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May 2, 2008

Restatement of Property Law: the supreme law of HOA-land

It appears, under the new supreme law of the land with respect to homeowners associations,[1] the Constitution is subservient to the rewritten, "modernized" doctrine of equitable servitudes[2]. While the Restatement addresses constraints on the validity of covenants, such as "reasonable", and not violating public policy or the Constitution[3], the Restatement states that in the event of a conflict between competing rights, the dominant right is not the constitutional right, but that expressed by the common law Restatement.[4]

As for public policy protections, public policy, as reflected in state laws and court decisions,[5] is well entrenched in favor of the association over the individual rights and freedoms of the people, the homeowners. The standard of "reasonableness" is tied to the existing values and objectives of society, and thus, the use of this loose standard only serves to reinforce the holdings of the Restatement and the protective HOA public policy.

The basis for ***New America*** is this shift away from the principles of the Founding Fathers to the protection of profit motivated real estate interests' private government, authoritarian associations that deny those fundamental rights and freedoms**.** Just compare, for example, the Preamble to your own Declaration and note the absence of the protection of your rights, as exist under public governance.

One of the arguments raised by HOA supporters is the freedom to contract right, and the abstention of government interference, raised to the level of an untouchable "sacred cow". One hears that the HOA represents the "will of the people", although this "will" is somehow expressed by means of the profit driven, developer written declaration of CC&Rs. This legally binding agreement is, not the result of the explicit consent of the governed, but the result of the servitude constructive notice doctrine – just record it at the recorder's office. This false view of "the will of the people" is encouraged by the Restatement,

> This section applies the **modern** [emphasis added] principle of freedom of contract to creation of servitudes. The Restatement of Contracts explains the principle: '"In general, parties may contract as they wish, and the courts will enforce their agreements without passing on the substance . . . The principle of freedom of contract is rooted in the notion that it is in the public interest to recognize that individuals have broad powers to order their own lives."[6]

This attempt at the reversal of supreme law appears in the appeal of an Arizona administrative law judge (ALJ) decision regarding the interpretation of a declaration provision. The administrative hearing concerned the meaning of the sentence,

> The Declaration maybe amended by the affirmative vote of Owners holding at least eighty percent (80%) of the total voting power in the Association at a meeting duly called pursuant to the Articles and Bylaws for the adoption of the amendment. This type of provision is not uncommon in CC&Rs.[7]

The association held that it meant 80% of those voting, while the homeowner held that it meant 80% of the members. The ALJ sided with the homeowner. On appeal, the HOA argued the boards exclusive right to interpret the CC&Rs as provided in the declaration,

> Section 14.01 provides that the Board of the Association has the exclusive right to construe and interpret the CC&Rs and that the Board' interpretation shall be final and binding on all members unless a court competent jurisdiction[8] declares the interpreted provision to mean otherwise.[9]

The HOA attorney has challenged the constitutionality of the legislative delegation of authority to the Office of Administrative Hearings and its ALJs to adjudicate HOA problems or to interpret the statutes, and that the ALJ exceeding the authority granted by the statutes. Yet, the Arizona statutes are quite clear on the authority and competence of the ALJ,

> an administrative law judge shall adjudicate complaints regarding and ensure compliance with: . . . 2. Title 33, chapter 9 and condominium documents, 3. Title 33, chapter 16 and planned community documents. (ARS 41-2198).
>
> the owner or association may petition . . . for a hearing concerning violations of condominium documents or planned community documents or violations of the statutes that regulate condominiums or planned communities. (ARS 41-2198.01(B)).
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> The administrative law judge may order any party to abide by the statute, condominium documents, community documents or contract provision at issue . . . . . (ARS 41-2188.02(A)).
>
> **The order issued by the administrative law judge is enforceable through contempt of court proceedings**. [emphasis added]. (ARS 41-2198.02(B)).

The tone of the HOA attorney, a CAI member, is to assert the absolute sovereignty of the HOA board over the members of the HOA, and the right to freely contract without state oversight and regulation. A “contract” not based on freely given consent in a give and take process between the parties, but one imposed by a profit motivated developer under the public entity theory, not of a written contract, but by merely remaining within the jurisdiction of the HOA. This “move or obey” principle only manifests obedience, not freely given consent.

> Simply remaining in this country, however, is highly ambiguous. It might mean that you consent to be bound by the laws . . . or it might mean that you have a

> good job and could not find a better one [elsewhere] . . . . or that you do not want to leave your loved ones behind. It is simply unwarranted that to conclude from the mere act of remaining . . . that one has consented to all and any of the laws thereof.[10]

The inherent inconsistencies in the theory presented by the HOA-CAI attorney are simply incredulous. They are, however, consistent with the CAI "central" (national organization) position as stated in its amicus brief in the NJ appeal of the Twin Rivers free speech case, where CAI openly advocated the ***New America*** principle of contractual independence from constitutional judicial authority.

> 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 . . . .[11]

To those who speak of liberty and freedom to contract, I call their attention to the other side of the coin, the freedom from contract, or the imposition of a contract on the people by the government. To those who speak of "majority rule", I call their attention to the tyranny of the majority and the tyranny of the legislature that tramples on the rights of the minority.[12] To those who speak of the board as knowing better than the courts, that belies the reality of the homeowner association experience and the unjust denial of homeowner rights, which is the issue at hand.

<u>"The Electorate of Law"</u>

This Arizona appeal is nothing more than an expression of the CAI objective and an explicit attempt to retain a "hands off HOAs" in order to maintain control and dominance over the homeowners, and to deny homeowners the equal protection of the laws and due process rights. This Arizona appeal reflects the tone and "modernized" view of property law as found in the Restatement. How did all this come to pass? How did property law as put forth in the Restatement come to surpass constitutional law and the Constitution? The contributing factors, as I see them, lie in the nature of our system of common law system of jurisprudence, and the mass merchandising and promotion[13] by real estate interests of a new innovation in housing[14]. And this innovation in housing fell to the courts to make new law regarding the clarification of the planned community legal scheme.

Simply stated, the sui generis nature of planned communities forced the courts to deal with a multitude of "first impressions" resulting in new laws. As a result of the national efforts to mass merchandise and promote this new mode of housing, the special interests were influential in attaining many highly favorable decisions, serving to "lock-in" the protection of the HOA/planned community scheme. And these special interests were supported by the property lawyers and the academics that wrote and talked about this new innovation in housing. The opposition was at a disadvantage, as today when a homeowner still cannot get an attorney to represent him, and, consequently, a favorable body of common law developed. That body of common law has become the "modernized" property law found in the restatement of servitudes.[15]

Support for this scenario can be found in the views of constitutional scholar Randy Barnett who described this process quite well,

> A weakness of the common-law process is that once a particular rule [decision] has become enshrined as a 'majority rule' [precedent], the very same practices that enable it to establish a stable [common law] make [common laws] difficult to dislodge. [Such errors were supposed to be corrected by occasional acts of legislation. . . . Today, legislation is hardly extraordinary . . . . Concurrently with the decline in legislation . . . we have witnessed the rise of external evaluation of common-law doctrine by professional, full-time academic legal scholars, philosophers, and economics, and by such influential groups as the American Law Institute [publisher of the various restatement of laws, including that of servitudes], a nonprofit organization comprised of judges, professors, and practitioners. By teaching students and by writing articles and books criticizing common law rules and proposing reforms, these observers comprise an electorate of law that gets to vote on the efficacy and justice of common law judges' decisions, but its members' votes are weighted according to the respect each has earned from peers and from succeeding generations, as well as the status of the institutions from which they speak.[16]
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> Where the legal system has moved away from a concept of justice . . . it has been largely replaced a result of legislation inspired academic, self-styled reformers [for the issue at hand, it is the HOA legislation over the years]. . . . In many cases, it was not the evolutionary common-law process that was wrong [precedent resulting from earlier court decisions], but its academic critics who wished to hard-wire their favored precepts [the protection of planned communities and HOA governance] into the legal system. . . . Academics have long performed an important function in providing this critical assessment . . . that is reflected in the judicial practice of considering and citing . . . 'learned authorities' [all those pro-HOA scholars like Hyatt, Sproul, Grimm, French] on a given subject in support of their decisions.[17]

This process above has been the primary cause for the replacement of the Constitution and constitutional law in favor of the common law of servitudes that reflect the views of the real estate "Electorate of Law". And with the current fashion to view the Constitution as a "living document", it wasn't too difficult to establish a New America of homeowners associations.

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[1] *Restatement Third, Property: Servitudes* (American Law Institute 2000).
[2] Id, Introduction, p. 3, "This Restatement presents a comprehensive modern treatment . . . ."
[3] Id. §3.1, passim.
[4] Id. §3.1, Comment h, "The question whether a servitude unreasonably burdens a fundamental right is determined as a matter of property law, not of constitutional law."
[5] See, for example, *Comm. For Better Twin Rivers v. Twin Rivers Homeowners Assn*., 929 A.2d 1060 (N.J. 2007) (NJ Supreme Court found no constitutional violations and added that it was confident that constitutional questions may be available); *Inwood v. Harris*, 736 S.W.2d 632 (Tex. 1987) (Texas Supreme Court held servitude law over explicit homestead exemptions provisions in Texas Constitution that applied to all homeowners).
[6] Supra, n. 1, §3.1, Comment a.
[7] Troon Village Master Assn v. Waugaman, LC2007-000598 (Maricopa County Superior Court 2007), Plaintiff/Appellant's Opening Brief at 21.

[8] "Court of competent jurisdiction" is defined in *Black's Law Dictionary* as, "A court that has the power and authority to do a certain act; one recognized by law as possessing the right to adjudicate a controversy."
[9] Id. at 18. (The actual provision provides that the board's construction or interpretation shall prevail, "in the absence of any adjudication by a court of competent jurisdiction").
[10] Restoring the Lost Constitution: The Presumption of Liberty, Randy E. Barnett, p. 19, Princeton University Press, 2004.
[11] *Comm. For Better Twin Rivers v. Twin Rivers Homeowners Assn*, Docket No. C-121-00, Appellate Division of the Superior Court, Community Associations Institute (CAI) Amicus Curiae at 20 (2004).
[12] See in general, *The Federalist Papers*, #10.
[13] *The Homes Association Handbook*, Technical Bulletin No. 50, The Urban Land Institute, 1964. (The seminal manual or "bible" for the current legal scheme regarding planned communities).
[14] *Community Associations: The Emergence and Acceptance of a Quiet Innovation in Housin*g, Donald R. Stabile, (Greenwood Press 2005). (Funded in part by ULI and CAI).
[15] Supra, note 1.
[16] *The Structure of Liberty: Justice and the Rule of Law*, Randy E. Barnett, p. 124 (Oxford University Press 1998).
[17] Id., p. 125.