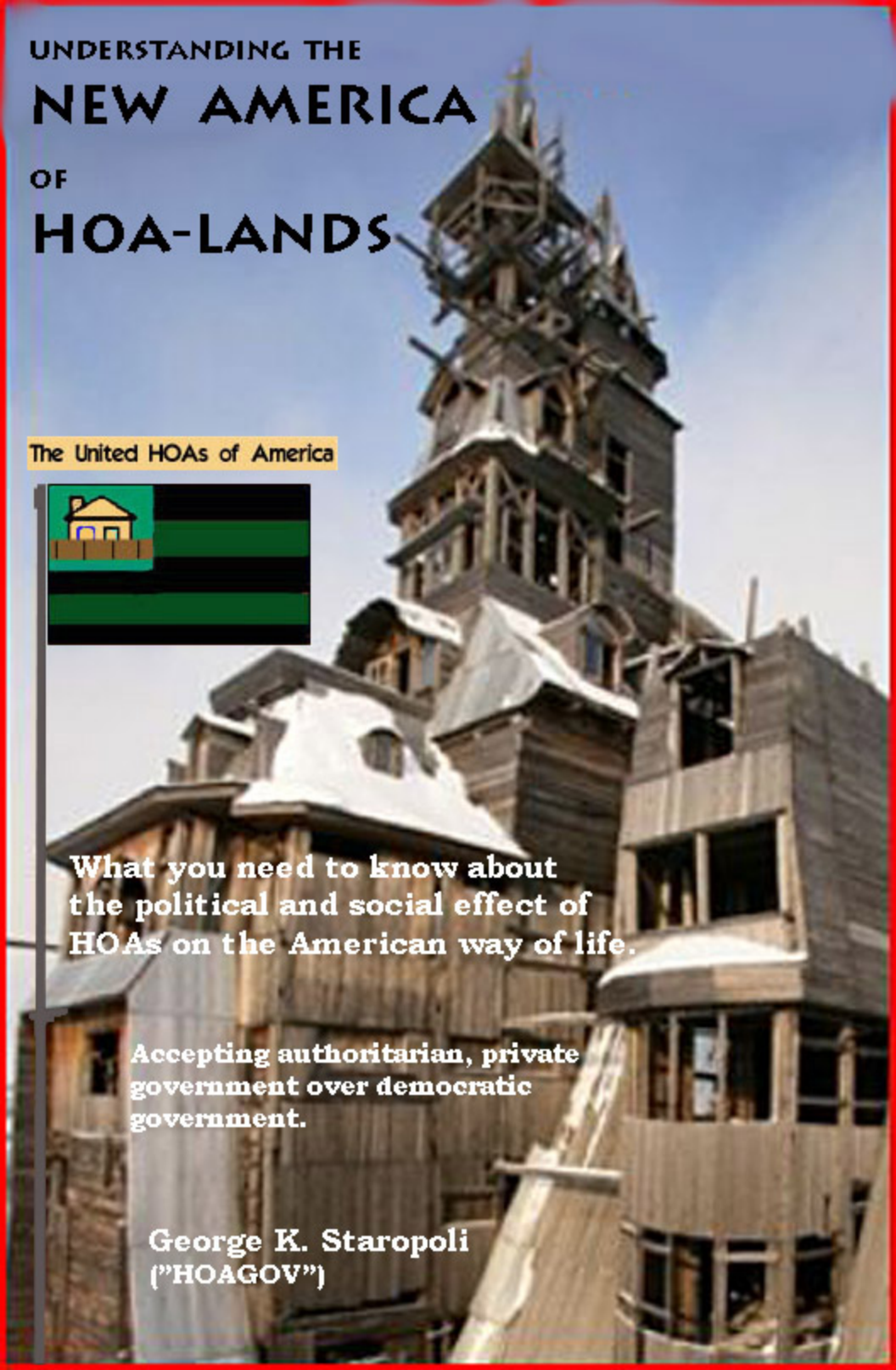
UNDERSTANDING THE

NEW AMERICA

OF

HOA-LANDS



What you need to know about the political and social effect of HOAs on the American way of life.

Accepting authoritarian, private government over democratic government.

George K. Staropoli
("HOAGOV")

Published by
StarMan Publishing, LLC
5419 E. Piping Rock Rd
Scottsdale, AZ 85254

Publisher's Cataloging-in-Publication data

Staropoli, George K.
Understanding the New America of HOA-Lands
/ George K. Staropoli.
ISBN-13: 978-0-9744488-5-5

Printed in the United States of America

LEGAL DISCLAIMER

The author has made every effort to be factual and has obtained materials believed to be factual or are the opinions of the writer, and from sources deemed to be reliable. This publication is being distributed with the expressed and implied understanding that the editor and publisher are not engaged in rendering legal, accounting, or other professional advice.

Table of Contents

(use bookmarks)

1. HOAs as an established institution
2. Proposal for muni-zation of HOAs
3. Is there an ideal HOA "constitution"?
4. American political governments
5. A fable, or is it?
6. George K. Staropoli

Supplemental ebook material (not included)

The Foundations of Homeowners Associations and the New America

Other publications and information can be found at the *Citizens for Constitutional Government web site, http://pvtgov.org*.

HOAs as an institution and its impact on society

The common definition of **"institution"**, for our purpose, is " a custom, practice, relationship, or behavioral pattern of importance in the life of a community or society", or "an established custom, law, or relationship in a society or community." The degree or strength of the acceptance of the established custom or behavior pattern often results in the perception that the institution is a concrete and indestructible reality, and not dependent on one's belief or acceptance of the institution. For example, marriage is an institution that has been losing its acceptance in recent time.

The definition of an institution well applies to planned communities and homeowners associations. As a result of the failure over 47 years to mount substantial opposition, homeowners associations have become an American institution, an accepted way of life. While there were "spots" of protest and informed communication over the years, it was the accumulated effect of the national lobbying organization, CAI, supported by real estate and land usage legal-academic aristocrats writing in their journals and speaking at conferences, that brought about the institutionalization of HOAs. Homeowners associations have become accepted as a way of life in our society and culture, and thoroughy ingrained into our society.

Consequently, it does not come as a surprise that any substantial opposition, such as my commentaries and citations of authorities, is met with disbelief. This is normal human behavior, which occurs with any idea or facts that are contrary to one's long term beliefs and values. This is the effect of institutionalization.

When confronted with facts and hard evidence to the contrary of these long held beliefs, the normal reaction is a defense of the long held belief. After all, many aspects of one's life are tied to one's beliefs and values, and they cannot be dismissed out of hand. The common reactions are: You are crazy! You don't know what you

are talking about! You're a weirdo! A radical! The reaction is to ignore any evidence to the contrary.

The stronger the belief, the more reactionary is the response to contradictory information. Defensive arguments offered to retain the long held belief can rise to highly illogical and absurd defenses. Even legislators are not immune to this aspect of human nature. Such is the effect of institutionalization on society.

HOAs became part of our society with the help of the special interests who did not speak, and continue not to speak, of any negatives about homeowners associations in America. The unspoken alliance of "no negatives" has been thoroughly ingrained into our elected officials, the media, and the public at large. Just a natural consequence of the institutionalization process. But, an institution does not automatically carry the stamp of being ethical, moral or just. Slavery was once an American institution. Established practices and behavioral patterns just reflect the mindset and values held by a large majority of the society, and we well know societies can go awry from time to time.

The only rehabilitation therapy is the continued and repeated exposure to the facts, and I mean facts backed by hard evidence, legal authority, and confronting those seeking to maintain the institution's continued existence in our society. Such as, presenting the other side of the issue at hand, which, as we know, was often purely propaganda and not the full truth. (A good example would be the HOA Academy backed by a number of Arizona towns that does not inform HOA members of their limited rights when a suit is brought by their HOA, or provide information about the statutes and the demanding nature of legal Rules of Procedure).

In time, either the established institution is now seen in a a different and unfavorable light, or society becomes divisive with the supporters taking dogmatic ideological positions, resorting to, essentially, an "I don't care" rationale.

Citizens for Constitutional Local, Inc
5419 E. Piping Rock Road, Scottsdale, AZ 85254-2952
602-228-2891 / 602-996-3007
info@pvtgov.org http://pvtgov.org

August 23, 2004

FOR IMMEDIATE RELEASE

Contact: George K. Staropoli, President
Citizens for Constitutional Local Government, Inc
602-228-2891

A proposal for the "Muni-zation" of HOAs; Stop developers from granting private government charters

Why are private corporations permitted to "grant" private government charters to organizations that give the power to control and regulate the people within the territorial boundaries of the subdivision? The developers are creating political governments, sometimes as a requirement of a local government, as defined in Black's Law Dictionary (when such powers are given to the HOA with respect to a territory, making it a political government for all intents and purposes).

What is the purpose of permitting and protecting such agreements through legislation that "sanctifies" these provisions in CC&RS? These CC&R "constitutional charters" that lack protection for the rights, freedoms and liberties of homeowners living in these

planned communities governed by HOAs. This is an issue of constitutionality, of the delegation of private governments unanswerable under the 14th Amendment. Let me offer this quote by Gillman in his The Constitution Besieged to help clarify this point:

> "Specifically, it came to be determined, first, that laws that singled out specific groups or classes for special treatment would withstand constitutional scrutiny only if they could be justified as really related to the welfare of the community as a whole … and were not seen as a corrupt attempts to use the powers of government to advance purely private interests; and second, that acts that interfered with an individual's property or market liberty would be considered legitimate so long as they were not designed to advance interests of just certain groups or classes"".

I have argued for some time now that the inequities and oppression of the current legal structure of planned communities can be successfully dealt with. This approach will better meet the legitimate government ends and interests and better provide social and general welfare benefits to citizens within the state, while treating all citizens equally under the law. The proposal is to simply make HOAs public entities after the developer meets the CC&R criteria of turning the HOA over to the homeowners and loses control of the community. At this point in time, the developer no longer has a stake in the community and its covenants, that are profit motivated, should not continue to be a burden to the homeowners.

Let me explain my proposal. By setting up special taxing districts for HOAs you will subject them to the same muni laws and protections of our government while still retaining the individual rules and regulations so dear to many as may be their belief in protecting property values. In short,

1. all amenities can be turned over to private operators, and I do mean "operators" as exist today to run such private facilities.

2. the current rules and regulations of HOAs would be incorporated into the district's ordinances subject to the same application of the laws as any other muni government (think of incorporated or unincorporated towns). Certain rules and procedures would not make the "cut", as expected in order for justice to prevail.

3. use of the subdivision's facilities can be restricted to homeowners by the special district's tax basis -- only members.

Let me clarify at this time, that there is an important distinction between the HOA and the subdivision real estate "package" known as a "planned community". HOA supporters continually cloud this distinction, because a planned community can exist without the private, undemocratic governing body known as the homeowners association. "Doing away with HOAs", as sometimes seen in the media, falsely implies doing away with the planned community real estate package. No, it doesn't. But the HOA special interests want you to think so. There is no need to impose undemocratic private governments over these communities of Americans that operate outside the 14th Amendment and the Constitution.

Let's examine this proposal to some extent. All objections relating to creating more levels of government and increasing government costs are not true, because each HOA will operate on its on as they do today. Yes, there will be some oversight involvement costs, but they can easily be handled as a "per door" charge to HOAs as currently used in Florida, Nevada and other states. But the state legislatures must realize that they helped create and allowed this problem to get out of hand, and must now rectify past errors.

These governments, this "additional layer of proposed government" as some have argued, already exists in large numbers and has been ignored by the states. It's now time to take effective action to stop the abuse of rights. These private governments are allowed to operate outside the laws of the land by remaining

private entities that benefit not the state -- witness the cries of lost rights and the lack of justice -- but benefit the special interests who live off the discord and adversity that they themselves foster.

I will not pursue the argument here relating to informed consent supposedly attributed to home buyers in order to declare that the CC&Rs are a binding contract. But, the alternative to this proposal is to keep the status quo with its false recognition that home buyers agreed, with full knowledge and express consent, to surrender their constitutional rights and freedoms to the HOA government.

The planned community concept has had its problems for over 40 years now, since it inception and wide scale promotion by ULI, NAHB and FHA in the 50s and 60s. It was sold as a social benefit, "affordable housing" to the government agencies and as a profitable business to the real estate special interests -- the developers, real estate associations, contractors, etc. Adherence to the laws of the land and the rights of homeowners was a secondary, if that, consideration. Even the formation of CAI in 1973 couldn't stop these problems, but created even more desperate measures in 1992 when CAI realized that it had to strongly lobby its interests in the face of mounting opposition. And the problems are still here and will remain here, because the concept is inherently defective and an anathema to American values.

Turning HOAs over to the government places no problems on the operation of the facilities. All that is necessary is to form a special taxing district that has limited and restricted authority as so specified. Your HOA's rules and regulations can be incorporated as special ordinances, but will now be subject to muni laws and oversight, and public hearings and meetings and public disclosures, etc. Also, by taking this route, the HOA procedures or rules will be subject to review as just and legally appropriate and binding.

This is a first proposal, one that I've studied for some time now as a result of my four plus years of involvement in homeowner rights advocacy. Let's work together on this to solve the problems. Let's not be afraid of finally taking decisive action and stand up to those

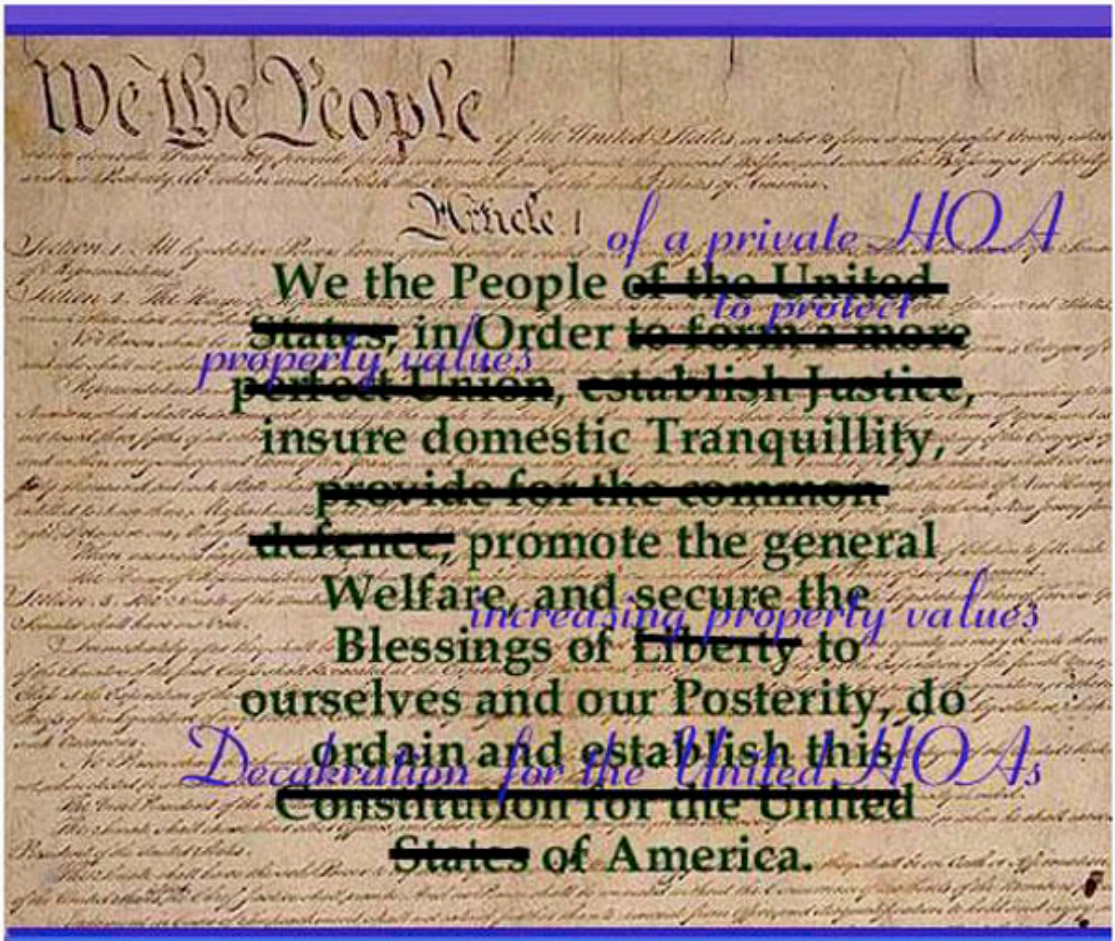
special interests who will not really be hurt by this proposal. Think about it.

Agents will still sell homes because developers will still build homes. HOA management firms will now manage the facilities, cut grass, keep the books, etc, but now independent of the CC&Rs. As for attorneys, well, there are always be a need for attorneys. And, homeowner advocates can finally stay at home, away from the legislature.

I will be happy to discuss this proposal with your or your staff to answer any of your questions. Any comments, suggestions or thoughts are welcomed. I am particularly interested in two categories of discussion: 1) on the mechanics, the methods and approaches contained in the proposal, and 2) on the question of adopting this proposal as good public policy.

Respectfully,

George K. Staropoli



Is There an Ideal HOA Constitution?

George K. Staropoli

Citizens for Constitutional Local Government, Inc.
supporting principles of democratic government

5419 E. Piping Rock Road, Scottsdale, AZ 85254-2952
602-228-2891 / 480 907-2196 (efax)
info@pvtgov.org http://pvtgov.org

September 24, 2009

by: George K. Staropoli

THE TASK

A reader of my HOA Constitutional Government blog asked the following questions:

1. In your opinion, what constitutes a reasonable set of covenants that protects the rights of homeowners while enabling a HOA to manage and maintain the common areas, facilities and character of community?

2. Another way of asking the same question: if you had the opportunity to write the Declaration and Bylaws for a new community, what would be in it; what would not?

THE BACKGROUND: FORMING NEW SOCIETIES

I hope the reader is not expecting a "silver bullet" answer, one that solves all problems and all concerns for all people. I also assume that the reader is hoping for such a silver bullet, an ideal governance model, with respect to HOA governance. Please bear with me and read on, because what I say addresses the legal, and social environment and culture upon which "protects the rights of homeowners" resides. One cannot simple change covenants without first dealing with the broader legal scheme and societal effects of homeowners associations.

For those not familiar with my views, these seemingly simple questions involve a much broader and complicated response. First, setting the stage for my reply, let me say that I am not in the business of designing utopian societies, as planned communities were initially conceived and promoted, because, whose view of utopia will be set down? HOA residents are well aware that neighbors do not agree with one another, and the board seems to be way out in left field. So, whose vision? How does one get consent to be governed or to accept the utopian vision? Certainly, we will all agree not from a take-it-or-leave-it developer's profit motivated covenants based on the "bible", the 1964 *Homes Association Handbook*. That utopian scheme, or planned community society, did not stem from any attempt to makes improvements in society or upon the US Constitution, but to make money. It demands a behavior modification of the HOA members

to adapt to the authoritarian regime, and to live up to the incessant pleas by HOA supporters to "Get involved! Get involved! Get involved!"

Utopian societies rose and fell based on some vision of a better world, and that includes communism, and required dedicated, devout followers, "true believers". Because of these requirements, they have been limited in number with small groups of participants or followers. Often, the vision required behavior modification of the followers, that is, a change in their behavior was necessary to conform to the standards, goals or objectives that make the vision. A simplistic example would be a religious order or a military school. Some prefer being told what to do, when to do it, what to wear, etc. For the military, they remain because they believe in the mission of the society, which could be "defending my country", or in that, "I got a better life here than at home."

When the impracticality of the vision became apparent, or the followers discovered through living the dream, that the vision didn't look too good, the society declined. Other social orders, such as the Pennsylvania Dutch are consistently involved in education, from childhood through adulthood, to reinforce their way of living. In these societies, the children who do not accept what can be called the mindset of the society, may leave while their parents remain strict devotees. The mass merchandising of utopian societies, and the HOA version also, to everyone, everywhere does not work.

Second, I am also not in the business of attempting to make a more perfect union. And neither were the drafters of the *Handbook*. Nor were they attempting to create a working democratic society. Constitutional issues were ignored since the designers of planned communities were only focused on real estate concerns: a land usage issue, a "best use of the land" issue, and an "affordable housing" issue to please all parties necessary for this concept to become well established. That's why, partially, the HOA is based on an undemocratic corporation model rather than our system of government. Who ever heard of a corporation being called democratic? And, it's hardly likely that anyone will come forth with a better system of governing than the Founding Fathers.

AS TO THE SECOND QUESTION

With some understanding of the above, I have already responded to the second question: not my job. Creating an entirely new society would be for a like group of thinkers, believers, or followers to decide amongst themselves and form the society. Admitting new members would consist of much more questioning and investigation of potential buyers than that performed by the third-party real estate agent today, and not at all by the HOA. Where such vetting, to use today's political terminology, would be included in the CC&RS as a protection against "undesirables" or potential "deadbeats" would ruin sales for the developer. If this question assumed that "a new community" would be basically an HOA, then that would be part of my answer to the first question, which follows.

AS TO THE FIRST QUESTION

Now, as to the first question above, which contain two premises, or implied assumptions. The first seeks to improve homeowner rights within the existing structure of the HOA, but adds

"the character of the community." The character of the community was an objective only so far a protecting the values of the physical landscaping and real estate structures incorporated within the subdivision. Other amenities, if any, and many HOAs as a result of the mass merchandising of this scheme do not have any amenities or common property, were selling points for the communal ownership of the common property under "affordable housing." "How else could the average homeowner own a pool, or a tennis court, or a park unless he agreed to share ownership? He couldn't afford it alone!" If you look at most of the larger HOAs they are very similar to a resort, and who can speak of the character of a resort? Nice friendly people? Party people? Seniors? They have a great board of directors? Are the resort personnel out there helping you have a good time, or watching that you obey the rules?

Yes, the *Handbook*, which I read by the way, did offer verbiage on how to create a happy, resort-like atmosphere in the community as if it were indeed a resort, but was silent on how to run a community government. The word "government" was taboo, even back then.

On a broad basis, in several of my prior Commentaries I have already addressed the question of a better HOA model that would allow the HOA to retain its function as a preserver of the landscape, yet introduces aspects of public government to protect homeowner rights and freedoms. Simple stated, taxing districts (see my Commentary on the muni-zation of HOAs). In anticipation of the reaction of many readers, let me say that I still have difficulty with the gut reaction by many who oppose public government intervention, or as I see it with respect to HOAs, government protection, yet see no problem with private government interference that removes many of their public "guaranteed" protections.

If readers have a problem with this, stop reading now because you are beyond any help. As you have discovered, your neighbors are not always on your side, they don't care about HOA violations or what they see as your personal problem. There is no one to help you. I say again: There is no one to help you. Face that fact. Of course, you can avoid any problems by being a good member of the regime, and always pay your assessments without a complaint. Only the enforcement of public laws against HOA "contract" violations or torts (acts that injure you one way or another, outside any contract) committed by the HOA board and officers will provide the help needed to protect your rights.

AS TO THE SPECIFICS OF THE NEW HOA ORDER

As to specifics of covenants or "laws", that must remain a matter for each community to determine once adherence to the Constitution is put into being. However, proposed covenants must pass muster under the Constitution, under the state's Declaration of Rights, and under existing applicable laws. No more, "It doesn't say so in our private contractual agreement." Yes, if you still want good, decent private government, then you must have good, decent and skilled private government officials. Or leave it to your municipality. If people don't get involved and remain apathetic, this is a sign that they really don't care, that they aren't willing to "put their money where their mouth is" in support of the HOA society. The community, the society has failed. If you try to force compliance, then you will regress back to the existing HOA regime's "modus operandi." That is the nature of such societies, either utopian in nature, or just monetary in nature to protect property values.

And, the Restatement of Servitudes, the massive 2000 revision, must be examined in its entirety to remove equitable servitudes as the basis of planned communities (see, Social Contract) and return the supreme law of the land as rightfully being the Constitution. ("*The question whether a servitude unreasonably burdens a fundamental constitutional right is determined as a matter of property law, and not constitutional law"*, Sec. 3.1, comment h). We cannot undo precedent, upon which the restatement seeks to summarize into guiding principles of law, but we can strip it of commentaries and personal views by the legal-academic aristocrats who have deviated from the protection of individual property rights and freedoms, which serve as the backbone of America and the US Constitution. For example, the Restatement in Sec. 6.16, comment b, says*, "the rule in this section states that the board has all the powers that are not expressly reserved to the members",* quite contrary to the Constitution. Where are the powers reserved to the members that the CC&Rs protect? Or the homeowners rights that the HOA cannot infringe upon? Where?

But, before specific covenants can be advanced, we need effective and fair laws that protect our "guaranteed" rights. In other words, a reasonable set of covenants would need to include a statement to the effect that "the HOA shall at all times be subject to the 14th Amendment, and to the same statutes, laws, codes, and common law that municipalities are subject to, as if it, too, were a public entity." With this covenant, there would be no need for separate and less restrictive HOA open meeting laws, or separate freedom of information acts, or bona fide due process, etc , while including election laws, and the necessary penalties against HOA violations of the law. No more free ride!

Understand that all of these protections can happen while the association's unique rules (ordinances), or restricted use of amenities for members only can remain, so long as they do not violate existing laws and your rights under those laws. It's up to the residents to create their society, for better or for worse, as the see fit in their community. This means things like bylaws, and quorums, or pool rules or painting schemes, are all local, neighborhood "ordinances". No more "anything in the governing documents to the contrary notwithstanding" or "this section applies unless the governing documents say otherwise" verbiage in the laws to confuse the people. What a waste of time and effort!

As part of meeting the public government law requirements, proper and fair disclosures to prospective buyers is a must! Today's so-called disclosures are inadequate because many material factors, the negatives in particular, are not mentioned -- they are still primarily regarded as selling tools. The HOA supporters believe in the old adage, "What the people don't know won't hurt them. Trust me!" Education is very important because the only education the public gets today comes from the pro-HOA special interests, mainly CAI, who are extremely biased toward selling HOA communities. We know HOA governance is markedly different from public government, but no educational seminars or public school civics or history classes cover these differences, nor are these differences the subject of political talk show discussions.

I realize that some do not like having their local municipality laws affecting their community. And this is one of the arguments advanced by pro-HOA supporters for local government rule, but mechanisms already exist in law to create separate local municipalities or self-government "islands". The difference would be the absence of a developer contract imposed on residents and one drafted by the residents themselves that treats the new entity as a public entity.

AS TO THE ADOPTION OF THE NEW HOA ORDER

The final major concern to be addressed is creation of our new HOA world, or the modification of all those existing HOA regimes to conform with the principles set forth above. Remember, successful utopian or "specialized" societies are the result of a relatively small group of loyal followers pursuing a vision that can retain the loyalty of succeeding generations. (Now you see why mandated membership was necessary for the survival of HOAs). With respect to forming a new community, how does the group, never mind having a profit-seeking developer concoct, a priori (before hand, as is the current case), create a vision for acceptance by the residents and subsequent new residents? And still only have dedicated and devote buyers admitted to or allowed to purchase a unit in the community? It can be done, but, in order to be successful without 45 years of continuing major, inherent problems (since 1964, see the Foundations of HOAs), it cannot be based on a mass merchandising scale. How else can the utopian HOA society continue to survive in accordance with the vision, as intended?

A much larger, and impossible, approach is any attempt to convert existing HOAs to the new HOA order. Keeping with the above principles, that would require 100% agreement with the new district-HOA charter. Anything less invites chaos, as exemplified by the division of India in 1948 between a Hindu state and a Moslem state. Who pays assessments or "usage fees", and uses the amenities? Who is bound by the rules and regulations and architectural requirements? Do we force a move of residents into member and non-member parcels as occurred in India in 1948? Even a 100% concurrence with a statement signed by each current member, whether or not "in good standing" per the CC&Rs, that he/she will abide by the will of the majority is a very difficult undertaking. Care, of course, must be taken to provide assurances and guarantees that the member's rights and freedoms will not be taken away without the same due process protections available to the public at large. You cannot do any more or better, but to place all citizens on an equal basis before the law. ("Equal Justice Under the Law" is inscribed on the facade of the Supreme Court building).

In the same manner as conducted by the Continental Congress that drafted the US Constitution, any new charter must be distributed to all affected parties, debated, and voted on. That is why, in all practicality for the mass merchandising of HOAs, the take-it-or-leave-it CC&Rs was the only way to structure the HOA, which also had to contain covenants granting wide powers to the governing board, restrict individual rights to ensure conformity, grant very little rights reserved to the homeowner, and compel the payment of assessments.

In order to accomplish this task of accepting the new district-HOA charter, a large-scale educational process would be required. A simple statement, "I am in favor of maintaining property values", is meaningless. In all practicality, an incremental approach to reach rapprochement with the Constitution may work on a limited basis, starting with those amendments to the CC&Rs that would have the broadest impact, such as the recognition that the HOA is equivalent to a public entity and is subject the relevant laws as a municipality. While the mindset of the members needs to be changed, there will be those who embrace the HOA as it exits today. What to do with them?

Perhaps "consumer choice" will finally arrive with the advent of the new HOA order communities, provided that local government sees the light and stops mandating the old regime system of governance. Then members can choose to move out, as the discontents are always told, and choose the new order. This may be the most workable approach. I am only guessing.

But, any change cannot happen without a change in the statutes and a change in the attitudes of the legislators, who must also be educated.

The choice is before each and every HOA member, and the home buyer. He can choose the New America way of life and remain living outside the "American Zone", as Host of the internet talk radio show OnTheCommons, Shu Bartholomew, informs her listeners. Or you can choose to remain under the American system of democratic government. If you chose to remain, as argued above, then you must speak out, and actively and monetarily support those leading the way. You must challenge those still promoting the old regime with their half-truths and misleading statements. Advocates must be determined and focused, and not haphazardly run around reacting to the moves and events created by the special interests, as occurs today. Advocates must be united and proactive on a national basis with a national program.

THE FOUNDATIONS of

HOMEOWNERS ASSOCIATIONS

and

THE NEW AMERICA

Parts I - III

George K. Staropoli

THE FOUNDATIONS of HOMEOWNERS ASSOCIATIONS

and

THE NEW AMERICA

George K. Staropoli

(In July 2009, the original 2006 document has been revised and divided into 2 volumes: Part I and Part II. A Part III, American Governments: HOAs under servitude law & public government under the Constitution)

Part III

American Political Governments

Published by
StarMan Publishing, LLC
5419 E. Piping Rock Rd
Scottsdale, AZ 85254

Printed in the United States of America

LEGAL DISCLAIMER

The author has made every effort to be factual and has obtained materials believed to be factual or are the opinions of the writer, and from sources deemed to be reliable. This publication is being distributed with the expressed and implied understanding that the editor and publisher are not engaged in rendering legal, accounting, or other professional advice.

Table of Contents

Is the restatement of law for servitudes establishing a parallel form of local private government, not subject to constitutional restraints and the protections of individual rights and freedoms? 1

Clouding the concepts of a business, a private government and public government.....16

But then, what is government?.....25

Government is defined by a "social contract", and CC&Rs define the new social contract.....31

Conclusions.....37

George K. Staropoli 39

American political governments:[1] private under servitudes law and public under constitutional law

Is the restatement of law for servitudes establishing a parallel form of local private government, not subject to constitutional restraints and the protections of individual rights and freedoms?

This lengthy paper, by internet posting standards, explores the dual forms of political government that currently exist here in the United States[2]. These two forms of

[1] Private governments, namely the homeowners association (HOA), are the governing body of a subdivision that is subject to CC&Rs under servitudes law. And, as nonprofit corporations, are further subject to corporation laws and any special real property laws referred to as state HOA acts or laws. They are not subject to state and US constitutions and municipality laws, as are public government entities. It is estimated that there are just under 19% of Americans living in HOAs today, which is more than either the Black or Hispanic minority percentages.

[2] See *Establishing the New America of independent HOA principalities,* George K. Staropoli, StarMan Publishing (2007). See author's interview video at the HOAGOV Channel, http://www.youtube.com/watch?v=o3I9v64JZ6o.

governance, which can be found in our history since medieval times, are clearly distinct and incompatible, having come to present times from two paths, one concerned with the control of real property interests by groups or associations of persons, and the other concerned with the democratic governance of a people. The former path has evolved into what is know today as the law of servitudes that govern homeowners associations, and the latter is known as constitutional law that governs all other American government entities.

Today, and for the past 44 years, these differing views of governance here in America have come together in conflict.[3] The government of our Founding Fathers, an experiment in democratic representative government, having endured some 220 years is under attack from the real property legal-academic aristocrats who, having commented in their establishment of rules for HOAs, advocate in the servitudes restatement of law: "*The question whether a servitude unreasonably burdens a fundamental constitutional right is determined as a matter of property law, and not constitutional law.*"[4]

This comment, serving to clarify the common law servitude "rules" for court usage, support the views of the Reporter/chief editor in the Foreword (emphasis added),

> Professor Susan French [Reporter (chief editor/contributor) for this Restatement] begins with the assumption . . . that **we are**

[3] See *The Foundations of Homeowners Associations and the New America*, George K. Staropoli, HOA Constitutional Government (http://pvtgov.org/pvtgov/downloads/hoa_history.pdf webpage) June 2009. (This report follows the history of the current HOA legal scheme from 1964).

[4] *Restatement Third, Property (Servitudes),* Susan F. French, Reporter (American Law Institute 2000), § 3.1, cmt h.

> **willing to pay for private government** because we believe it is more efficient than [public] government . . . . Therefore **this Restatement[5] is enabling toward private government, so long as there is full disclosure . . . .**[6]

What was the basis for the assumption? Did it include concerns that individual property rights would be surrendered to an authoritarian corporate form of government? And who was the "we"? And, the reader can see for himself, in the Reporter's own words and view point,

---

[5] What are Restatements? (University of Texas School of Law, **http://tarlton.law.utexas.edu/vlibrary/ outlines/restatements.html).** Restatements are secondary sources that seek to "restate" the legal rules that constitute the common law in a particular area into a series of principles or rules. They are prepared by the American Legal Institute (ALI), an organization formed in 1923 consisting of prominent judges, lawyers and teachers. The ALI's purpose is to distill the "black letter law" from cases, to indicate a trend in common law and, occasionally, to recommend what a rule of law should be.
The legal rule is printed in boldface type. Following the Restatement rule is a section labeled "Comments." Comments are written by the drafters of the Restatement to explain the provision and identify its limitations. The "Illustrations" sections of the Restatement provide examples of how a particular Restatement provision would apply in specific factual situations. Most Restatement provisions conclude with "Reporter's Notes," which give the history of the provision and cite to the authority from which the rule was derived. Restatements are not primary law. They are, however, considered persuasive authority by many courts, especially as support for legal arguments that have not been addressed by the courts in a particular jurisdiction. Restatements are heavily annotated with case citations and thus can also be an excellent case-finding tool. Summaries of cases which have adopted or interpreted the Restatement rules can be found in the Appendix volumes which accompany a set of topical volumes or, in later Restatements, in the Reporter's Notes (e.g., Restatement (Third) of Agency). In addition, West topic and key numbers and A.L.R. Annotations will be cross- referenced in the Appendix for the more recent Restatements.

[6] Id, Foreword, third paragraph.

that the Restatement is pro-HOA, and silent on protecting individual rights and freedoms. The courts, making use of this Restatement, will be making pro-HOA rulings that exclude concerns for the American values and principles of democratic government, which will be explored further in this paper.

In the Introduction (emphasis added), *"This Restatement presents a comprehensive **modern treatment** of the law of servitudes . . . ."* and then claims that *"it preserves the judiciary's traditional role **of protecting the public interest in maintaining the social utility of land resources**."*[7]

What does "modern treatment" mean? Does it mean the acceptance, promotion and support of HOAs, as we shall discover in Chapter 6 of the Restatement? What does "social utility of land resources" mean? Social utility?? Under servitudes (the Restatement has redefined this term as "covenants running with the land") posterity is locked into what amounts to a developer's idea of a governing "constitution" that is geared to protect his financial, as well as the mortgagor's financial interests, and supposedly maintain property values under what can be viewed as an adhesion contract, with very little homeowner protections, as we shall also discover in Chapter 6. And where does the public enter into this private arrangement? Does it include preserving the individual property rights and constitutional restraints on government? No, adherence to the Bill of Rights is not mentioned at all in either the Foreword or Introduction, just creating a "private government."

Does the judge who makes use of this persuasive authority understand these terms? Can he answer the questions posed above? Are these legal-academic aristocrats making new laws outside the judicial system? Or,

[7] Id, Introduction, first sentence.

outside the legislative process, which the courts themselves are very hesitant to violate? The description of what the Restatements are all about, footnote 4, clearly reveals that the Restatements are not simply a summary of case law. The introductory remarks clearly show personal, unsupported views of a preferred direction for real property law that trespasses upon, but ignores, constitutional law and state constitutions as well. (Sec. 3.1 of the Restatement, Validity of Covenants, and the "rules" regarding constitutionality will be addressed later).

The most recent state supreme court challenge to the constitutionality of the HOA regime took place in NJ[8], and reflects the influence of the new world order of private governments as promoted by the Restatement.

> The Association argues that . . . it was error to impose constitutional obligations on its private property. The Association urges this Court to follow the vast majority of other jurisdictions that have refused to impose constitutional obligations on the internal membership rules of private homeowners' associations.[9]

The homeowner plaintiffs argued *"that political speech is entitled to heightened protection and that they should have the right to post political signs beyond the Association's restricted sign policy."*[10] The court saw the issue as (emphasis added),

---

[8] Committee for a Better Twin Rivers v. Twin Rivers, 2007 N.J. LEXIS 911, 929 A.2d 1060 (NJ 2007).
[9] Supra n. 8, p.20.
[10] Id.

> Here, we must determine whether this case presents **one of those limited circumstances where, in the setting of a private community**, the Association's rules and regulations are limited by the constitutional rights of plaintiffs.

And the court, hinting at where its holding will go, comments on case law where,

> Those courts recognize either explicitly or implicitly the principle that "the fundamental nature of a constitution is to govern the relationship between the people and their government, not to control the rights of the people vis-a-vis each other."[11]

Both the US Constitution and the NJ constitution, under which this case was brought, were found to be incapable of interfering with privately contracted governments, because of the disjointed clause in Art. 1, sec. 10 of the US Constitution, and repeated in similar form in state Declarations of Rights[12] articles within their constitutions. It seems that when it comes to private contracts, the constitutions are viewed as permitting private parties to contract to do what ever they so desire, ignoring, or placing in a lower level of importance, all of the other objectives, purposes, prohibitions, restrictions and citizen protections stated throughout these constitutions. The state police

[11] Supra, n. 8, p.37.

[12] For example, the Arizona Constitution, Art. 2, Declaration of Rights, Section 25. No bill of attainder, ex-post-facto law, or law impairing the obligation of a contract, shall ever be enacted.

powers, under the Preamble[13] objective of "promoting the general welfare", which is used to regulate activities for the benefit of the general public, the public good, do not seem to be applicable to HOAs, leading to the conclusion the contracting parties are, by virtue of the contract, unquestionably acting in a manner for the benefit of the public, for the good of greater society. In many, many other areas, such is not the case!

The Twin Rivers case illustrates additional, serious aspects of how government by private "contracts" that are subject to servitudes law, the CC&Rs or declaration, has been accepted by the courts as a legitimate form of political government in these United States, even being held superior to the supreme law of the land, the Constitution. Both the Twin Rivers opinion and the Restatement of servitudes law endorse the "business judgment rule" which is a corporate business doctrine designed to protect boards of directors from legal liability.

The heart of the BJR, as stated in the Restatement, lies in its design to *"encourage entrepreneurial [business] risk taking by protecting directors from personal liability for losses due to* ***erroneous business judgments****"*[14] (emphasis added), and *"is intended to reduce the ease with which disgruntled members can obtain judicial review [court decisions] of association decisions and to discourage judges from substituting their judgment for that of the*

---

[13] *"We the people, in order to . . . establish justice, insure domestic tranquility, provide for the common defense, promote the general welfare and to secure the blessings of liberty . . . ."* Note that here is no mention of promoting or establishing homeowners associations , or to beautify the American landscape by authoritarian enforcement, or "*maintaining the social utility of land resources*" (see Supra, n. 7).

[14] Supra n. 4, §6.13, p. 237. (This section is titled, Duties of a Common-Interest Communities to it members).

association."[15] Admitting that the courts prefer the BJR, servitudes law in the Restatement advises that directors should be liable "*only where* ***no reasonable person*** *would have taken the same course*"[16] (emphasis added), which is equivalent to the strict requirement for a murder case of "*beyond a reasonable doubt*" (interpreted as there is no other reasonable alternative).

It is interesting to note that the rules in sections, §§6.13 and 6.14, were formulated with the intent of balancing the relationships between directors and the HOA, and the members and the community. *"They provide advantages of the business judgment rule*", which protects directors, and *"protect individual community members from careless and risky management practices*," which seems contract the first quote.[17] While rule § 6.13(1)(c) requires the board to act reasonably, rule §6.13(2) places the burden on the homeowner. Rule §6.14 recites the "good faith", "deal fairly" and prudent man obligations, without a requirement for reasonableness, and "comment b" recites the purpose of the HOA: *"to protect property values and quality of life by managing the common property."*[18] It appears that *"quality of life"* follows from managing the common property alone, and not from a much broader "promoting the general welfare" concern.

In rejecting the homeowners' argument of a violation of their constitutional free speech rights, the NJ justices declared,

---

[15] Supra n. 4, §6.13, p.236.
[16] Supra n. 4, §6.14, p. 270. (This section is titled, Duties of Directors and Officers to the Association).
[17] Supra n. 15.
[18] Supra n. 4, §6.14, p.269.

> Moreover, common interest residents have other protections. First, the business judgment rule protects common interest community residents from arbitrary decision-making. . . . Pursuant to the business judgment rule, a homeowners' association's rules and regulations will be invalidated (1) if they are not authorized by statute or by the bylaws or master deed, or (2) if the association's actions are fraudulent, self-dealing or unconscionable.[19]

What has happened to the Constitution, which clearly states,

> This Constitution, and the laws of the United States . . . shall be the supreme law of the land; and that Judges in every State shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding. Art. VI, paragraph 2.

In its amicus curiae brief to the NJ appellate court, CAI urged,

> 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

[19] Supra n. 8, p. 45-46.

> effectuating change through the democratic process.[20]

What is being said here about constitutional protections? Perhaps, Prof. McKenzie can clarify this, when he wrote in 1994,

> Residents in CIDs commonly fail to understand the difference between a regime based formally on rights, such as American civil governments, and the CID regime, which is based on restrictions. This often leads to people becoming angry at board meetings and claiming that their "rights" have been violated – rights that they wrongly believe they have in the CID. This absence of rights has important consequences because the balance of power between individual and private government is reversed.[21]

When the discussion turns to homeowner rights, advocates are speaking of a restoration of those rights claimed to have been surrendered to the HOA by virtue of the servitudes law of constructive notice, or simply by a "posting" of the CC&Rs to the county clerk's office as being necessary and sufficient for legally binding all lot owners. This doctrine is contrary to the strict requirements for a bona fide surrender of one's rights, namely, a fully knowledgeable

---

20 Community Associations Institute amicus curiae brief to the NJ Superior Court, Appellate Division, *Committee for a Better Twin Rivers v. Twin Rivers*, A-4047-03T2, Feb. 7, 2006. The common theme, as reflected by this statement, is that CAI and other pro-HOA supporters consider the so-called servitudes contract "holier than thou", sacrosanct, and that regulation by unaccountable HOA regimes is to be preferred over constitutional restrictions on government that also provide for homeowner protections.

21 Infra, n. 34, p. 148.

party, not under any pressure or stress to agree to the surrender, and by means of an explicit written instrument. What CAI is saying in its brief above is not to open HOAs to the same restrictions and prohibitions that de jure (legal) government entities are subject, and to the same protections that all Americans are entitled under the laws of the land. In other words, CAI argued for independent "principality" status where the CC&Rs are the "laws" of the land.

Why are we seeing all this deference to private contractual arrangements that are allowed to deny constitutional protections to homeowners? Why are business interests allowed to subject homeowners and their posterity to these authoritarian regimes, not permitted to be terminated until some 20 - 30 years have past? Why did the national special interest trade group, CAI, vehemently oppose the application of constitutional protections to homeowners in HOAs?

A critique of the NJ supreme court's opinion can be found in the Rutgers Law Review article,[22] co-authored by an author of the AARP amicus brief[23] supporting the homeowners, that provides a rationale behind the support for HOAs,

> The *laissez-fare* approach to CIC regulation is reflected in the statutory law, which affords exceedingly few rights and protections to

[22] *The Twin Rivers Case: Of Homeowners Associations, Free Speech Rights, and Privatized Mini-Governments*, Paula A. Franzese and Steven Siegel, Rutgers Journal of Law and Public Policy, vol. 5:4, p. 729, Spring 2008.

[23] BRIEF OF AMICUS CURIAE AARP, Steven Siegel, Franco A. Munoz, and Ann Silverstein, Supreme Court of NJ, Docket # 59,230, Committee for a Better Twin Rivers v. Twin Rivers.

> homeowners association residents, and in the common-law principles applied by New Jersey courts when resolving disputes arising over CIC governance.[24]

CAI knows better than to argue that HOAs are democratic. The Restatement §6.14, Representative Government (emphasis added), provides a blatant reversal of a government of the people, by the people, for the people: "*Except as otherwise provided by . . . an association . . . is governed by a board . . . .* ***The board is entitled to exercise all powers of the community except those reserved to the members.***" Under Art. 9 and 10 of the Constitution, all rights that are not grants of authority or restrictions of authority, belong to the people, the homeowners.

* * * *

And why are the legal-academic aristocrats arguing for the supremacy of servitude law over constitutional law?[25] And why are the courts hearing no evil, seeing no evil, and speaking no evil about these private governments unanswerable under the Constitution? HOAs are not just another nonprofit corporation concerning itself with social relationships, charitable concerns, or providing services to members who can freely enter and exit without the harsh penalties of financial liens or threats of having their homes taken away. HOAs regulate and control the people within a subdivision with the objective of maintaining property values as the "state's" objective, without concern for the Bill of Rights, namely the First and Fourteenth Amendment protections. Yet, we repeatedly see our government continually side with the collective ownership of property in

[24] Supra n. 22, at 731.
[25] Supra n. 4.

a communal setting that is free to ignore the Constitution, allowing it to be subservient to these private communities. They are de facto governments functioning independently of the constitutional protections and restrictions to which our government is held.

The Constitution is not entirely ignored in servitude law, just those protections and restraints are ignored. What servitude law says, in §3.1, Validity of Covenants, of the Restatement is that they must not be illegal (which is an explicit recognition of the applicability of police powers to regulate!), unconstitutional, or not violate public policy. Under "public policy", the reader is advised that it includes, a servitude that

1. is arbitrary or capricious,
2. "*unreasonably burdens a fundamental constitutional right*", which grants, as valid, any reasonable burden, or restriction or restraint on a constitutional right. The Twin Rivers opinion reflects the extent to which the courts are quick to subordinate the constitution to private property concerns and to servitude law.
3. is unconscionable, as further set forth in §3.7, Unconscionability [sic]. (The discussion in §3.7 touches on contract law and the UCC, but avoids any explicit mention of unconscionable adhesion contracts, to which a neutral party would have devoted serious analysis).

Here is where one would expect to find allegiance to this country and to its democratic system of government, but §3.1 is silent. Its silence causes one to believe that was it an intentional omission, because the creation of independent private governments was an objective in subjecting HOAs to servitude law, and constitutional law made subservient.

This silence, this broader unspoken alliance, can be traced back to the modern incarnation of utopian communities as promulgated by the Urban Land Institute's *The Homes Association Handbook*[26] of 1964. This guide to the creation and promotion of planned communities, with stated requirements for HOAs to be tied to servitudes and covenants running with the land, promised something for everyone as an inducement to climb aboard the bandwagon. It, too, was silent on allegiance to the Constitution. It had to, in order to be able to coerce homeowners into compliance.

> We 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. (p. 15) . . . The 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. (p. 16) . . . 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. (p. 314).[27]

The internet paper by this writer, *The Foundations of Homeowners Associations and the New America* (see

[26] *THE HOMES ASSOCIATION HANDBOOK*, Urban Land Institute Technical Bulletin #50, 1964.
[27] Id.

footnote 3), examines this 433 page "bible" for establishing homeowners associations across the land.

In considering the above, several extremely important questions can be raised:

> 1. Can a legislature delegate its functions, not government services but functions, to private entities without oversight or compliance with the Constitution, as required of all government entities?
>
> 2. Can private parties enter into contractual arrangements using adhesion contracts and a constructive notice consent, which serve to regulate and control the people within a territory (an HOA), within the state, to circumvent the application of the Constitution?
>
> 3. In 2009, should HOAs, as a sui generis private government, be held as state actors under the US Supreme Court criteria as a result of state protective statutes reflecting a cooperation, support or coercion; a symbiotic relationship; a close nexus; or an entwinement between state and HOA?[28]

[28] The Twin Rivers case discussed state actors and the 1946 "public functions" company town test in *Marsh v. Alabama,* often cited by the national lobbying group for HOAs, Community Associations Institute (CAI), who had filed an amicus brief in support of the association. A summary of the indicated US Supreme Court criteria can be found in *Brentwood Academy v. Tennessee Secondary School Athletic Ass'n*, 531 U.S. 288 296 (2001). These criteria did not enter into this case.

Clouding the concepts of a business, a private government and public government

There are numerous legal arguments regarding HOAs as quasi- or mini-business, or is equivalent to a business, none of which are addressed by the real property legal-academic aristocrats in the Restatement. The NJ trial court in Twin Rivers quickly dismisses the issue of HOAs as a quasi-government with a strict legal view, saying.

> Private organizations, even when they perform municipal functions, do not become quasi-municipal agents. . . . A quasi-municipal agency is "a corporation, created by the Legislature, that is a public agency endowed with the attributes of a municipality that may be necessary in the performance of a limited objective," or "a public agency created by authority of the legislature to aid the state in some public or state work for the general welfare." . . . Twin Rivers was not created by East Windsor Township and none of its authority to regulate within the community is delegated to it by the municipality.[29]

Another strict legal view of a government subdivision can be found by examining your state statutes on the requirements for forming legitimate incorporated and unincorporated towns/villages. (The requirements are varied and much less stringent than those imposed by the "public functions" test from the 1946 *Marsh v. Alabama*[30] opinion regarding free speech in a company town. The NJ justices

[29] *CBTR v. Twin Rivers Homeowners' Association*, p. 6-7,Docket C-121-00, Superior Court, Mercer County, Feb. 17, 2004.
[30] *Marsh V. Alabama*, 326 US 501 (1946).

cited this antiquated test, and never raised the more current US Supreme Court criteria for state actors/action.) Simply stated, HOAs are chartered under corporation laws, and not under municipality laws or by legislative decree through a designation of powers.

The reader should understand that references to "mini-government", "quasi-government", or "equivalent to a government" can only have meaning outside the strict legal creation or formation statutes, and only in terms of the broader concept of a government as a person or body that controls and regulates the people within a territory, which may be a simple subdivision. This is the view that has been debated by many legal scholars and HOA authorities, that should have be addressed long ago, in the name of justice, and as required under the Constitution.

Former CAI president Wayne Hyatt, and co-author Susan French, (also the Reporter for this Restatement) devote chapter 4 of their book on homeowner associations law to the topic of mini-governments, and saw into the future with,

> The third theory, 'symbiotic relationship' or the ' sufficiently close nexus', [both are part of the Supreme Court criteria] are less relevant to the common interest community setting of today [1998] but may have more relevance in the future. State action is found . . . [31]

[31] *Community Associations Law*, Wayne S. Hyatt and Susan F. French, Ch. 4, p. (Carolina Academic Press 1998). Ch 4 consists of some 89 pages of discussion of numerous cases pertaining to constitutional issues. Hyatt seems to be having second thoughts on the benefits, values and problems after 44 years of public existence. See

In a more recent presentation of an earlier article by Hyatt, the reader is presented with the constitutional implications of HOA private governments and their impact on the public at large, the greater community.

> These issues [the sui generis nature of HOAs, and predominantly judge-made laws that become common law precedent] are significant far beyond the real estate industry and the legal community that supports the real estate industry As community associations reach beyond their geographic boundaries to become more involved in the broader community, as they perform more community services for their own members, and as they build public and private alliances to provide many different services that were formerly public services, the legal, political, social, and economic consequences and effects increase and implicate corporate, municipal, constitutional, and other areas of law as well as social and public policy concerns.[32]

A search of the literature reveals attacks on the HOA form of governance by political scientists, not real estate lawyers:

1. **In 1992**, Dilger wrote,

> Other scholars view RCAs [HOAs in today's terminology] more critically.

[32] *COMMON INTEREST COMMUNITIES: EVOLUTION AND REINVENTION*, p. 307-308, Wayne S. Hyatt, 31 J. Marshall L. Rev. 303, Winter 1998. Re-published by The John Marshall Law Review on 9/9/2008 as part of Symposium proceedings.

> [HOAs] . . . have governance procedures that violate the constitutional standards applied to government. They want government to regulate [HOAs] to insure that they are run in a democratic fashion and are in full accord with constitutional guarantees embodied in the First and Fourteenth Amendments.... Moreover, [HOAs'] critics question the assertion that homeowners are freely and knowingly consenting to restrictions on their property rights in exchange for enhanced property values [33]

2. **In 1994**, McKenzie wrote on the violations of rights and freedoms and the fact that HOAs could get away with actions that would be prohibited under public government.

> HOAs currently engage in many activities that would be prohibited if they were viewed by the courts as the equivalent of local governments. . . . The balance of power between the individual and the private government is reversed in HOAs. ... The property rights of the developer, and later the board of directors, swallow up the rights of the people, and public government is left as a bystander.[34]

---

[33] *Neighborhood Politics: Residential Community Associations in American Governance*, p. 37-38, Robert Jay Dilger, New York Univ. Press, 1992.

[34] *Privatopia*: *Homeowners Associations and the Rise of residential Private Government*, Evan McKenzie (Yale Univ. Press 1994);

3. **In 2000**, the author of a partisan history of HOAs, which was funded by CAI, wrote,

> [HOAs are] a consumer product sold by a profit-seeking firm, a legal device, a corporation reliant on both coercive powers and voluntary cooperation, a democracy, and a lifestyle. . . . The innovators of CAs were entrepreneurs . . . The dilemma [as far back as the 1930s] was how to ensure their widespread acceptance among government agencies, builders and developers, and prospective home buyers.[35]

4. In 2007, Franzese and Siegel analyzed HOA issues, holding that,

> For too long, conventional wisdom has been that CICs are nothing more or less than the product of market forces, and that the elaborate CIC servitude regime is nothing more or less than a market response to consumer demand. This received wisdom ignores the realities of several distinctly non-market phenomena, including the pervasive privatization policies of local governments and the self-interested motives of CIC developers, that

[35] *Community Associations: The Emergence and Acceptance of a Quiet Innovation in Housing*, p. 68, Donald R. Stabile (Greenwood Press 2000). (A book partially funded by ULI and CAI).

> are at variance with the best interests of CIC homeowners.[36]

5. In 2008, Franzese and Siegel team up again and criticized the Twin Rivers opinion,

> The Twin Rivers decision is unsatisfactory in many respects, because it lacks clarity and a firm underpinning in settled constitutional doctrine. The Court's failure to anchor its decision in established constitutional doctrine is particularly unfortunate, because there is substantial precedent available and adaptable to the homeowners association paradigm [legal concept or model].[37]

At this time, it should be quite apparent that CAI and other promoters of HOAs have had a personal agenda: control over planned communities for profiteering purposes. And that the popular political vision of America with its "no government is good for America" faulty ideology has only served to concentrate legal power into the hands of HOAs. And these private government regimes have strong legal precedents in support as a result of the vicious cycle of many years of HOA favorable case law, which have been compiled into an almost complete rewrite of servitudes law under the direction of pro-HOA persons -- the common law Restatement of Servitude -- which only serves to further increase pro-HOA decisions. And when the courts resort to extensive reliance on precedent and the Restatement, without

[36] *Trust and Community: The Common Interest Community as Metaphor and Paradox*, Paula A. Franzese and Steven Siegel, Vol 72, Missouri L. Rev., 1111, 2007.
[37] Supra n. 22, p 250.

stepping back to look at the ugly forest through the trees, justice is not served, and a new America is being established.

* * * *

Returning to the questions posed earlier, under constitutional law, the answer to question #1 is a well settled, resounding no! First, the Art. 1 of the Constitution is quite emphatic that *"All legislative powers herein granted shall be vested in a Congress of the United States," "To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers and all other Powers necessary*" (Art.1, sec.8), and under the Tenth Amendment, "*The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States, or to the people.*" And state constitutions contain wording similar to, "*The legislative authority of the state shall be vested in the legislature.*" Research into case law produced only one case on point, where a planning board issued a regulation that, upon petition of two-thirds of affected property owners [private persons], the board would modify property boundaries, and the other affected one-third would be so bound by law. The court opinion found the ordinance to be unconstitutional as "*an unreasonable exercise of police power.*"[38]

Case law does abound with issues pertaining to delegation of legislative powers to the Executive or his agencies. Delegation of legislative powers to government agencies is permitted, but subject to restrains, such as, the delegated authority is subject to and limited by the declared legislative policy relating to such delegation. Even with respect to the delegation to the President of the US such is a limiting factor on his authority, and one cannot reasonably

[38] *Eubank v. City of Richmond*, 226 U.S. 137 (1912).

expect that delegation to lesser persons or to private persons would be less restrictive.

> When the President is invested with legislative authority as the delegate of Congress in carrying out a declared policy, he necessarily acts under the constitutional restriction applicable to such a delegation.[39]

With respect to homeowners associations, there is no delegation from the state legislature, just a series of statutes. Furthermore, the Restatement ignores constitutional law in general, but comments that servitudes law should control in the event of a conflict between constitutional law and servitudes law.[40]

The pro-HOA supporters would strongly argue that the HOA is not exercising legislative powers, or for that matter, any public executive of judicial powers since it is not a government. These supporters describe HOAs as privately contracted associations of homeowners who have willingly consented to be governed, and who have openly and willing surrendered their rights and freedoms that all other non-HOA members enjoy. "Consent to be governed"[41] is a public government doctrine, and cannot be found within the CC&Rs "contract."

* * * *

[39] *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935).
[40] Supra, n. 4.
[41] See generally my discussion of CC&Rs as the new social contract, *CC&Rs: The Non-legitimate Social Contract,* in which Rouseau is quoted: , *"After the state is instituted, residence implies consent: to inhabit the territory is to submit to the sovereign*".

The major alternative description of the HOA legal structure is that it is a business, and therefore, not a government. In fact, the CEO of CAI, the national pro-HOA lobbying trade organizations has argued that *"Community associations are not governments . . . . Yet they are clearly democratic in their operations, electing their leadership from among the homeowners on a periodic basis. In fact, associations operate much* ***more democratically than almost any other form of corporate entity***."[42] (Emphasis added).

From the point of view of the developer and the pro-HOA service vendors, namely the HOA lawyers and HOA management firms, the answer to question #1 would be "Yes". It is doubtful that any unbiased homeowner -- one not pro-HOA or having suffered injustice under an HOA regime -- would admit that making a business investment was a material consideration when buying his HOA controlled home. Yes, they would probably agree to the benefits of the HOA -- property maintenance, amenities, and enforcement against violators, to name a few -- but not to a conscious belief that they were entering into a business relationship. They thought that they were buying a home.

Now, while the Restatement of servitude law completely ignores constitutional law, it is replete with rules, analysis and points of view reflecting the position that the HOA is essentially a nonprofit business having the objective of maintaining property values, and *"having substantial power to affect both the quality of life and financial health of their member*."[43]

---

[42] *Democracy In Our Communities?,* Tom Skiba, We The mutual benefit and reciprocal nature of those rules and regulations, and their enforcement, is essential to the fundamental nature of the communal living arrangement that Twin Rivers [*43] residents enjoy. Welcome to Ungated, April 2, 2008 (http://cai.blogware.com/blog/archives/2008/4/2/3616608.html).

[43] Supra n. 4, Vol. 2, p. 68.

But then, what is government?

This paper has shown that an HOA, in strict legal terms, is neither delegated authority by the legislature, nor is chartered under the state's municipality laws. The HOA, itself, the private nonprofit corporation and governing body of a subdivision, is subject to CC&Rs, which has been identified as the HOA's "constitutional" contract between the HOA and its members. They are therefore subject to servitudes law. The Restatement subjects HOAs to a collective, a communal,[44] agreement between the subdivision (territorial) developer of a residential community, which can be identified as equivalent to a small village or to a large town on the one hand, and each lot or unit owner member, separately, on the other hand. And when those covenants run with the land, then servitude law has trespassed and infringed upon the American system of political government, and upon the supreme law of the land.

Servitudes had their origins long ago in the feudalism of medieval times[45]. It all began with the victory of William the Conqueror who seized all lands in his name, and awarded parts to his knights, "tenants in chief", for services. In time, they subdivided their lands to subtenants for services to the knight himself, which led to the start of tenants in perpetuity. These grants were originally for the life of the parties only,

---

[44] Supra, n. 8 p. 42. The concluding opinion held: "*The mutual benefit and reciprocal nature of those rules and regulations, and their enforcement, is essential to the fundamental nature of the communal living arrangement that Twin Rivers residents enjoy*."

[45] See generally, *The Law of Property*, Third Edition, §§ 1.6 - 1.8, Feudal Tenure to Ownership, William B. Stoebuck and Dale A. Whitman, (Hornbook Series, West Group 2000). See also

but then were permitted to pass to the heirs of the owners. These English laws passed on to the new discoveries here in America, and American real property evolved in time to fee simple ownership. Land ownership was then transferred with conditions under the complex laws now referred to as servitudes.[46]

The ownership of land was originally tied to the governance of the people by the King and his vassals governing the land owned by the king. It has evolved over the centuries as governance took on a republican, democratic nature to where real property ownership was no longer tied to the king, but to simply property owners. But, with the third edition (2000) of the Restatement of servitudes, we have come full cycle to where the servitudes have trespassed and infringed upon political government, rejecting our democratic form of governance.

The HOA proponents strenuously argue that many organizations levy fines, require the payment of dues or assessments, make "laws", and regulate the conduct of their members, etc. and they are not considered a government. (Remember, the argument being made is not of a de jure government, which is well accepted, but that HOAs are the equivalent to a public government were it not for the legality of their creation). They continually evoke the 1946 "company town" test of public functions, and ignore state statutes on the creation of local governments that do not, themselves, meet the public functions test, but are otherwise legitimate de jure towns. And these promoters, these special interest groups, also conveniently ignore those highly applicable US Supreme Court test criteria of state actors/actions, which would indeed make HOAs the equivalent of a government entity.

[46] Id, Ch. 8, Servitudes.

* * * *

Perhaps a refresher course in the fundamental philosophy and principles of government, and of democratic representative government, will help us today to better understand what a government is all about. I shall be referring to Blackstone's Commentaries[47] and Locke's Second Treatise.[48]

> By the constitution of the United States, the solemn and original compact here referred to, being the act of the people, and by them declared to be the supreme law of the land, the legislative powers thereby granted, are vested in a congress, to consist of a senate and house of representatives. As these powers, on the one hand, are extended to certain objects [areas], as to lay and collect taxes, duties, &c. so on the other they are clearly limited and restrained . . . . These, and several others, are objects [areas] to which the power of the legislature does not extend**;** and should congress be so unwise as to pass an act contrary to these restrictions, the other powers of the state are not bound to obey the legislative power in the execution of their

---

[47] *Blackstone's Commentaries on the Laws of England* (lectures at Oxford University, 1753) contain Appendices with Notes that were written by St George Tucker, Professor of Law, William & Mary University, in 1803. The value of *Blackstone*, and *Tucker's Blackstone* lies in their contemporaneous commentary on English laws that influenced the Founding Fathers. See The Constitution Society website at http://www.constitution.org/tb/tb-0000.htm.

[48] ***Second Treatise of Civil Government***, John Locke, 1690, can be found at the Constitution Society website, http://www.constitution.org/jl/2ndtreat.htm.

several functions . . . but the very reverse is their duty, being sworn to support the constitution, which unless they do in *opposition* to such encroachments, the constitution would indeed be at an end.[49]

The GOVERNMENT or administrative authority of the state, is that portion, only of the sovereignty, which is by the constitution entrusted to the public functionaries: these are the agents and servants of the people. . . . . Legitimate government can therefore be derived only from the voluntary grant of the people, and exercised for their benefit.[50]

But, as it is necessary to the preservation of a free government, established upon the principles of a representative democracy, that every man should know his own rights, it is also indispensably necessary that he should be able, on all occasions, to refer to them. In those countries where the people have been deprived of the sovereignty, and have no share, even in the government, it may perhaps be happy for them, so long as they remain in a state of subjection, to be ignorant of their just rights. But where the sovereignty is, confessedly, vested in the people, government becomes a subordinate power, and is the mere creature of the people's will: it ought therefore to be so constructed, that its operations may be the subject of constant observation, and

[49] Supra, n. 47, Editor's Appendix, Book First, Part First, Note A.
[50] Id, Note B.

> scrutiny. There should be no hidden machinery, nor secret spring about it.[51]

And much earlier, John Locke wrote about people uniting in a common purpose for their mutual benefit, as we are mistakenly told is the broad purpose of the HOA.

> Those who are united into one body, and have a common established law and judicature to appeal to, with authority to decide controversies between them, and punish offenders, are in civil society one with another [§ 87] . . . . Where-ever therefore any number of men are so united into one society, as to quit every one his executive power of the law of nature, and to resign it to the public, there and there only is a political, or civil society [§ 89] [The HOA subdivision that is subject to CC&Rs is a form of civil society] . . . . For he that thinks absolute power purifies men's blood, and corrects the baseness of human nature, need read but the history of this, or any other age, to be convinced of the contrary. [§ 92] [The failure of the state to hold HOAs accountable to them, and their failure to enforce the laws against violations by HOAs, is a grant of absolute power].[52]

While Locke seems to agree with the objectives of the HOA, "*The great and chief end, therefore, of men's uniting into commonwealths, and putting themselves under*

[51] Id, Note D, ¶ 2.
[52] Supra, n. 48.

government, is the preservation of their property"[53], he cautions,

> There wants an established, settled, known law, received and allowed by common consent to be the standard of right and wrong, and the common measure to decide all controversies between them . . . yet men being biassed [sic] by their interest, as well as ignorant for want of study of it, are not apt to allow of it as a law binding to them in the application of it to their particular cases.[54]

Locke is clearly saying that the preservation of property itself, alone, is not the entire end of government, as we see with the HOA "constitutions." He adds,

> The legislative, or supreme authority, cannot assume to its self a power to rule by extemporary arbitrary decrees, but is bound to dispense justice, and decide the rights of the subject by promulgated standing laws, and known authorized judges; [55]
>
> . . . .
>
> The legislative cannot transfer the power of making laws to any other hands: for it being but a delegated power from the people, they who have it cannot pass it over to others. The people alone can appoint the form of the common-wealth, which is by constituting the

[53] Supra, n. 48, Ch. IX, Of the Ends of Political Society and Government, § 124.
[54] Id.
[55] Id, § 137.

> legislative, and appointing in whose hands that shall be. And when the people have said, We will submit to rules, and be governed by laws made by such men, and in such forms, no body else can say other men shall make laws for them; nor can the people be bound by any laws, but such as are enacted by those whom they have chosen, and authorized to make laws for them.[56]

And, as we have made clear, this private government has not been delegated authority by the legislature to so govern subdivisions. Surely, allowing the unfettered voice of a few people to stand in place of our elected representatives cannot be tolerated.

Government is defined by a "social contract", and CC&Rs define the new social contract

The current view of the controversy that HOAs are governments make use of these similarities of purpose and functions between other legal entities and HOAs to argue that the homeowners association is not a government. However, since the "evidence" presented clearly demonstrates that governments and HOAs share these attributes, this comparison also serves the argument that a government is a business. This comparison argument, promoted by the pro-HOA special interests, places credence on the much quoted, yet archaic and misplaced 1946 Supreme Court holding (*Marsh v. Alabama*)[57], "public functions" test that compared functions, services, and public access territories (the issue in this case was not about whether or not HOAs are governments, but on the

[56] Id, § 141.
[57] Supra, n. 30.

application of free speech to company towns). It fails in face of the stark reality that state laws do not impose any such requirements on the incorporation of a town or village.

Given the prevalence of this misguided public functions test, I've repeatedly made use of a basic definition of government: a government is: "*the person or group that controls and regulates the people within a territory.*" While the functions and provided services of a government are shared with many other entities, both businesses per se and nonprofit organizations, this definition "separates the chaff from the wheat." What has been absent from any debate on this controversial topic has been the subject of purpose: what is the purpose of the organization? Businesses per se, have a profit motive. Nonprofit entities have a multitude of purposes ranging from a purely educational focus to providing a united support group for a particular trade or industry or to providing some form of charitable assistance to the public.

The question to be addressed, and that has not been addressed, is: <u>What is the purpose of government that distinguishes it from all these other organizational forms?</u> If none can be found, then what is the point of a government? Can we really say that American government is a business like any other business? But, before we proceed any further, an examination of the loosely used term "government" or more precisely, "public government" is in order. After all, all organizations, if viable, have a form of government or governing body. Keeping it simple, a number of related definitions from *Black's Law Dictionary* will clarify my definition of a government.

Under "government", Black's simple definition says: *"The structure of principles and rules determining how a state or organization is regulated."* And, to clarify by what is meant by a "state", Black's speaks in the same terms of the

differences in function that distinguishes an association from that of the state, and of the need to determine the "essential and characteristic" activities and purposes of a state. A state is a community of people established for "securing certain objectives . . . a system of order to carry out its objectives." Nothing new here, but Black's then goes on to say*: "Modern states are territorial; their governments exercise control over persons and things within their frontiers.*" And cautions not to confuse the "state" with other communities of people in other forms of organizations designed to accomplish other objectives.

With this understanding, we can now move forward to examine the distinguishing essentials and characteristics of public, or state government. And the answer to the question raised above can be uncovered in the political and democratic philosophies and fundamental principles written centuries ago, in the writings of Rousseau, Voltaire, Locke, Montesquieu, Thomas Jefferson, James Madison and the other Founding Fathers. In short, and stated simply, they are the surrender of the rights and freedoms possessed by man living in "the state of nature" (which is a long forgotten condition and environment, yet, unrecognized, is still a condition actively desired in today's society), under a "social contract" that establishes the quid pro quo for this surrender.[58]

In his *Social Contract*, Jean Jacques 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

[58] See generally, CC&Rs: The Non-legitimate Social Contract, George K. Staropoli, internet paper, 2006 (http://pvtgov.org/pvtgov/downloads/new_social.pdf).

> covenants. The problem is to determine what those covenants are.[59]

And 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."[60]

> 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.[61]

And when factions or cliques form within the community,

---

[59] Jean-Jacques Rousseau, *The Social Contract*, Book 1, Ch. 1 (1762).
[60] John Locke, The Second Treatise of Government, § 171 (1690).
[61] Id, Book 2, Ch. 4.

> 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."[62]

Even the national lobbying organization, Community Associations Institute (CAI), joins in this social contract philosophy when it 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 Communities3* clearly reflects the position that the CC&Rs are seen as a social community, not a business, regulating and controlling the homeowners:

> 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. [63]

It should be understood, then, that government is essentially a quid pro quo surrender of certain freedoms and liberties in order to regulate and control the interactions between the members of the society, for the benefit of the society. And, all other rights and freedoms that belong to

---

[62] Id, Ch. 3.

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

Man -- the members of the society -- that are not derived from government, shall be protected from infringement by either government itself or from infringement by some more powerful faction within the society.

It should be also be understood that government pervades almost every area of society, the community of people, living within a designated territory, and cannot be equated with the very limited scope of the surrender of one's rights in a business organization, or while a member of a social, sports or charitable club or organization, which benefits the limited purposes of the organization and not society as whole. Our US Constitution is the American social contract between the government and the people. HOA CC&RS are also a social contract, but between the HOA government and its people, the members of the subdivision.

Public governments and homeowners associations share this one distinguishable feature that establishes the HOA as a bona fide political government, although the aims of the contract, the purpose of the society, are so dissimilar. A government may be democratic or autocratic, but, regardless of structure, is still a political government. Or, a government can be established to support "state" monetary or business objectives, as, for example, a fascist government or an HOA government. And if we, if our government officials, legislators and judges, are to be true to our democratic origins, then HOAs must be accountable to the US Constitution as are all other forms of government. The continued failure to correct this "separatist" movement serves to continue the establishment of the United HOAs of America, the ***New America.***

Conclusions

The essential point is that HOAs are more equivalent to local government than to a business or any other nonprofit organization. Don't be fooled by the necessary use of non-governmental terminology to distinguish de jure public government status from private HOA government status. HOAs are governments true and true and must be brought back under the umbrella of the US Constitution. Otherwise, what is the purpose of the Constitution? What is the purpose of having a written contract between the government and the people, if the people can unilaterally deny and violate the contract? Have our enlightened generation of political and judicial leadership found the promised land where the will of the people shall prevail? Or have they become another example of: ***"Those who cannot remember the past are condemned to repeat it."*** [64]

The conclusion that we live today in a New America consisting of private government HOAs subject to servitudes law, and of democratic public government subject to the US Constitution, cannot be denied. HOAs have been allowed to secede from state government, with the "sovereign's" blessings. If the Southern States only had recourse to servitudes law in 1861, our Civil War could have been avoided.

* * * *

A few words are in order that serve to summarize the conditions and problems confronting democracy in HOA-land caused and abetted by the abdication of state legislatures and courts to uphold the Constitution.

---

[64] George Santayana, *Life of Reason, Reason in Common Sense*, Scribner's, 1905, page 284.

The Emperor's New Clothes

by Hans Christian Andersen

Many years ago there lived an Emperor who was so exceedingly fond of fine new clothes that he spent vast sums of money on dress. To him clothes meant more than anything else in the world. He took no interest in his army, nor did he care to go to the theatre, or to drive about in his state coach, unless it was to display his new clothes. He had different robes for every single hour of the day.

In the great city where he lived life was gay and strangers were always coming and going. Everyone knew about the Emperor's passion for clothes.

Now one fine day two swindlers, calling themselves weavers, arrived. They declared that they could make the most magnificent cloth that one could imagine; cloth of most beautiful colours and elaborate patterns. Not only was the material so beautiful, but the clothes made from it had the special power of being invisible to everyone who was stupid or not fit. for his post.

"What a splendid idea," thought the Emperor. "What useful clothes to have. If I had such a suit of clothes I could know at once which of my people is stupid or unfit for his post."

So the Emperor gave the swindlers large sums of money and the two weavers set up their looms in the palace. They demanded the finest thread of the best silk and the finest gold and they pretended to work at their looms. But they put nothing on the looms. The frames stood empty. The silk and gold thread they stuffed into their bags. So they sat pretending to weave, and continued to work at the empty loom till late into

the night. Night after night they went home with their money and their bags full of the finest silk and gold thread. Day after day they pretended to work.

Now the Emperor was eager to know how much of the cloth was finished, and would have loved to see for himself. He was, however, somewhat uneasy. "Suppose," he thought secretly, "suppose I am unable to see the cloth. That would mean I am either stupid or unfit for my post. That cannot be," he thought, but all the same he decided to send for his faithful old minister to go and see. "He will best be able to see how the cloth looks. He is far from stupid and splendid at his work."

So the faithful old minister went into the hall where the two weavers sat beside the empty looms pretending to work with all their might.

The Emperor's minister opened his eyes wide. "Upon my life!" he thought. "I see nothing at all, nothing." But he did not say so.

The two swindlers begged him to come nearer and asked him how he liked it. "Are not the colors exquisite, and see how intricate are the patterns," they said. The poor old minister stared and stared. Still he could see nothing, for there was nothing. But he did not dare to say he saw nothing. "Nobody must find out,"' thought he. "I must never confess that I could not see the stuff."

"Well," said one of the rascals. "You do not say whether it pleases you."

"Oh, it is beautiful-most excellent, to be sure. Such a beautiful design, such exquisite colors. I shall tell the Emperor how enchanted) I am with the cloth."

"We are very glad to hear that," said the weavers, and they started to describe the colors and patterns in great detail. The old minister listened very carefully so that he could repeat the description to the Emperor. They also demanded more money and more gold thread, saying that they needed it to finish the cloth. But, of course, they put all they were given into their bags and pockets and kept on working at their empty looms.

Soon after this the Emperor sent another official to see how the men were ,getting on and to ask whether the cloth would soon be ready. Exactly the same happened with him as with the minister. He stood and stared, but as there was nothing to be seen, he could see nothing.

"Is not the material beautiful?" said the swindlers, and again they talked of 'the patterns and the exquisite colors. "Stupid I certainly am not," thought the official. "Then I must be unfit for my post. But nobody shall know that I could not see the material." Then he praised the material he did not see and declared that he was delighted with the colors and the marvelous patterns.

To the Emperor he said when he returned, "The cloth the weavers are preparing is truly magnificent."

Everybody in the city had heard of the secret cloth and were talking about the splendid material.

And now the Emperor was curious to see the costly stuff for himself while it was still upon the looms. Accompanied by a number of selected ministers, among whom were the two poor ministers who had already been before, the Emperor went to the weavers. There they sat in front of the empty looms, weaving more diligently than ever, yet without a single thread upon the looms.

"Is not the cloth magnificent?" said the two ministers. "See here, the splendid pattern, the glorious colors." Each pointed to the empty loom. Each thought that the other could see the material.

"What can this mean?" said the Emperor to himself. "This is terrible. Am I so stupid? Am I not fit to be Emperor? This is disastrous," he thought. But aloud he said, "Oh, the cloth is perfectly wonderful. It has a splendid pattern and such charming colors." And he nodded his approval and smiled appreciatively and stared at the empty looms. He would not, he could not, admit he saw nothing, when his two ministers had praised the material so highly. And all his men looked and looked at the empty looms. Not one of them saw anything

there at all. Nevertheless, they all said, "Oh, the cloth is magnificent."

They advised the Emperor to have some new clothes made from this splendid material to wear in the great procession the following day.

"Magnificent." "Excellent." "Exquisite," went from mouth to mouth and everyone was pleased. Each of the swindlers was given a decoration to wear in his button-hole and the title of "Knight of the Loom".

The rascals sat up all that night and worked, burning more than sixteen candles, so that everyone could see how busy they were making the suit of clothes ready for the procession. Each of them had a great big pair of scissors and they cut in the air, pretending to cut the cloth with them, and sewed with needles without any thread.

There was great excitement in the palace and the Emperor's clothes were the talk of the town. At last the weavers declared that the clothes were ready. Then the Emperor, with the most distinguished gentlemen of the court, came to the weavers. Each of the swindlers lifted up an arm as if he were holding something. "Here are Your Majesty's trousers," said one. "This is Your Majesty's mantle," said the other. "The whole suit is as light as a spider's web. Why, you might almost feel as if you had nothing on, but that is just the beauty of it."

"Magnificent," cried the ministers, but they could see nothing at all. Indeed there was nothing to be seen.

"Now if Your Imperial Majesty would graciously consent to take off your clothes," said the weavers, "we could fit on the new ones." So the Emperor laid aside his clothes and the swindlers pretended to help him piece by piece into the new ones they were supposed to have made.

The Emperor turned from side to side in front of the long glass as if admiring himself.

"How well they fit. How splendid Your Majesty's robes look: What gorgeous colors!" they all said.

"The canopy which is to be held over Your Majesty in the procession is waiting," announced the Lord High Chamberlain.

"I am quite ready," announced the Emperor, and he looked at himself again in the mirror, turning from side to side as if carefully examining his handsome attire.

The courtiers who were to carry the train felt about on the ground pretending to lift it: they walked on solemnly pretending to be carrying it. Nothing would have persuaded them to admit they could not see the clothes, for fear they would be thought stupid or unfit for their posts.

And so the Emperor set off under the high canopy, at the head of the great procession. It was a great success. All the people standing by and at the windows cheered and cried, "Oh, how splendid are the Emperor's new clothes. What a magnificent train! How well the clothes fit!" No one dared to admit that he couldn't see anything, for who would want it to be known that he was either stupid or unfit for his post?

None of the Emperor's clothes had ever met with such success.

But among the crowds a little child suddenly gasped out, "But he hasn't got anything on." And the people began to whisper to one another what the child had said. "He hasn't got anything on." "There's a little child saying he hasn't got anything on." Till everyone was saying, "But he hasn't got anything on." The Emperor himself had the uncomfortable feeling that what they were whispering was only too true. "But I will have to go through with the procession," he said to himself.

So he drew himself up and walked boldly on holding his head higher than before, and the courtiers held on to the train that wasn't there at all.

George K. Staropoli

"HOAGOV"

Mr. Staropoli is an Arizona resident who has been active as a homeowners rights advocate since April 2000. He has appeared before legislative committees in Arizona (HOA Study Committee), Nevada, and Florida (Robaino HOA hearing), and has corresponded with several legislators in a number of states on HOA issues. 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 (2005)*, AARP Policy Institute *Homeowners Bill of Rights* proposal (2006), and acknowledged in the Thomson – West legal treatise, *California Common Interest Developments – Homeowner's Guide (2006)*.

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 is author of ***"Establishing the New America of independent HOA principalities" (2008)***, and 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.

602-228-2891
480-907-2196 (efax)
info@pvtgov.org

http://pvtgov.org