

We the People

Article 1 of a private HOA

We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquillity, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.

to protect property values

increasing property values

Decaration for the United HOAs

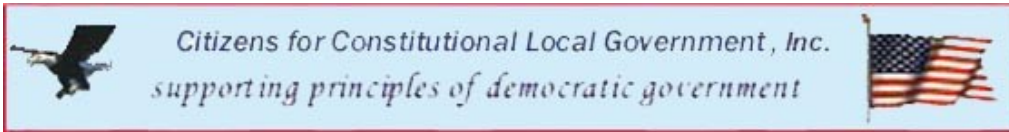
States of America.

Is There an Ideal HOA Constitution?

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September 24, 2009

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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 simply 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 make 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 as 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 exists 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.