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VIA FACSIMILE (602) 256-7045
(Original by U.S. Mail)

Nick Dranias, Director
CENTER FOR CONSTITUTIONAL GOVERNMENT
Goldwater Institute
500 East Coronado Road
Phoenix, Arizona 85004

Re: Editorial "Regulating HOAs Violates Freedom of Contract"

Dear Mr. Dranias:

This letter is in response to your editorial comments that Senate Bill 1162 violates a community association's freedom to contract. For many years now virtually every subdivision developed in the valley have some form of common ground or area the municipality refuses to maintain with public monies. For example, the town of Gilbert and city of Mesa require developers provide for private management of recreational areas, parks, private streets, walkways, and so forth. This translates to mandatory community associations and is problematic because prospective buyers looking for newer homes are forced into living in deed restrictive communities. Freedom to contract does not exist under these circumstances.

Some attorneys support the position that the legislature should not regulate or restrict an association's "freedom to contract" and cite to the Restatement (Third) of Property: Servitudes ("Restatement") as their authority; yet, the Restatement states that limitations must be placed on an association's restrictions by, *inter alia*, the respective state's statutes so as to avoid injustice.

As a trial attorney, I am witnessing a clear trend that concerns me greatly. Associations are using their "contract" to act in any way they please without fear of legal consequence. A few of the many cases I have encountered over the last year demonstrate this point.

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Case 1: Association's community documents allow one-story to two-story home conversions. There are many conversion homes in the community. Homeowner goes to his association for approval to convert his single story home to a two-story home. The association tells him no. When asked why not, the association simply shrugs its shoulders and says we don't like it and we don't care what our rules say. Homeowner goes to court, requesting that the court order the association to follow its own rules and approve the conversion. In the middle of the lawsuit, the association amends the CC&Rs to prohibit two story homes in the community. Many voting on the two-story prohibition are two-story homeowners! Having "amended" its rules to prohibit two-story homes, the association sought and obtained dismissal of the lawsuit. In dismissing the lawsuit, the court essentially said the homeowner cannot have a case if he does not have a rule that is being violated.[1] In legal terms, the court ruled the case was "moot." To make things worse, the court ordered the homeowner to pay the association's attorneys' fees and costs even though it was the one that acted improperly.

Case 2: Association's CC&Rs require unanimous consent of the members to sell the community tennis courts. The board knows it can't get unanimous consent and sells the tennis court anyways. Homeowners are furious. One homeowner sues. After a year and a half of litigation and tens of thousands of dollars later, the association files a motion to dismiss with the court, arguing it successfully amended the CC&Rs to allow the sell. Without SB1162, the association may successfully dismiss the lawsuit and the homeowner will likely be required to pay for its legal bill.

Case 3: Association's CC&Rs prohibit parking boats on lots in the community. The association board refuses to enforce the CC&Rs despite numerous requests that it do so. Homeowners seek court order that it enforce the boat prohibition. Association amends CC&Rs in the middle of the lawsuit to allow boat parking. The case goes away.

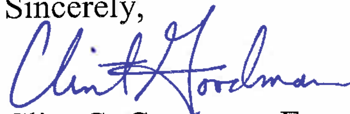
[1] The Court of Appeals affirmed the trial court's ruling.

Without SB1162, community associations will continue to amend CC&Rs in the middle of lawsuits to avoid accountability. And even more disturbing, courts will continue to order homeowners to pay for the association's attorneys' fees and costs once those lawsuits are dismissed. Can there be a clearer example of injustice?

That said, I support the legislature's desire to create a forum wherein the homeowner can expeditiously resolve his concerns without fear of prolonged litigation and attorneys' fees. But despite this advancement in the rights of homeowners, my greatest fear is that homeowners now repulse the idea of litigating any issue period. Disputes taken to the OAH and resolved are appealed to the Superior Court by associations, meaning homeowners face prolonged litigation and incur legal costs they tried to avoid by taking their matter to the OAH. I have a client to whom this happened, and when his association appealed the case to Superior Court, the association threatened my client, telling him that if he lost the case, it would make him pay their legal fees of more than $50,000.00.[2] This new approach successfully discourages many homeowners from resolving their disputes with their associations.

Like you, I am a proponent of the constitution but am convinced that associations are using a "freedom to contract" argument to tear it down. SB1162 necessarily discourages this practice. Do not hesitate to contact me should you have any questions or concerns.

Sincerely,



Clint G. Goodman, Esq.
President and Founding Attorney

cc: Clint Bolick, Esq.

[2]This is not an isolated case. Many of my clients opt not to resolve their disputes via the OAH and oftentimes decide not to litigate issues at all regardless of how egregious the circumstances.