



Dec. 28, 2007

## **Puppet Governments and the Illusion of Democracy: Voting Delegates**

In its lobbying efforts, and other propaganda efforts to promote the acceptance and support of planned communities with homeowners associations, Community Associations Institute, CAI, has made use of models of representative democracy generally known as voting “delegate systems”. Simply stated, HOA members vote for their “representative” or delegate in their “district”, which is some predefined neighborhood. The delegate gets to vote in place of the homeowner-member on issues requiring a membership vote.

The problem is, these delegates have no real powers because the Declaration of CC&Rs determines who is responsible for the operation of the HOA form of governance, and that is the Board of Directors. And we all know that the CC&RS are not modeled after the US Constitution, Declaration of Independence, or contain any Bill of Rights protections, or on the principles of the social contract, or on John Locke’s *The Second Treatise of Government*. No, the 1964 marketing plan for planned developments, as we know them today, was the Urban Land Institute’s *Homes Association Handbook*, TB#50,<sup>1</sup> that was based on profit motives for the real estate interests.

This illusion of democracy at work reminds one of the “people’s democracies” where the people vote for their representatives who possess very little real power, and are subject to a Central Committee, or to Commissars, who control the government. The HOA form of governance is not the product of attempts to produce a more perfect government than our current form of democratic government, but is the adoption of the top-down corporate model of governance with the board of directors in control for all practical considerations.<sup>2</sup>

The delegate voting system is used in the Terravita HOA in Scottsdale, Arizona. Its Declaration<sup>3</sup> defines a Delegate as,

The representative selected by the Members within each Neighborhood responsible for casting the votes attributable to Lots in the Neighborhood on

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<sup>1</sup> A 423 page document funded by several federal agencies, such as the Public Health Service, the Office of Civil Defense, FHA, Veterans Administration and the lobbying group, the National Association of Home Builders (NAHB). But, where are the political scientists? CAI was formed in 1973 as problems arose with the HOA form of governance.

<sup>2</sup> One HOA has gone as far as creating the illusion of the separation powers, one of those ingredients in addition to democratic elections that constitute a truly democratic government (the others being the establishment of checks and balances and a Bill of Rights to protect the people by restraining government). See its website:

<http://kentlandsusa.com/> (10/11/07). For more information, see commentary at Constitutional Local Government, <http://pvtgov.wordpress.com/2007/10/11/the-illusion-of-a-democratic-hoa-kentlands-community-charter/> (12/28/07)

<sup>3</sup> See [http://pvtgov.org/pvtgov/ahlis/terravita/terr\\_93\\_decl.pdf](http://pvtgov.org/pvtgov/ahlis/terravita/terr_93_decl.pdf)

matters requiring a vote of the membership (except as otherwise specifically provided in this Declaration and in the By-Laws).

And the Delegate is authorized to (emphasis added),

Except as otherwise specifically provided in the By-Laws, Articles of Incorporation or this Declaration, the Voting Delegate representing each class of membership within a Neighborhood shall cast all votes which it represents as it, in its discretion, deems appropriate.

On the surface, there seems to be nothing wrong with this method, after all, its used in all our public forms of government. Well, yes, alone it may seem harmless and beneficial, but when viewed in the total scheme of things it becomes just another form of puppet government. The nature of a democracy is not determined solely by whether or not the people vote directly or through representatives, but is determined by the provisions of the governing constitutions and laws put into effect to ensure that the constitution functions as intended. For example, HOAs have no bylaws or Rules and Regulations for clean and fair elections, not even for vote counting. It has been attributed to Josef Stalin, communist dictator and “head commissar” of the Soviet Union, that *“The people who cast the votes decide nothing. The people who count the votes decide everything.”* And “fair elections” remains one outstanding complaint about HOA governance.

In response to the complaints of rigged elections and misuse of election proxies the Arizona Legislature outlawed the use of proxies in 2005. The CAI lobbyist at the time was well acquainted with this bill, HB2154, and the impact on HOAs. Or was he? In 2007 a Terravita homeowner filed an administrative agency complaint (07F-H0067035-BFS) that resulted in the declaration that the May 2007 Terravita election violated the new law against the use of proxies in HOAs. Terravita utilized its Voting Delegate mechanism. The OAH judge declared that the delegates were proxies in violation of the statute.

Now, the same attorney for the HOA who was the CAI lobbyist active in 2005 has filed an appeal (LC2007-000588 in Maricopa County) of the decision claiming, among other things (emphasis added)<sup>4</sup>,

If this Court affirms the Decision, the Association will likely be unable to govern itself. Delegate voting is critical to the Association. The Association's governing documents do not provide for any other way to elect its directors. How would the Association elect directors?

Upholding the ALJ's Decision would leave the association in a legal limb . . . The documents that currently govern the Association would suddenly contain gaps and would no longer make sense.

Because of the potentially devastating effect it could have on the Association, the Decision would be an unconstitutional impairment of the contractual rights of the Association and its members, each of whom purchased their properties with the reasonable expectation that (1) a functioning Association would exist to govern

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<sup>4</sup> See [http://pvtgov.org/pvtgov/ahlis/terravita/lc07-588\\_hoa-open\\_27-31.pdf](http://pvtgov.org/pvtgov/ahlis/terravita/lc07-588_hoa-open_27-31.pdf).

their lots, and (2) they would be able to decide matters through a Delegate voting system.

Note the rush to hide behind the Constitution with its simple statement that “*No state shall . . . pass any . . . laws . . . impairing the obligation of contracts*” (Art I, sec. 10). However, it is well known and generally accepted legal doctrine that there are always limits on such broad statements. For example, the Continental Congress, under the Articles of Confederation, passed the North West Ordinance of 1787 that contained an expanded prohibition with respect to contracts:

[I]t is understood and declared that, that no law ever to be made . . . that shall, in any manner whatever, interfere or affect private contracts or engagements, *bona fide* (sic), and without fraud, previously formed. Art. 2<sup>nd</sup>.

And about a century later, the Supreme Court clarified the question of the regulation and “interference” into contracts resulting from the exercise of state police powers. To what extent may state legislation regulate contracts?” was answered in *Holden*<sup>5</sup> when the Court wrote:

While the people of each state may doubtless adopt such systems of laws as best conform to their own traditions and customs, the people of the entire country have laid down in the constitution of the United States certain fundamental principles, to which each member of the Union is bound to accede as a condition of its admission as a state.

This right of contract, however, is itself subject to certain limitations which the state may lawfully impose in the exercise of its police powers. . . . [T]hat the police power cannot be put forward as an excuse for oppressive and unjust legislation, it may be lawfully resorted to for the purpose of preserving the public health, safety, or morals, or the abatement of public nuisances, and a large discretion 'is necessarily vested in the legislature, to determine, not only what the interests of the public require, but what measures are necessary for the protection of such interests.'

The Arizona Legislature spoke when it adopted HB2154 that prohibited the use of proxies in HOAs, and did not make an exception for voting delegates.

Furthermore, this is rather disingenuous of the CAI-HOA attorney, claiming a “Surprise, surprise! What are we to do?” The HOA attorney and the HOA had discussed the new law over this 2-year time frame, but the HOA went ahead anyway, under advice of counsel, using the Delegates instead of direct voting or secret ballots as required by the law. The surprise was the unexpected decision by the ALJ who wrote in his decision, in part (emphasis added)<sup>6</sup>,

Black’s Law Dictionary, Eighth Edition, 2004, defines “proxy” as “one who is authorized to act as a substitute for another.” Respondent’s Declaration defines “voting delegate” as “The representative selected by the Members responsible for casting the votes attributable to Lots in the Neighborhood on matters requiring a vote of the membership.” Declaration, Article I, Section 1.44. By definition,

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<sup>5</sup> *Hardy v. Holden*, 169 U.S. 366 (1898).

<sup>6</sup> See [http://pvtgov.org/pvtgov/ahlis/terravita/oah-035\\_decision.pdf](http://pvtgov.org/pvtgov/ahlis/terravita/oah-035_decision.pdf).

“delegates” are authorized to act as substitutes for a group of association members with respect to voting on association matters which require a vote of the members. That is a proxy. Furthermore, it is a unique form of proxy that removes the customary rights that a voter would otherwise retain with the more traditional form of proxy. . . . [M]embers of an association with a delegate voting system have no ability to exercise their individual election preferences or revoke the delegation of their vote to the voting delegate once the delegate is elected to that position.

Notwithstanding Respondent’s attempt to distinguish proxies from delegate voting, not even proxies create as much potential for abuse as the delegate voting system. Respondent’s delegate voting system essentially disenfranchises all but 22 of Respondent’s 1,380 members in Board elections.

What we are seeing here is a futile attempt to improve the democratic basis for governing local communities, and the ensuing difficulties caused by the HOA form of corporate governance. On the other hand, if the reader argues that HOAs are really businesses, as the CAI CEO has recently stated, then the attempts to create an appearance of democracy within the legal structure of the Declarations and CC&Rs is just another attempt at creating puppet governments to keep the masses happy.

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