impaired, meaning that when an owner is delinquent in paying assessments, a lien can be recorded according to the Association's collection schedule; however there is a new caveat. Prior to recording a lien for delinquent assessments, an association must offer the owner and, if so requested by the owner, participate in "internal" dispute resolution pursuant to the association's "meet and confer" program required by Civil Code Section 1363.810.

. . . .

This bill provides you with another illustration of how HOAs could be adversely affected without the watch dogging and efforts of CLAC. The original proposal for limits was $2,500 delinquent assessments and three years (yes, AND), and would have required the minimum bid for a sale to be at 65% of the appraised value of a unit. This was a "kicker" as it would have chilled most if not all Association sales for assessments.

Twin Rivers, Twin Rivers

by Tom Skiba at 02:51PM (EST) on February 15, 2006

Well, the NJ Court of Appeals has handed down its long-awaited decision in the Twin Rivers case - although it is far from the final act in this long-running drama. For those of you who have not been following this case as it has wound its way through the NJ court system, the basic contention is that the Twin Rivers Community Association is not a corporation, but a government, and is thus subject to the limitations on governmental action defined in the NJ State Constitution related to freedom of expression, voting, rule-making, etc.

In its decision, the Appeals Court found for the plaintiffs on several issues, particularly related to freedom of expression, and for the association on several issues, including voting rights and rule-making. For a quick summary of the decision, a copy of the full appellate court opinion, and some additional analysis by CAI members in NJ, you can check out: http://www.caionline.org/govt/news/twin_rivers.cfm.

Why is this important to those who live and work in associations? First and foremost, associations are corporations just like Google and the local hardware store. No court would ever find that Google is a governmental entity and subject to such constitutional restrictions. Why should associations be treated any differently? Second, treating an association as a government is not the path to efficiency and effectiveness. The reality is that corporations are inherently more efficient than governments. The law of unintended consequences would seem to indicate that making associations comply with governmental restrictions will raise costs, decrease efficiency, and lead to even more complaints about rising assessments and how funds are allocated. Finally, how far should this go? Will board members have to make their personal finances and backgrounds public, as do many elected officials? Will we have the nation's partisan political atmosphere infect our associations? Let's hope not.

George K. Staropoli

Mr. Staropoli is an Arizona resident who has been active as a homeowners rights advocate since April 2000. He has appeared before a Nevada Legislative committee, the Arizona HOA Study Committee, and testified many times before several Arizona Legislative committees; has been active in submitting homeowner rights issues to the legislators, the media and the public. His opinions and views have appeared in the national media: Kiplinger's Personal Finance magazine, CNN/MoneyOnline and in the New York Times, L.A. Times, Palm Beach Post, as well as on local TV news and in the Arizona Capitol Times. Mr. Staropoli has been quoted in *Private Neighborhoods and the Transformation of Local Government*.

In 2000 he founded and is president of the nonprofit **Citizens for Constitutional Local Government, Inc,** Scottsdale, AZ, a nonprofit organization seeking to inform the legislators and public about common interest property issues and to expose the prevalent myths and propaganda about carefree living in an HOA. *Citizens* believes in supporting principles of American democracy.

George has published several books and videos on reforming planned communities and their HOA form of government. He is editor of *Buyer's Guide to Living in a Community Association* (2001), and he is author of *The Case Against State Protection of Homeowner Associations* (2003)**,** reaching a growing audience of concerned people. The author, a veteran homeowner rights activist, makes his case against state government protection of homeowner associations. He documents, using his appearances before the Arizona Legislature, state legislative hostility toward upholding the civil liberties of homeowners with their broad, misguided interpretation of "private contract" prohibitions, and the use of statutes that favor the HOA.

His StarMan Publishing, LLC produced a 42 minute DVD, *Somewhere Over the Rainbow* (2004), of the Arizona Legislative session documenting the loss of homestead protections and the right of the HOA to foreclose, and a 2 volume, 4 disk DVD series, *Homeowner Rights Advocacy 2006* (2006), documenting homeowner rights advocates at legislative sessions in Arizona and Texas.

Mr. Staropoli was a member of the CEO Club, NY, NY, served as Treasurer and board member of a Penn. HOA, and was a board member of the Valley Citizens League, Phoenix, AZ. He holds a MS in Management from Polytechnic University, Brooklyn, NY.

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