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August 31, 2006

**THE TRUTH ABOUT
THE EMERGENCE AND QUIET ACCEPTANCE OF
PLANNED COMMUNITIES
AND
HOMEOWNERS ASSOCIATIONS**

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Part I

THE MASS MERCHANDISING OF PLANNED COMMUNITIES: HOW AMERICANS LOST THEIR CONSTITUTIONAL & PROPERTY RIGHTS August 31, 2006

THE HOMES ASSOCIATION HANDBOOK, Urban Land Institute Technical Bulletin #50 1964¹

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PREFACE

Civil law, like criminal law, aims to shape people's conduct along lines which are beneficial to society – by preventing them from doing what is bad for society . . . or by compelling them to do what is good for society. . . . Civil law, like criminal law, is effective mainly because of the sanctions which the law imposes, through the courts, upon those who commit violations.²

Statutes are expressions of public policy. And common law is, after all, merely the courts' notion of what best promotes public policy.³

Law reflects the values and morals of society, but it can argued that too often the society reflected by the law is that of the rich and the powerful, including special interest groups. As the theory goes, the powerful enact laws to help them make and protect wealth, and then use the criminal laws to coerce others into helping them in the process.⁴

OVERVIEW

The reader of this publication cannot but come away with the distinct realization that the authors promoted certain aspects of planned communities while deliberately avoiding a solid presentation of a number of serious concerns. It is a comprehensive manual, except for any discussion of the form of democratic governance of the community, for the mass merchandising of a profit-making business enterprise. Not only does this 422 page publication promote the selling of planned communities to the public, the federal government agencies, local governments, the mortgage companies and to the Realtors, it provides sample Declarations, Articles of Incorporation and Bylaws for use by the attorneys for developers.⁵ This use of sample forms⁶ (similar to the legal forms that can be found in any legal research library) serve as guidelines and is a common practice used by the attorneys, which explains the commonality of many of the most oppressive and harsh terms and conditions imposed on homebuyers.

Yet, the word “democracy” is mentioned only a handful of times, and in the context of democratic form of leadership as with,

The other [as opposed to a bureaucratic style of leadership] requires more participation **in order to give members a feeling of satisfaction with ssociation operations**; it may be called the ‘democratic style’. [emphasis added].⁷

And, when the Handbook addresses specific covenants for inclusion in the Declaration for the developer turnover of the association to the homeowners the authors advise,

² Wayne R. LaFave, *Criminal Law*, p. 12 (West Group 2000).

³ Id, p.15.

⁴ James W. H. & Sandra L. McCord, *Criminal Law and Procedure for the Paralegal*, p. 12 (West Legal Studies 2001).

⁵ Appendices F, G, H.

⁶ Appendices K, L.

⁷ In Chapter 16, Leadership Style, Skill and Sources, § 16.2, Bureaucratic of Democratic? It May Depend on Common Facilities.

It is our conclusion, however, that generally it is unwise to plan for the selection of the management of a homes association by something less than a fully democratic process (See Chapter 15).

However, Chapter 15, “Creating the Association and its Facilities”, simply deals with a variety of non-governing topics, and includes marketing techniques as well as weighted voting in favor of the developer and benevolent paternalism by the developer controlled board.

Another example of the complete disregard for the constitutional and property rights of the homebuyers are the guidelines for handling the priority of liens that the authors felt was needed to protect the interests of the developer and the mortgagor, and to insure the continued existence of the corporate entity proposed to manage the planned community, the “automatic homes association”⁸. While this Handbook recognizes the problem with the timing of when the covenants running with the land become binding, at the time the developer sells the first lot, it advises that the states will protect the HOA from any homestead exemption because of this priority of liens⁹, but urges the need to insert wording to grant the mortgagor a priority lien before this “developer” lien.¹⁰ The home-buying public protections, as was the intention of the various state legislatures when creating the homestead protection, was intentional disregarded by the advertising of this technical oversight.

Over the 42 years since the publication of *The Homes Association Handbook*, it has become the “bible” for the mass merchandising of planned communities with the accompanying affect on American society, its values and the loss of individual property rights, and the loss of fundamental rights and freedoms upon which this country was founded. The Handbook was supported by several federal agencies and real estate interests¹¹, and continues to be supported by these same entities along with state legislatures and local municipalities, with the same apparent disdain for the protection of American liberties and freedoms.

The mantra of “less government intervention”, this call for a laissez-faire policy by reputable libertarian public interest firms, masks the prevalent protectionism of planned communities by the states and their failure to protect a segment of society from the predator marketing tactics of the real estate industry.

THE MASS MERCHANDISING OF PLANNED COMMUNITIES

What is remarkable, and disgraceful, is the failure of state governments across the country to impose sanctions for board memembr violators of planned community, homeowners and condo

⁸ Term used for today’s mandatory membership association.

⁹ “We believe that the lien of assessments will, in all states, be recognized as superior to and unaffected by the homestead exemption”. P. 322.

¹⁰ “In absence of an express provision altering priorities, the court held that the lien of the assessments was superior to the lien of the mortgagor . . . a suggested provision dealing with priorities may be found in Appendix F.” p. 321.

¹¹ From the cover page: the Federal Housing Administration, US Public Health Service, Office of Civil Defense, Urban Renewal Administration, Veterans Administration, and the National Association of Home Builders. The Urban Land Institute was formed in 1936 as a research division of the National Association of Real Estate Boards (now the National Association of Realtors) under the name of the National Real Estate Foundation (see generally, *Community Associations: The Emergence and Acceptance of a Quiet Innovation in Housing*, Donald R. Stabile (Greenwood Press 2000).

owners associations. Homeowner violators are subject to fines, penalties, interest with accompanying liens on their homes, and even the HOA's right to foreclose on their homes. It seems as though state governments have set a laissez-faire approach as good public policy when it comes to holding planned community governments accountable to the state. Such an attitude can only be interpreted, as cited above, as "this is beneficial and good for society." One-sided enforcement of the laws against homeowners has become the standard of what is beneficial for the American people.

These HOAs have risen to a level that surpasses the accountability of governmental entities under the law, while granting these authoritarian private governments almost equal status and powers as if they were indeed governmental entities. HOA assessments have been given the same status as federal tax payments under the recent changes in the federal bankruptcy laws, and while a person has help and can negotiate a workout plan under federal guidelines for the payment of his taxes owed, there are no similar laws that require a workout for the payment of HOA assessments owed the private organization, the HOA.

The origins of how this came to be here in America, the bastion of democracy, can be traced back to the ULI's Technical Bulletin #50, that was prepared and supported by the real estate special interests, and aided by federal agencies (See Appendix 1, TB#50 Table of Contents). The effects of this 1964 guide to the selling of planned communities to the public, the media, and the legislatures can still be seen today with several states having adopted a UCIOA (Uniform Common Interest Ownership Act) law, or are considering the adoption of such a law, as, for example, are Texas and California. UCIOA can be seen as the extension of the premises and protection of business interests, made into law. The repeated calls for a Bill of Rights, due process and the equal application of the laws protections, as are all governmental bodies are held, remains shockingly absent from all versions of UCIOA.

This paper makes extensive use of quotes from TB#50 so the reader can, for himself, assess the tone and true motivation of the authors and promoters of planned communities.

The Framework

HOA supporters, including legislators:

Some people do not know how to live in an HOA. They entered into a contract and now they are trying to break it because of something they do not agree with. We expect people to live up to their contracts.

The courts:

You, Mr. homeowner, do not have these rights because you surrendered them when you agreed to be bound by the CC&Rs, which are a binding contract.

The homeowners:

I did not know I entered into a contract when I bought my home. I signed no CC&Rs or contract to obey any rules. And I never agreed to surrender any rights. Nobody told me that I was doing all of this.

The Con

The “pat ourselves on the back” book by Donald R. Stabile¹², which was partially funded by ULI and the Community Associations Institute (CAI)¹³, carries the subtitle: *The Emergence and Acceptance of a Quiet Innovation in Housing*. However, the reader of TB#50, this bible on how to make the planned community concept work, comes away with a far more sinister picture of corporate collusion and conspiracy, and government willingness to look the other way and hear no evil, see no evil and speak no evil.

This quiet acceptance was accomplished by the mass merchandising of the planned community model by entities with a strong business profit-making motive, who published and distributed TB#50 as the tool to overcome any objections by the public, the real estate agents, the mortgage companies, the state legislatures and the local planning boards. TB#50 had something to say on how to sell the concept of HOAs to everybody. And it accomplished this task in a typical business marketing and promotional plan that had answers to the legal concerns, the operation of the HOAs, the physical infrastructure and amenities of the planned communities, down to how to select the right people from the homeowners in order to properly run the homeowners association. All in such a way as not to disturb the profit picture for the developer or mortgage company, and in a way that mandated the loss of homeowner fundamental rights and freedoms by means of an unconscionable adhesion contract, the Declaration. The need for state legislation in order to make the planned community model viable was stressed in TB#50.

A common theme that the reader encounters through out TB#50 is the requirement to perpetuate the business-developer’s plan for the community, unchallenged by any government agency and made extremely difficult to amend by the association members (just recall the difficulty in amending the US Constitution). This guideline strongly emphasizes that the HOA association and planned community must endure as a monument to the developer, or was it to reassure the mortgage company about property values, and to mollify local government that it will not be required to become involved in what amounts to independent principalities.

THE ULI BLUEPRINT FOR SELLING PLANNED COMMUNITIES

Some of the more serious and sensitive issues of the past, 42 years ago, and still continuing today are presented below.

¹² *Community Associations: The Emergence and Acceptance of a Quiet Innovation in Housing*, Donald R. Stabile (Greenwood Press 2000).

¹³CAI was created by in 1973, some nine years after the publication of TB#50, to stop the problems that were occurring with planned communities. It was to provide educational services to HOAs, the government, and the public. Its organization paralleled that of a typical state agency with a board or commission consisting of representative organizations affected by the agency. In 1992, with continued HOA problems and severe criticism by political scientists, such as, Robert Jay Dilger, Evan McKenzie, Stephen E. Barton, Carol J. Silverman, and Gregory S. Alexander, CAI reorganized as a trade group in order to concentrate on lobbying state legislatures to support planned communities and HOAs. See generally, *Supra* note 4; *Privatopia: Homeowner Associations and the Rise of Residential Private Government*, Evan McKenzie (Yale Univ. Press 1994).

The Necessity for Covenants Running with the Land

TB#50 makes it very clear in Chapter 1 that the homes association, by definition, is tied to covenants running with the land:

[W]e have taken the position that no organization is a homes association unless provided for, in some manner, in the covenants, deeds, or other recorded legal documents which affect title to the land within the development.”¹⁴

[T]he right to membership in such an association is automatic [mandatory in today’s jargon] for every home owner because it cannot be withheld from an owner whose land is charged with the obligation to pay its assessments.”¹⁵

This bible for creating planned communities impresses upon its readers that the community’s source of income is from maintenance funds, the assessments, that are legally levied against the land by recorded covenants, which bind each and every owner as a lien against the land. Numerous pages then explain and inform of the necessity for properly worded covenants that run with the land be part of the recorded declaration in order to make the association’s assessments on these members legally binding. The collection of assessments is the life-blood of the HOA, its source of revenue just as the state collects taxes to pay for its operation.

This obsession with the acceptance and survivability of the planned community dominates any concern for constitutional protections of homeowner rights to the extent that foreclosure becomes a weapon of enforcement against non-payment of assessments. This enforcement tool (for a detailed discussion of foreclosure, see Foreclosure below) is available because,

Fundamental to the legal arrangement for a homes association is the covenant for assessments which must be made to run with the land so that the association can be assured of a continuing, legally enforceable source of maintenance funds.¹⁶

In this manner, making use of equitable servitudes and covenants running with the land, TB#50 has side-stepped any and all contract law elements relating to a proper meeting of the minds, misrepresentation, proper notice of the covenants and restrictions, sufficient due process with respect to any surrender of constitutional rights. All these issues are easily bypassed by the real estate doctrine of constructive notice, the posting to the county clerk’s office leaving it the obligation of average Americans seeking to buy a home to discover what they had agreed to when they took possession of their new HOA controlled home. Recording the declaration also “*establishes a ‘uniform scheme’ of land use . . . which is mutually enforceable among the home owners and by the homes association as their representative.*”¹⁷

Superiority of Liens: Homestead Exemption loophole and mortgage liens

TB#50 advises that the states will protect the HOA from any homestead exemption because of this priority of liens, but urges the need to insert wording to grant the mortgagor a priority lien

¹⁴ Chapter 1, “*Is it a Homes Association or Isn’t it?*”, p.5,

¹⁵ Id, p. 6.

¹⁶ Chapter 23, “Affirmative Covenants”, p. 314.

¹⁷ Chapter 12, “Setting the Legal Foundation”, p. 199.

before this “developer” lien. The home-buying public protections, as was the intention of the various state legislatures when creating the homestead protection, was intentional disregarded by the advertising of this technical oversight.

We believe that the lien of assessments will, in all states, be recognized as superior to and unaffected by the homestead exemption.¹⁸

In absence of an express provision altering priorities, the court held that the lien of the assessments was superior to the lien of the mortgagor . . . a suggested provision dealing with priorities may be found in Appendix F.¹⁹

Section 10 of Appendix F contains the simple wording almost identical to that found in most declarations and state laws: “*The lien of the assessments provided herein shall be subordinate to the lien of any mortgage . . .*”²⁰ The reason for this limitation upon the homeowner is obvious -- to insure the acceptance of favorable loans to the developer, and to insure the viability of the planned community. (See the 30 year restriction below). It is a plus in favor of the mortgagor who obviously will accept higher property values given the private HOA maintenance of the community, meaning higher sales prices for the developer. “Inadequate maintenance of the common properties will impair the value of the homes and so of the mortgage lender’s security”.²¹

So, from the initial concept and model of the planned community, the individual homebuyer has entangled himself in the financing of the developer by allowing the mortgagor to have a first lien for payments in arrears not directly affecting the owner’s private property, but for payments on common property that is owned by the HOA. Please understand what is happening here. The mortgage company does not want to collect the assessments as part of the mortgage payment along with the insurance and taxes. Why not? Is it because the mortgage companies recognize the frailty of HOA boards and the legalities of its operation? Perhaps they do not want to become involved in HOA- homeowner squabbles relating to questions of legitimacy and validity of HOA actions.

The homebuyer has granted the mortgagor a favored position not related to the condition of his private home, but to the possible devaluation of the common areas that the homeowner does not directly own or control. Why must the mortgagor be granted this additional protection and assurances, if not but to assist and aid in the viability of the HOA that is only, at most, a third-party beneficiary of the homeowner’s mortgage loan?

The lien of assessments unpaid for by the home owner . . . would, if permitted to come ahead of the mortgage, eat into the mortgage security. For this reason, the mortgage lender is justified in asking that the lien be postponed to his mortgage.”²²

¹⁸ Supra n. 16, p. 322.

¹⁹ Supra n. 16, p. 321.

²⁰ Appendix F, Covenants, p.391.

²¹ Supra n. 17, p. 210.

²² Supra n. 17, p. 211.

What about the justification of the homeowner for his equity in his home in regard to the loss of his homestead exemption or foreclosure as excessive punishment that leaves him, in reality, with nothing?

The Necessity of Foreclosure

Why is it necessary for the HOA to foreclose on a home for failure to pay assessments? Granted that the HOA's survival, like any other governmental entity of non-profit organization, depends on a revenue stream of contributions, donations, and taxes. But, only the state or federal government is allowed, and will, take a person's home for the nonpayment of taxes, but only after protective procedures have had a chance at a workout. Why do so many state laws mimic the ubiquitous covenants, including the model homes association forms contained within TB#50,²³ and legally permit the HOA to foreclose? As stated in the Preface to this paper, such laws reflect the legislature's view of good public policy, and these foreclosure laws say that it's good public policy to permit an HOA to foreclose on a person's home.

Of course, the homeowner has agreed to allow this foreclosure on his home, but the question is one of the equal application of the laws, due process protections and good public policy especially with the lack of any constitutional protections of the homeowner's rights within the HOA constitution, the Declaration. And, there's the issue of the lack of any state enforcement of wrongful acts committed by the governing body, the HOA board. Other entities that have the right to foreclose have a bona fide stake in the failure to make payments to them, namely the mortgage company that advanced substantial sums as the mortgage loan. But, what is the substantial amount of hard cash has the HOA advanced, and what bona fide stake does it have to warrant foreclosure rights, to warrant such draconian measures?

Foreclosing on a \$200 HOA debt with over \$2,000 in attorney fees causing the homeowner to lose his equity in his home that can have a market value of \$120,000 or \$200,000 or even \$1,000,000, representing a 200 to 5,000 times ratio of damages to losses, is extremely excessive. Can the HOA substantiate damages in this amount? No! **So just what does the right to foreclose reflect? The punishment of offenders!** A hideous "crime", an act against the best interests of the community, the HOA, that warrants severe punishment as a deterrent to other homeowners. **Foreclosure is nothing more than excessive punishment by the HOA.**

Excessive punishments, as in excessive punitive damages, has been found by the US Supreme Court to be an unconstitutional violation of the 14th Amendment's due process clause and a deprivation of property.²⁴ The Court offered a 10 to 1 or less ratio as acceptable ratios for punitive damages.

Disregarding the above concerns, in 1964, with the highly motivated special interests seeking to make the planned community model with its mandatory authoritarian homes association

²³ Appendix F, Covenants, and Appendix H, Bylaws.

²⁴ *State Farm v. Campbell*, 538 US 408 (2003). This action involved the amount of an insurance claim award. ("The Due Process Clause of the 14th Amendment' prohibits the imposition grossly excessive and arbitrary punishments a tortfeasor [wrong-doer]; [The \$145 million award was] neither reasonable nor proportionate to the wrong committed, and it was an irrational and arbitrary deprivation of the property of the defendant").

acceptable and successful, TB#50 strongly argued for the right to foreclose as an effective legal means to “guarantee” HOA revenues. the primary purpose of TB#50 was to demonstrating how the promoters had taken steps to protect the interests of the industry participants, steps that were necessary for the acceptance and survival of this new approach to home ownership. The right to foreclose was a paramount selling point, and is directly connected to properly word covenants granting the HOA the right to collect assessments and to lien the homeowner for the non-payment of assessments (see “The Necessity for Covenants Running with the Land”, above).

The covenant for maintenance assessments, unlike protective covenants, looks to legal enforcement which will result in a collection of a sum of money. Such enforcement can be made through a proceeding to foreclose a lien on a house.”²⁵

Such enforcement can be made through a proceeding to foreclose on the home . . . It [the lien] is enforced by foreclosure proceedings . . . Moreover, foreclosure of a lien is the best remedy available Foreclosure proceedings . . . do not require personal service of process ²⁶

The Exercise of State Police Powers to Fine and Penalize

While the authors spend much time concerned with the legalities of assessments and enforcement by means of liens and foreclosure, very little is said about violations of the CC&Rs and rules of the HOA. They do advise that the rules be publicized with information about penalties, and that they be few and be simple.²⁷

As to penalties for violations of the rules, TB#50 is careful to not to specific monetary penalties and liens, but does advise that, “Penalties for abuse of the rules should be appropriate to the facility, the abuse, and the offender.”²⁸ It is clear that the penalties refer to acts committed at some common area facility, and not for any violations outside the common areas.

However, the authors recognize the need for effective enforcement against rule-breakers, but seem to have developed a blind eye to the enforcement of violations by uninformed and incompetent boards. The authors advise getting local authorities involved to help with enforcement of the private organization rules,

Since empty threats will only tempt the rule-breaker [board members appear to be excluded from this advice] the association must be strong enough to enforce its rules and must have the cooperation of local authorities, when necessary, as an aid to enforcement.²⁹

The reader of TB#50 is strongly warned that,

²⁵ Supra n. 16, p. 314.

²⁶ Supra n. 17, p. 202.

²⁷ Chapter 18, “Using the Common Property”, p. 283-4.

²⁸ Id, p. 285.

²⁹ Id, p. 283.

The right to enforce a covenant against a particular violation can be lost if action is not taken promptly; by proceeding in court if necessary. . . Thus, the failure to enforce covenants may have a snowballing effect leading to a destruction of the neighborhood plan.³⁰

And the reader is further warned, of a common wrongful act that occurs frequently today, that to delay enforcement may be bring greater penalties. Referring to the equitable doctrine of estoppel by latches, without mentioning the doctrine, “*The principal of equity which operates here is the same as that which would deny enforcement because of delay.*”³¹

Again, the authors are more concerned about conserving the neighborhood and the detrimental affect that the owners of the HOA, the homeowners, may have on the community, but fail to offer equally strong wording relating to the proper and effective governance by board members. The board memembr, that other class of owner, seems to be somehow blessed with the virtues of angels, and can do no wrong.

A surprising result from the reading of TB#50 relates to the non-appearance of monetary fines for violations of the covenants, just the failure to pay assessments. Nothing is even mentioned about foreclosing for failure to pay fines and penalties. Not even a mention of the disenfranchisement. However, Article 3, Section 3 of the sample bylaws does permit the suspension of facilities for violations of the rules, for up to 30 days. Could the use of these enforcement techniques have arisen today from the laissez-faire treatment of HOAs by the state, leading to “we can do anything we want” attitude by HOA boards?

The 30 Year Restriction on HOA termination – Preserving the Developer’s Plan

For some unspecified reason, the authors are opposed to democratic rule by the homeowners, in spite of statements made elsewhere in the guideline (see “Democracy and Planned Communities” below). “Interim” modifications, those less than the initial term of 30 – 40 years are opposed on the grounds that

“A provision which would allow for substantial modifications to the covenants at any time would throw away one of the significant advantages of covenants as compared to zoning – that covenants need not be left open to continuous struggle.”

And again, unspecified reasons are given for requiring an initial non-modifiable declaration period: “***It is generally agreed that the first period should run . . . as long as it will take to amortize the initial home mortgages***”³²[emphasis added]. What is so unique about the initial mortgages, and the counting of the time period that undemocratically binds all future homeowners? The answer is never provided, and it appears to be an arbitrary and capricious time in favor of the initial, and therefore higher risk, mortgages.

³⁰ Chapter 20, “Conserving the Neighborhood”, p. 297-8.

³¹ Id, p. 298.

³² Supra n. 17, p. 212.

Amending the Declaration with less Than 100% of the Owners

This is another controversial issue also addressed by TB#50, 42 years ago, and is still alive today, being subjected to many court decisions with opposing answers. Contractually, a person's property cannot be taken away without his consent, unless of course the government invokes its eminent domain powers for the public benefit. With respect to the dreadful termination of the HOA, the guidelines warn readers that if the CC&R provisions cease to apply after a certain time, "*certain legal objections can be raised to a provision which allows them to be reattached by the vote of less than all the owners.*"³³ This is another contradiction to the democratic voice of the homeowners, and a clear statement of authoritarian dictatorship in the best tradition of National Socialism. As Fascist Benito Mussolini said, "*All within the state, nothing outside the state, nothing against the state,*"³⁴ except we now can equate "developer" with the "state."

Furthermore, TB#50 carefully points out the need to require more than 50% of the homeowners to **terminate** the covenants, as the declarations are commonly worded today, rather than to **reinstate** them "*Although most homeowners would rather see the covenants continue, a majority to reinstate them may be difficult to muster.*"³⁵

Weighted Voting in Favor of Developer

Advice provided to readers of the guideline comes from a real-life developer:

The developer should maintain control of the homes association . . . Obviously, conflict can arise between an autonomous association and the developer . . . If the developer is not careful to define the lines of authority and responsibilities, he might find that he has a Frankenstein that continuously interferes with his plans.³⁶

The developer is warned that he "*must prevent the destruction of his plan of development and of his market by a run-away association.*"³⁷ And in spite of cautionary statements that if the developer is doing a good job, he can expect a good proportion of the owners to see things his way and vote accordingly, the developer is told that he "*may further extend his control of the association board by providing for staggered elections . . .*" and by "*giving the developer extra voting power . . . with a weighted voting ratio where 'the developer will lose control only when 75 per cent of the homes have been sold.'*"³⁸

Democracy and Planned Communities

"Democratic planned communities" is simply an oxymoron. In planned communities, the homeowners' constitution, or private government charter, was cast without any homeowner representation by the profit-seeking developer long before any homeowner entered into the

³³ Id. (There is a discussion concerning amendments that increase the homeowners burden will be objected to if not approved by all the homeowners).

³⁴ Benito Mussolini Wikiquote, http://en.wikiquote.org/wiki/Benito_Mussolini (August 29, 2006).

³⁵ Supra n. 9.

³⁶ Chapter 15, 'Creating the Association and its Facilities', p. 240-1

³⁷ Id.

³⁸ Id, p. 241.

picture. The supposedly democratic mechanism of voting to amend the plan in accordance with the will of the majority is, in all practicality, a myth in the CC&Rs, which were promulgated with the intent not to be able to change the plan. TB#50 reflects an understanding that the association is not truly democratic and that the board will, in reality, really control the association.

Homebuyers bring with them the expectation that the HOA would be a democratic form of government with all the protections of the US Constitution backed by the laws of the land. They are not told in this handbook that the Bill of Rights does not apply to private agreements and contracts, as the Declaration is regarded. Homeowners bring with them the expectation that even if the governing documents contained outlandish provisions, the courts would not hold them to be valid and any such provisions would violate their fundamental rights and freedoms. Nobody tells them any different, not even state agencies with the obligation to protect consumers, going back to the beginning with TB#50.

And that's all TB#50 has to say about the democratic governance of planned communities. There is no discussion of the Constitution, or the Bill of Rights, or any protection of homeowner rights that are available to those not living in a planned community. It cannot say more because there is no similarity of corporate boards of directors and public governments, nor are there laws to equate the private, contractual HOA government with our public system of government with all its protections of our rights and freedoms. If municipalities are bound to the US Constitution, why can private, contractual governments be permitted to bypass the Constitution?³⁹ Will the state allow planned communities to succeed from America as being argued by some scholars?⁴⁰

Reasons for the Inclusion of Voting privileges

Those who have been involved in homeowner rights advocacy over the years have heard the oft-repeated statement made by the supporters of HOAs, as well as pro-HOA legislators, that HOAs are good examples of a democracy because the homeowner can vote for the board of directors. Period. That is all that these supporters have to say about HOA democracy. Where did this false and oversimplified argument originate? From within TB#50.

The other [as opposed to a bureaucratic style of leadership] requires more participation **in order to give members a feeling of satisfaction with association operations**; it may be called the 'democratic style'. [emphasis added].⁴¹

The members can always fall back on democratic controls provided in the bylaws [the corporate governance form of bylaws] to exercise their power to correct a

³⁹ *We are a nation not of 'city-states' nor HOAs, but of States*, Constitutional Local Government, <http://pvtgov.blogspot.com/2005/06/we-are-nation-not-of-city-states-nor.html> (September 1, 2006) US Court of Appeals, 630 F.2d, at 717, cited in *COMMUNITY COMMUNICATIONS CO., v. BOULDER*, 455 U.S. 40 (1982).

⁴⁰ *HOA Secession from Local Government: The future of Planned Communities?*, Constitutional Local Government, <http://pvtgov.blogspot.com/2005/09/hoa-secession-from-local-governent.html> (Sept 1, 2006).

⁴¹ Chapter 16, "Leadership Style, Skill and Sources", § 16.2, "Bureaucratic or Democratic? It May Depend on Common Facilities", p. 247.

situation But usually members will not involve themselves in active participation.⁴²

The right of every home owner to membership and to vote is, in our opinion, critical to the strength and success of an automatic homes association.⁴³

Because the articles and bylaws of a corporation are relatively easy to change, further strength will be lent to this arrangement [mandatory assessments require membership] by inserting a provision governing membership and voting rights in the association in the text of the declaration of covenants and restrictions.⁴⁴

One cannot help but reflect on the fact that countries like Cuba and China allow their citizens to vote in public elections, but no one refers them as examples of democracy at work.

Promoting Planned Communities

The reader, who was not the public at-large or the homebuyer but the various special interest groups, is assured that,

As with the law of the State, the home owner in the automatic association cannot plead ignorance of the covenants to excuse his failure to pay assessments. These are as sure as taxes.”⁴⁵

Almost everyone today has knowledge of what a homeowners association is all about from real estate agents, developers, the media and any public agency informational links, such as from real estate departments or other agency regulating builders or professional organizations. Such information is a sharp disconnect from the guidelines provided by TB#50 as outlined above. However, the guideline does not ignore the selling, marketing and promotional aspects to creating planned communities. Such promotional material is consistent with what homebuyers, at this time, are told about HOAs.

In extolling the virtues of planned communities, in the opening chapter, the authors make their position quite clear with,

“Constructive forces are needed to counteract these aspects [the destruction of a sense of community] and to utilize the opportunity that growth offers to build better communities an organization of home owners . . . whose major purpose is to maintain and provide common facilities and services.”⁴⁶

With that statement addressing a societal problem, the authors speak to the developers, lenders, professionals and municipalities saying that the “*can reach broader markets and achieve significant cost savings by using the homes association concept.*”

⁴² Id, p.248.

⁴³ Chapter 27, “Special Points in the Articles or the Covenants”, p. 347.

⁴⁴ Supra n.17, p. 209.

⁴⁵ Supra n. 36, p. 233-4.

⁴⁶ Supra n. 14 p.4.

“Federal agencies should give private industry maximum encouragement in the use of homes associations . . . ; “Lawyers, appraisers, planners and others . . . can increase their services to society by creating better neighborhoods through the homes association approach.”⁴⁷

Yet, the political concerns of imposing a contractual private government under an authoritarian form of governance without constitutional protections for the assessment payers, the owners of the associations, goes without discussion or concern. **There is no concern in TB#50 for the effect of this privatization of community government on the stated objectives of planned communities: creating better communities.**

As an illustration of the benefits to the community, the learned authors then dare to compare a community having a homeowners association with one not having an association. Highland Gardens, a suburb of Philadelphia [as best as can be determined some 42 later], is compared with Sunnyside Gardens in New York City,

When responsibility for common areas lies with a citizens association, the results are likely to resemble the situation shown [as the suburb]. The same type property, under jurisdiction of an automatic homes association, turns out looking like [Sunnyside Gardens].⁴⁸

This comparison is extremely biased and inexcusable, since Highland Gardens was just another community while Sunnyside Gardens was the result of influential persons with a belief in utopian societies. Supporters of the Sunnyside model, frequently cited with regard to early utopian attempts at community living, included the leading idealist of the times (1924) Ebenezer Howard, and Eleanor Roosevelt.⁴⁹ This comparison is pure hype and borderline misrepresentation. It’s hardly a fair comparison at all from a federal government supported study.

Figure 15A, pp. 324-5, (See Appendix 2, Promotion) depicts an existing country club as an example of a planned community, stating *“yours automatically . . . membership is automatic – without any membership fees or assessments . . . the resident members are the owners . . .”* The guidelines contain another real-life quote that *“All such members shall execute a written membership agreement . . . that the proposed member subscribes to and agrees to be bound by the [governing documents]”*.

Why there is so much emphasis today regarding the dissemination of the governing documents? What does the disclosure of the governing documents, with their inherent and developer biased and restricted covenants, but absent any discussion of buying a business or joining a private government operating outside the US Constitutional protections, constitute a full disclosure of all the material facts affecting the purchase of real property? The guideline advises, *“It is most important that new buyers be informed before they buy of the bylaws and restrictions on their property.”⁵⁰* And then the guideline makes the unsupported and misleading

⁴⁷ “Highlights of the Findings and Recommendations”, p. x

⁴⁸ Supra n. 14, p. 5.

⁴⁹ Sunnyside Gardens Preservation Alliance, <http://www.sunnysidegardens.org/history/history.html> (August 29, 2006).

⁵⁰ Supra n. 36 p. 236.

assertion that, *“In short, all parties are protected by the dissemination and acknowledgment of all the facts concerning the buyer’s relations with his new community”* [emphasis added].⁵¹
The informed public knows better.

The developer must⁵²

- *“thoroughly indoctrinate his own sales force in selling and informing the home buyer about the homes association”* and *“be thoroughly sold on the worth of the association.”*
- Convince the public officials in the area of the development *“that the automatic homes association is, by virtue of its legal rights and obligations, quite different from the combative neighborhood associations they have known before”* [emphasis added], and
- *“That the homes association represents all the owners of an area and is organized to produce a healthful residential environment and preserve its values. Thus it is a limited partner of the local public body and a bona fide interpreter of public interest.”* [emphasis added].

Local planning boards are advised to,

*“Be sure that the covenants running with the land provide for an automatic rather than a non-automatic homes association, for adequate maintenance assessments and other safeguards for the home owner and the local public agency.”*⁵³

And for the Realtors and other sales people,

Feature the common areas and facilities in sales promotions. Emphasize particularly that the automatic homes association **gives the home owner an effective voice in control and operation** of these facilities ...⁵⁴ [emphasis added].

And for the lenders,

Recognize in your appraisals and mortgages the values of these rights in the individual properties so that the developer and builder can include them in sales price.⁵⁵

SUMMARY

The Urban Land Institute Technical Bulletin #50, *The Homes Association Handbook*, was the vehicle for this mass merchandising of planned communities with influence today on events and attitudes.

⁵¹ Supra n. 36 p. 237.

⁵² Supra n. 36, p.236-7.

⁵³ Chapter 3, “Special Viewpoints and Recommendations”, p.30.

⁵⁴ Id, p. 32.

⁵⁵ Id.

The model and concept of planned communities with their mandated homeowners associations has been presented and sold to the legislatures, government agencies, commissions and officials, and to the media and public in general as the unquestionable means to better, healthier, vibrant and desirable communities. And the means to this noble end was the HOA governing body supported by unconscionable adhesion contracts in the form of covenants, conditions, and restrictions, including the HOA bylaws, that would maintain property values for the benefit of all -- the local municipalities, the homeowners, and the real estate special interests.

Sadly, in their effort to sell this concept to Americans, the promoters found it necessary to cast a scant eye on the constitutional protections of homeowner rights. This intentional disregard in the presentation, explanation, selling and mass merchandising of this new order of society -- communal living under authoritarian HOA regimes -- amounts to a con on Americans. The emergence and quiet acceptance of this innovation in housing -- as ULI and Community Associations Institute proudly announced in the subtitle of *Community Associations*,⁵⁶ a book that they partially funded in 2000 -- was accomplished with subterfuge and a disregard for the values and beliefs in the democratic institutions upon which this country was founded.

This effort has been an attempt to set the record straight so all concerned and interested parties, especially the policy makers and public interest firms, can take a fresh look at the real motivations behind planned communities. It can be asked:

- Is the continued government support, cooperation, encouragement and protection of planned communities and homeowners associations warranted, considering the corresponding detrimental affect on the American social order warranted and political system of government?
- Can property values be maintained under a democratic form of governance that retains the homeowner protections guaranteed to those not living in an HOA?
- When will the state hold these independent, private governments accountable to society, as are all other state entities?

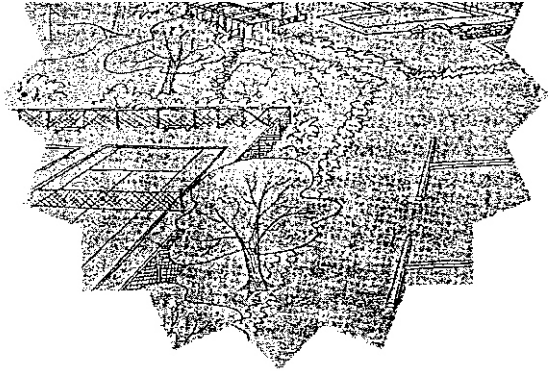
⁵⁶ Supra n. 12.

APPENDICES

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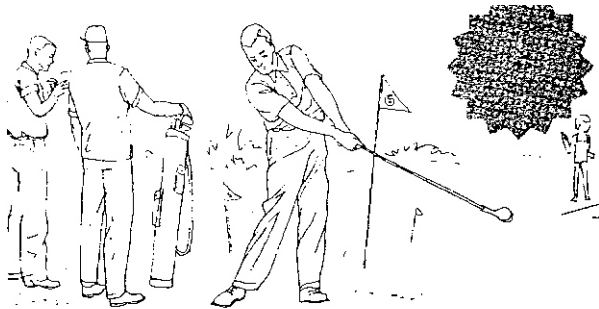
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Appendix 2. Promotion.



Southglenn COUNTRY CLUB

..... yours automatically—thanks
to advance environmental planning



How Will Southglenn Country Club Maintain its Exclusiveness?

As homes are occupied, pictures will be taken of each family for the club files so that users of club facilities can be properly identified and the privacy of the club insured. Membership is transferred only by the resale or leasing of any Southglenn home.

Who Will Build and Maintain the Facilities?

The facilities will be built by Perl-Mack and deeded to Southglenn Country Club, Inc., a non-profit corporation, at no cost. Southglenn Country Club, Inc. will maintain the facilities, backed by Perl-Mack to insure the success and stability of your club. The only fees will be 50c per round of golf and 50c for adults and 25c for children for swimming which will go toward payment of maintenance and supervision costs. Non-users of the facilities will pay nothing.

Is There Any Tax to You, the Home Owner, for the Club?

No. Southglenn is not in any recreation district altho homes in nearby areas are presently assessed a 3 mill tax for their recreation district. Southglenn Country Club will provide Southglenn residents with more facilities than are presently enjoyed by neighboring area—and with no tax or assessment.

Who Owns Southglenn Country Club?

The resident members are the owners. In 1971, the members themselves will take over control and management of Southglenn Country Club, Inc. and will determine future operating and maintenance policies for the support and future enhancement of this valuable property.

It is fitting that Perl-Mack, winner of the best-in-the-nation award for the planning of Northglenn, should now bring you in Southglenn Denver's premier residential development with environmental planning.

Working again with the top planning firm of Harman, O'Donnell and Henninger and, after months of study of the finest residential developments in the nation, Perl-Mack brings you the exclusive Southglenn Country Club.

Here is "outdoor privacy" which only you and your Southglenn neighbors may enjoy. Here is a new and better world of family living—a private club whose facilities are planned in advance to accommodate all the families who will live in Southglenn.

Naturally you will be proud of these facilities. They will be a delight to see. They will help assure the physical well-being of yourselves and your family. And, of course, these exclusive facilities will enhance the value of every home in Southglenn—your home!

Perl-Mack's concept of advanced environmental planning assures you of the enjoyment of Southglenn Country Club with no growing pains, no financial problems, no overcrowding. You will delight in a happy world of reality that is still only a distant dream for your friends living in other areas.

Who Belongs to Southglenn Country Club?

Membership is automatic—without any membership fees or assessments—to residents of Southglenn by Perl-Mack. Membership is limited exclusively to these families.

What Facilities Will Be Provided...and When?

Here Is Perl-Mack's Guarantee

When the first 400 homes are built and occupied in Southglenn, Perl-Mack will build a swimming pool, shelter and bathhouse facilities.

When another 200 homes are built and occupied in Southglenn—or 600 in all—Perl-Mack will build tennis, park and playground facilities.

When another 200 homes are built and occupied in Southglenn—or 800 in all—Perl-Mack will build a nine-hole par-3 golf course.

This Guarantee Is Your Assurance of Performance

A guarantee is only as good as the people behind it—so let's look at Perl-Mack's past record as a gauge in figuring how long it will take to achieve these goals.

In the past year Perl-Mack has built, sold and had occupied over 800 homes in one development. For the past few years Perl-Mack has ranked among the top builders in the nation in volume of homes sold.

In Northglenn a community swimming pool was built and paid for by Perl-Mack—and the community was enjoying its benefits only 10 months after the first family moved into Northglenn. In less than a year after the first family moved into the area, the Northglenn Par-3 Golf Course was in operation.

You may be interested to know that the 23-acre area identified as "Southglenn Country Club" on the Southglenn Master Plan is already zoned for recreational use and cannot be utilized for any other purpose.

And the Land Shall Be Made Good Again
george k. staropoli

In the beginning
There was the land,
And the land was good
And the people were happy.



Soon upon the land
Came the moneychangers
In the guise of builders
Of the community.

And the moneychangers said
Behold, the covenants, conditions and restrictions
Were sacred and holy works,
And the people shall flourish and prosper.

And the legislature looked upon these C&D&R's
And said they were sacred and holy,
And that land values shall multiply ten-fold,
And the people shall flourish and prosper.

But the moneychangers were not content,
Seeking laws that forced the people
Against their judgment and wishes
Into mandated planned communities.

Soon, the multitude became angry at their plight,
Yet the moneychangers and legislature
Cast the people into involuntary servitudes
With continued tithes while disputes went unresolved.

The child-like people, seeking paradise
On earth and the gates of heaven,
Were not permitted audiences

With the magistrates.

*And so the multitude suffered
At long and terrible time,
Praying for a savior one day
To deliver them from their existence.*

*One sect sought the accomodation
With the ruling powers and moneychangers.
Another sought a cleansing
Of an unworkable oppression upon the people.*

*Those seeking accommodation held fast to their desires
To see their fortunes on earth multiply ten-fold,
And that all such plans were good and just,
For the land values increased for all the community.*

*But many saw the desecration of the beliefs, values and ideals
Of the founders of the Great Nation that covered the land,
Saying behold the society that thou hast created,
Where Me First has replaced Love Thy Neighbor.*

*At babble of communities arose
By the followers of the moneychangers,
With beliefs, values and ideals of the Old Ways,
Once rejected by the Founders of the Great Nation.*

*Woe unto the followers of the moneychangers
For the sins of the fathers shall be cast upon the sons.
Repent now and restore the beliefs, values and ideals
Of the Great Nation and make the land good once again.*