

Position Statement On Common Interest Developments

My Name is Robert Metcalf. I currently reside in, and serve on the Board Of Directors for a Common Interest Development (CID) known as Concord Crossing, located in Chadds Ford, PA. When I began my term in May of 2006, I decided to educate myself concerning CIDs to enhance my performance as a board member. Frankly, what I learned shocked and scared me. The purpose of this paper is to illustrate and provide some possible remedies to what I perceive as the greatest injustice perpetrated upon the American citizen in history.

The Root Problem

There are two basic issues concerning CIDs:

- The basic legal framework in which they operate.
- The lack disclosure required by law for perspective buyers.

As American citizens most of us take for granted the responsibilities and protections provided for us in our laws. It is unfortunate however that a sizable part of us have had these rights and protections stripped away without being afforded the opportunity to really understand what it means to purchase a property in a CID.

Approximately 60,000,000 United States citizens now live in what are loosely defined as CIDs. While the earliest mention of an "Association of Property Owners" goes back to 1826 in Boston, these types of developments really started to propagate in the 1970s. Real estate developers faced a problem, especially in the urban and suburban areas surrounding large cities. Land was becoming scarce. In addition, most local governments had very strict zoning requirements with regard to lot sizes, setbacks, etc. In order to get around these problems, the developers turned to the CID. By creating a Not-For-Profit Corporation, the "Homeowners Association" (HOA), not only did they find a way around the zoning issues, but they also created a framework, which would let them exercise total control over a project until it was finished. Furthermore, they discovered a very seductive tool to entice the local governments to give their approval. That tool is this. The developers, through the HOA, would provide basic services such as snow removal and trash collection for a fee charged to the homeowners. The local governments for their part would get to tax the residents at the full rate, without providing any services. A true "Quid Pro Quo".

The developer's main interest is profit. In order to maximize that profit it is in their interest to control every aspect of the development during the construction and sales phase. They do this through the three main documents, which define the HOA:

- The Declaration, which describes the property and its basic legal foundation.
- The Bylaws, which describe the day-to-day operating constraints.
- The Rules and Regulations, which control the resident's behavior.

What most people fail to understand is that when they sign off on these documents at settlement (I will have more to say about this later) they have subjugated themselves to an ¹ **adhesion contract**. They have agreed to live in a corporation, and live under corporate governance. While operating under the "Business Judgment

1) See Appendix C

Rule" is appropriate and necessary in the working world; it has no place in one's personal life.

The Private Government

While one can make the argument that the developers have a right to run their business as they please, the real issue is what happens when they leave. At some point the project is completed and the developers perform the "Dedication". That civic sounding term is really just a euphemism to describe the legal act of absolving themselves of any further responsibility for the community. What they leave behind is a heretofore-unknown form of government; domestic life structured as a corporation. In addition, the dictatorial powers that are provided to the developer via Pennsylvania's Uniform Condominium Act (UCA) and Uniform Planned Community Act (UPCA) continue on, unabated. Some examples:

- The monthly assessment or fee is a lien on the unit owner's property by definition (Section 5315 UPCA and Section 3315 UCA). Not even the real government has that kind of power. If a citizen fails to pay his or her taxes the governing authority has to place a lien on the property with proper judicial oversight.
- Through ² **easements** included in the governing documents, the HOA has the authority, through the board of directors, to demand access to the owner's home for "inspection". Law enforcement, save for a few very well defined situations, does not have that power. Again, they must have the outside supervision of the courts, through the issuance of a search warrant. There are cases in some communities where the police, instead of attempting to procure a warrant, now call the HOA's board to get the authority to demand access.
- If the HOA and a resident find themselves parties in a legal dispute, the HOA has the right, by statute, to assess the unit owner to recover its attorney fees. Furthermore the directors are indemnified against any personal responsibilities for their acts as well as being covered by large insurance policies to cover any liability, which no matter how unlikely, might occur. An attorney, whom my own association has engaged on occasion, was awarded over \$46,000.00 in legal fees over a \$500.00 dispute.

These kinds of draconian remedies are simply not right, and are the result of a law created by, and in the interest of, the real estate developers and the real estate developers alone. The foundation of good governance is the idea of checks and balances. An HOA is devoid of this. Even though the governing documents state that the unit owner may appeal a board decision, whom does he or she appeal that decision to? the board. The end result of this is that a small number of people, a majority of the board (in my case 3), can rule arbitrarily and absolutely, with little or no fear of consequences. Rules can be created, modified, or revoked without considering the community's desires at all, in effect changing the "terms of the contract" at will. In most communities there are no term limits for the directors. This allows boards to become "entrenched", and since they operate under the principles of corporate law, they can manipulate the HOA's operation to virtually insure the continuation of their terms in office.

If the actions of a board are especially egregious, the unit owner can get satisfaction through the courts. However, the cost to that owner in time, money, and their

2) See Appendix C

quality of life can be disastrous, particularly when compared to the board, which are essentially held harmless, regardless of the outcome. The CID Industry claims that first and foremost a HOA is a corporation, and therefore should conduct itself as one. But what does that really mean? Virtually every local government is a corporation. Is there any legal difference between the two, or any other corporation for that manner? Not really, save the distinction between profit, and non-profit, and even that is primarily for tax purposes. A corporation is a creature of the law, created to limit the personal liability of those who control it. In Concord Crossing's case the Articles Of Incorporation do not specify any particular reason for its existence at all, and I suspect the same is true of any corporation. In fact, in the eyes of the law a corporation's lawful behavior is determined by what it does, how it acts. This is why the legal standard of proper corporate behavior is different for IBM as opposed to Concord Township. The determination of that standard is a work in process that started in the early days of this country and continues on to this day, as was demonstrated in the "Twin Rivers" decision handed down from the Superior Court Of New Jersey. While the details of this case exceed the limitations of this paper, the significance of the decision lies in the fact that for the first time a court held that because a HOA acts as a government, wielding governmental powers, it is in fact and function, a government and therefore is a "constitutional actor", and thus subject to the Constitution. This decision is so antithetical to the concept of corporate governance that it caused the president of the CAI (explained below) to state, "Everything changed today". The courts are starting to recognize that HOAs are governments and should be held to the same standards of behavior.

The CID "Industry"

One of the side effects of the huge growth in CIDs has been the spawning of various types of support services. These would include the developers, legal firms specializing in CID law, property management companies, and loosely knit member based associations that when taken together make up the 50 billion dollar a year CID industry. At the top of the list would be the "Community Associations Institute". Founded in 1973, the CAI was created to represent the interests of HOAs and the property owners who lived in them. This however turned out to be less than successful, so in 1992 they transformed themselves into a 501c, a trade organization that does advocacy on behalf of its members. According to the latest information I am able to obtain the CAI has approximately 16,000 members, nearly all of them some form of service provider that targets HOAs as potential customers. As a result, all of these organizations have "public policy" positions. Why? What possible reason could these entities have for adopting such a posture? The answer, and there can only be one, is control. The CAI doesn't even try to disguise it. Their mantra, and this is verbatim, is "The HOA is a business, run it like one". At every turn they resist any effort to amend the laws, and return control and oversight to the residents. Here are some examples

According to "The Alliance Messenger – July 2003", a HOA industry newsletter, trumpeted the following legislative victory in Texas by defeating HB 2646/SB949 – Property Owners Association Restrictions. Here is what the bill provided:

- Allowed owners access to POA (Property Owner Associations) records for any reason whatsoever.
- Required payment plans for any owner who was delinquent.
- A mandatory 2-year waiting period on "significant collection actions, including foreclosure".

This next one is particularly interesting considering the current law. They defeated HB 844; HB 1279 – American Flags And Flagpoles. Here is what the bill provided:

- Provided that residents could display the American Flag in any way they chose.

HB 1641 – Property Owners Association Restrictions. This bill would have mandated the following:

- Required POAs to send violation notices in English and Spanish. Remember this is in Texas.
- Would have prohibited non-judicial foreclosures.
- Would have made POAs subject to the “Open Meetings Act”, a set of rules concerning the how a meeting is to be conducted to insure openness.

This and other volumes are available online at www.allianceonline.net.

While I realize that the above deals with Texas, I still think that it illustrates the mentality that prevails within these organizations.

In my state, Pennsylvania, there was HB 1903 – Amendments to Pennsylvania’s Uniform Planned Community Act. The response from Steven Sugarman (an attorney that Concord Crossing is considering for representation), Chairman of the Community Associations Institute Pennsylvania Legislative Action Committee, was one of resistance, taking a stance against such things as notice of meetings, dispersing of power through committees, availability of minutes, etc.

For its part the CAI has produced a remarkable 65-page document titled, “Public Policies”, which is available in total at <http://www.caionline.org/govt/position.cfm>. While it is beyond the scope of this document to provide an ³ **analysis in detail**, there is one overriding theme in all of CAI’s positions; **They do not, and will not, support any policy or legislation that in any way places greater limits on HOA’s authority to control developments than now exists.**

I challenge the notion and stated purpose of these groups. In my opinion their goal is simply the retention of power. George Orwell in his greatest of works, 1984, stated as much in the final confrontation between Winston and The State. It turns out that The State wants power and control simply for the sake of power and control. **Power in and of itself becomes the goal. Any fleeting benefit to the community is simply the by-product of acquiring and maintaining control.** Anything that in any way threatens this control must be stopped dead in it’s tracks, thus avoiding the disclosure of the unfortunate truth; **These organizations, associations, and institutes serve no one but themselves, in order to perpetuate their mythology, and their existence, at the expense of the property owners.**

Maintaining Property Values – Justification For Anything And Everything

The justification for all of this, according to the CID industry is the preservation of property values. **This is an absolute myth.** Surprisingly, there is very little concrete information with regard to this. I have been able to find only three studies:

3) See Appendix B

- Homeowner Association Foreclosures and Property Values in Harris County, 1985-2001, by Christopher Adolph from Harvard University, http://faculty.washington.edu/cadolph/homepage/Adolph_hoas.pdf He concluded, and I quote:

*"Although HOA foreclosures are ostensibly motivated by efforts to improve property values, neither foreclosure activity **nor HOAs** appear linked with the above average home price growth."*

- The Cost Of Conformity by Dr. Jeremy Groves from Northern Illinois University, www.niu.edu/~jgroves/groves01.pdf This is a study of approximately 125,000 home sales in the Saint Louis metropolitan area. This is a large sample. Dr. Groves conclusion is, and I quote:

*"... locating in an RCA **decreases** the value of a home between 0.04% and 1.70%. While these coefficient estimates are statistically significant, the average effect is not economically significant."*

- What Are Private Governments Worth? by Amanda Agan and Alexander Tabarrok from George Mason University, <http://www.cato.org/pubs/regulation/regv28n3/v28n3-2.pdf> This is a study of 12,000 home sales in suburban Washington D.C. The authors of this study drew another conclusion. I quote:

*"Local private governments are expanding in number both in the United States and around the world. Local private governments are also expanding in scope, with many offering private security and a few even offering services such as day care, schools, and courts to arbitrate homeowner disputes. Our data indicate that houses in HOAs in Northern Virginia are worth, on average, more than 5 percent more than similar houses in the same neighborhood but outside of HOAs. Given those large advantages, it is not surprising that HOAs are growing rapidly. We have shown that HOAs increase house value, but many questions remain unanswered. Do HOAs increase house value because they offer better-quality services than local government? Or do HOAs increase house value because they offer services that local governments cannot (e.g., more restrictive zoning) or do not (e.g., greater security)? How does the governance structure of HOAs impact house value? Can we find, for example, what people are willing to pay for term limits or supermajority rules? Studying HOAs may also help us to identify how and why local governments are failing to maximize returns for their residents. **Ideally, the knowledge provided by private governments could be used to improve services for everyone.**"*

As you can see there are differences of opinion. However, I think there is more to this than initially meets the eye. The last citation, What Are Private Governments Really Worth, presents what is, in my opinion, a somewhat slanted analysis. First, the area analyzed is suburban Washington D.C. This is a very unusual real estate market, due to its proximity to the Capital. Second, if you read the article you will notice that in the sample, roughly 11,000 of the 12,000 properties are deed restricted. Third, this was published by the Cato Institute (www.cato.org), a pro private enterprise, anti government organization whose opinions are not nearly as

unbiased as those sourced from the academic world. What really disturbs me however is the last sentence, which I will address later in this paper.

For the moment, let's assume that the last study is correct; HOA properties are worth 5 percent more than non-HOA properties. According to the United States Census, the median price for a home in 2006 was \$246,500.00, 5 percent of which is \$12,325.00. I have one question. **Would you sell the protections afforded you by the US Constitution and the Bill Of Rights for 12,000 bucks?** Don't you think that's pretty cheap when you consider the cost to acquire them?

In 1941 my parents purchased a tract house in a suburb of Philadelphia, PA known as Westgate Hills. They paid \$5,000.00 for it. There were no "Covenants, Conditions, and Restrictions" (CC&Rs). There were no "Bylaws". There were no "Rules And Regulations". Not a gate in sight. In fact, there were no deed restrictions whatsoever. They lived there until my mother's death in 2003. That's 62 years. Today, Westgate Hills looks better then it ever has. The average selling price is over \$300,000.00. Over the past 70 years there has been a constant inflow of new, young families to take over the properties as the elders of the community pass away. According to the CID industry something like this cannot possibly happen. Residents, left to their own devices, will run a neighborhood down without the "helping hand" of the CID service providers.

Through the propoganda disseminated by the CAI and like institutions, the myth that HOAs enhance the appreciation of property value is THE belief held by the public at large that allows CIDs to propagate.

The "Big Lie" – Lack of Disclosure and Disillusionment

Another issue that needs to be addressed is the lack of disclosure provided by the developers during the sales phase of a project. The average person simply has no idea of what they are getting involved in. In my case the HOA's activity was described as "they mow the grass and plow the snow, you'll love it". I did not know, **nor was I told**, the degree to which the Association would control almost every aspect of my living in Concord Crossing. This deception is executed exquisitely in an environment almost devoid of any meaningful disclosure.

If you pick up a pack of cigarettes, apply for a loan, watch a television ad for a pharmaceutical, or any number of other things, one thing is instantly, crystal clear; the law has **forced** the manufacturers or providers to disclose information about the product or service, that left to their own devices, they would suppress. Furthermore, that information is prominently displayed, so there can no misunderstanding as to what the possible outcome from using that product or service may be. Why shouldn't those standards be applied to CIDs as well? After all, the acquisition of a home is for most people the largest purchase they will ever make. In addition, it is an action that is not easily undone. Everyone who has ever gone through the settlement process realizes the notion of reading every document that you must sign is unrealistic, therefore the standard CID industry defense, "you signed the contract so live with it", is as disingenuous as it is hollow.

My neighbors are intelligent, educated people, yet out of approximately fifteen residents I have spoken to about this only two were aware how invasive and ubiquitous the Association could be. How is this possible? How could such a large percentage of the unit owners be so completely ignorant about something that could

potentially bankrupt them and perpetrate the losing of their property? Again, there is only one possible answer, **the lack of proper disclosure**.

" The Fatal Flaw"

In the end, as horrendous and as sinister the above may be it, in my opinion, pales in comparison with what I call ⁴ **"The Fatal Flaw"**.

One could make the case that the concept of civilization at the atomic level, is the idea of law. The phrase "the law of the jungle" (i.e. no law) is the polar opposite to societal living. The cornerstone on which the efficacy of the law resides is in the citizens being treated fairly and impartially, which in turn generate the acceptance and support necessary for society to function in an orderly manner, hence the phrase "justice is blind". The reason any person who sits in judgment, who happens to find themselves in the situation of having to judge someone with which he or she has had any personnel involvement whatsoever, will recuse themselves is to preserve that sense of impartialness. The same is true of juries. One only has to look at the great lengths that are taken to insure that a jury is unbiased to understand how paramount this concept is to the law.

In a HOA this principle can never be applied. **It is simply impossible for residents to make impartial judgments concerning other residents**. This results in the "Fatal Flaw". Every violation notice, fine, or ruling handed down by the HOA is taken as a personal slight. It cannot be avoided. The effect over time is cumulative; a corrosive force that slowly, but inexorably, destroys the fabric of the neighborhood, setting neighbor against neighbor, raising pettiness to a high art form, and creating deep-seated resentments that never dissipate. Unfortunately impartialness and fairness are diametrically opposed to personal involvement and friendship. Ultimately this fact, and this fact alone will force an end to this style of living, at least as it exists in its present state.

Are There Any Solutions?

I think the first thing one has to realize is how widespread this problem is. The number of complaints about HOA abuse has become so great that even the AARP has issued "**A BILL of RIGHTS for HOMEOWNERS in ASSOCIATIONS**". This document, which can be downloaded from http://www.aarp.org/research/legal/legalrights/inb128_homeowner.html, addresses many of the issues I have stated in this paper, as well as offering its interpretation of what must be done to protect homeowners. I strongly suggest that this document be studied. On the other hand the CAI will tout its Zogby poll (<http://www.caionline.org/about/survey.cfm>), which consisted of interviewing 800 CID residents about their HOA experience. Mind you, that's 800 out of 60,000,000. I'll leave judgment of the statistical validity of a sample that size, and hence the conclusions drawn from it, to the reader.

For my part, I believe there are three distinct levels of remedy that could be enacted to provide relief for unit owners.

4) See Appendix A

Provide perspective homeowners with adequate disclosure.

This, in my opinion, is the very least that should be done. While it doesn't change the lot of people already involved with HOAs, it would serve to educate the population at large about exactly what they would be signing off on. At a minimum it should provide the following:

- Be the first item in any sales information as well as the settlement documents.
- At settlement it should be notarized as a separate action.
- It should be one page only, written in large bold type, stating the following:
 1. The buyer is entering into a binding contract with the HOA and agrees to live under the rules of corporate governance.
 2. Corporate governance provides for the Board Of Directors to control every aspect of life in the HOA as provided for in the declaration, bylaws, and rules and regulations.
 3. The monthly assessment is in fact a lien on the buyer's property, and failure to pay will result in foreclosure.
 4. The "business judgment rule" allows the BOD wide latitude in creating and enforcing rules and regulations, without seeking the approval of the unit owners.
 5. The BOD will hear any appeal of a decision by the BOD.
 6. Any decision by the BOD that is in conflict with the buyer's constitutional rights will take precedent and by agreeing to this contract the buyer acknowledges that fact.

This may sound dramatic, but the fact is that this represents **exactly** what the buyer is agreeing to. It would be interesting to see how the marketplace would react to this type of disclosure.

Adopt a "Homeowner's Bill of Rights" similar to AARP's

While this approach has several appealing attributes, in my opinion it still falls short. The reason being that it is still an attempt to make what is a fundamentally flawed idea work. I do believe however that it could bring substantial improvements providing it included the following:

- First and foremost, it should subjugate the HOA to the law of the land, and provide for the upholding of all the rights of citizens as provided for in The US Constitution, Federal law, State law, and Local law.
- It should mandate that HOAs provide for outside oversight, either in the form of an ombudsman, or preferably the courts through an administrative judge. If either of those two solutions proves insufficient any litigation that may result should operate in the same legal framework as any process.
- It should mandate that the burden of proof fall on the accuser and not the defender.
- It should require that any change to any rule or regulation be approved by a majority of the unit owners.
- It should require that the annual budget be approved by a majority of the unit owners.
- It should define the monthly assessment as a debt, and not a lien on the unit owner's property.

- It should disperse the powers now concentrated in the BOD among independent committees.
- It should allow any deed restriction to be modified and eliminate deed restrictions that “run with the land” in perpetuity.
- It should force local governments to rebate the taxes collected for services not rendered.

Obviously this approach has many legal issues to contend with, however, one way around all of them would be to make each unit owner a director by definition. This would then allow the “Board Of Directors” (i.e. the entire community) to set up individual committees, including an executive committee, which would be responsible for the day-to-day operation of the HOA, as well as other bodies to handle other issues.

Complete abolition of the present CID structure

In my opinion because of the “Fatal Flaw” the only true cure for the HOA epidemic is to completely abolish them. While this is certainly the most radical approach, actions like this are not unheard of. The Civil Rights movement of the 1950s and 1960s comes to mind. Along with the more visible public transportation and right to vote issues, seventy-five years ago it was common for deed restrictions to forbid the sale of properties based on the prospective buyer’s race. Today the idea of such a practice is abhorrent to virtually everyone, so much so that the elimination of such restrictions attained the lofty legal status of becoming public policy. It is my firm belief that someday, after enough people have lost their homes to over zealous and unscrupulous law firms, after enough people have been forced to suffer the indignity of a self-righteous, self-absorbed, BOD spouting endless edicts of minutia about “rules and regs” and “fiduciary responsibility”, all wrapped up in the mythology of “maintaining property values”, this fraud will be seen for exactly what it is; **a systematic infusion of corporate culture and governance into the domestic lives of an ever larger share of the American population.** Who wants to live at work?

Previously I cited “What Are Private Governments Worth” The final sentence states:

“Ideally, the knowledge provided by private governments could be used to improve services for everyone.”

Can you read between the lines? Since when has it been good public policy to imitate the private sector? What this is really saying is “Hopefully, some day **all** real estate development will contain private governance as its main organizing principle.” This is already happening. In some municipalities, mostly in the Sunbelt States, a building permit will not even be issued unless it is a deed-restricted community.

In my view what is needed is a new class of government. A form of government that functions in much the same way as a CID but with one fundamental difference; **it would be a public, not private, entity.** That would mean that the actions it took and the behavior of the office holders within it would be held to the same standard as any other form of government. The election of officers would be under state oversight. Most important this form of government would be a constitutional actor by definition, thus insuring the civil rights of all who would be governed by it.

Conclusion

One might ask; "If you dislike it so much why don't you move?" My answer is simple; "I don't want to." Care must be taken not to confuse the neighborhood with the HOA. The two things really have very little to do with one another. My neighbors are some of the nicest people I have ever known, and I do not want to lose those relationships, in fact, I will not lose those relationships. 60,000,000 people live in CIDs, that's 20 percent of the American population, and I'm sure that most of those people feel the same way I do about their neighborhood and neighbors. Just as the brave people who were instrumental in the civil rights movement started as a small group of discontents, so it is with the anti CID movement. All one has to do is peruse the Internet to find an ever growing population of citizens who are tired of being subjected to this fraud. Make no mistake; **this is as much a battle for civil rights as what occurred in the 1950s and 1960s.**

Most likely, events will occur in much the same manner, with relief initially coming primarily from the courts, as illustrated by the Twin Rivers decision. Ultimately however, legislation is the final solution, as it always has been. This is an important issue, affecting the quality of life for many on a day-to-day basis. Professor Evan McKenzie author of "**Privatopia: Homeowner Associations and the Rise of Residential Private Government**" stated: "All Homeowners Associations are one election away from disaster". Don't you think it's time we rid the country of these patently un-American institutions and replace them with true democratic systems, designed to preserve the resident's rights as opposed to denying the same?

If you read the various articles found on the CAI's website such as "**Community Harmony & Sprit**" (<http://www.cairf.org/research/bpharmony.pdf>) what you find are endless references to "community building", "creating activities" and the like, as if they have finally figured out how to "corprotize" all the elements that produce the richness of the human experience known as societal living and incorporated it into a nice little "policy package" that tells people how to enjoy life. These never ending phony pedantic patronizing pontifications are, in a word, pathetic. Shallow, hollow, ham fisted attempts to convince **anyone and everyone** that they can't have a normal and peaceful existence without their guidance and heavy-handed oversight.

The simple truth is that you cannot create neighborhoods by the actions of a state legislature. You cannot create communities by decree. Things of this nature must form independently, the result of real relationships that take time, effort, and real desire to effect. They cannot be "invented", no manner how many "symposiums", "policy papers", "round table discussions", or "experts" you throw at them.

In the end you can have a corporation or you can have a community, but you cannot have both.

Robert Metcalf, Treasurer,
Concord Crossing Homeowners Association

Appendix A – How Has The “Fatal Flaw” Gone Unnoticed

In the early to mid part of the last century an architect known as **Le Corbusier** (you can find a biography at http://en.wikipedia.org/wiki/Le_Corbusier) founded what is now known as the **Modernist** movement in design. His vision is what is responsible for the skylines of most cities throughout the world today. Gleaming skyscrapers, dozens of stories tall, surrounded by park-like expanses of well manicured landscaping were the basic components of his concept of utopia. The social scientists, urban planners, and other architects of the time bought into the concept completely. Immediately after the Great Depression the federal government decided to correct the appalling conditions that existed in the slums of our cities through the erection of public housing. The main problem to be solved was how to deliver a sufficient population density footprint while at the same time significantly improve the quality of life for the poor. Their answer was to employ the concepts and design goals as expressed by the Modernist Movement. In America, and all over the world during the 1950s and 1960s, high rise housing projects were created by the thousands. All the experts agreed that this was the final solution to the “housing issue”. There was a problem however. In Saint Louis the government had constructed a large project (12,000 residents in 33 11 story slabs) named Pruitt-Igoe. Apparently, for some reason the complex was being systematically destroyed. No one understood why. Soon the same phenomenon started to happen in other projects. Later on, by the late 1970s, it was happening in **All** the high rise projects. In 1972 they blew up Pruitt-Igoe. It was the first recognition that something had gone very wrong. In subsequent years more and more of these “vertical ghettos” have been razed, until now they have virtually disappeared. At the same time however they noticed another phenomenon. In the “low-rise” or townhouse style dwelling the problems were nowhere near as severe. Why? The residents were the same. The level of poverty was just as great. How could the outcome be so different. What they discovered, and this is the main point, was that a fundamental element of human behavior had been overlooked, completely missed. **They realized that high rise projects eliminated the “defensible space” surrounding the residents. That is; the more pairs of eyes on a particular space, the less responsibility each of those pair of eyes felt for that space.** This is why that all the high rise projects are now being replaced with low rise units. **The real issue here is that it took an entire generation to isolate and identify this as the root cause for the failure of Le Corbusier's ideas.**

I believe that we are in the midst of a similar situation with regard to CIDs. At the time this concept of housing was being created and molded into its current configuration, none of the “experts” were aware of, or had even conceived of the problems that would inevitably result from having residents exercising control over other residents. They failed to realize that the personal acrimony which would result from such a structure would be cumulative and inexorable. They failed to realize, that over time, this phenomenon would bring community participation to such a meager level that for all intents and purposes it would be non-existent. When I first moved into Concord Crossing in 2000 the general meetings had a very high level of support, with unit owner attendance over 80%. At our last meeting we barely had enough to meet the quorum of 20%, which had already been reduced from the original requirement. Several of my neighbors, who I know personally, that once were active community volunteers have now withdrawn completely because of the hubristic and petty behavior of the Board and the management company. Has the community benefited from this? The fact is **the people responsible for the creation of CIDs, just like the “experts” mentioned in the previous**

paragraph simply missed the most basic characteristic of human behavior; peers must treat each other as equals if there is going to be a collegial society. Furthermore, it will take at least a generation for the public as a whole to realize and act on what in my view is the most egregious failure of social engineering in history – the CID.

Appendix B – Comments On The CAI Public Policies

The following are some comments pertaining to the CAI's public policies. **The summaries are the CAI's directly from their website.** My comments are in blue type, immediately underneath the summary. These statements are short, as any one of these positions would require an entire paper to analyze fully, and I have only considered the ones germane to the main thrust of this paper.

AESTHETICS AS AN ECONOMIC ISSUE

CAI opposes any and all attempts at the federal, state and local levels to enact laws or regulations that ignore or negate the economic importance of aesthetic controls.

This truly is at the heart of the CAI charade, plausible statements that on the surface seem reasonable but upon closer inspection reveal severe shortcomings. In this case, the problem is that "beauty is in the eye of the beholder". Whose aesthetics are correct? Whose aesthetics have more "economic value"? How do you measure this "economic value"? The fact is the answers to these questions are unknowable and the resulting standards are simply the arbitrary opinion of a small number of people at a certain point in time that have no real basis in fact. Does anyone really believe that having brown shades as opposed to white shades effects property values? The idea is absurd on its face. Don't misunderstand me. The overall appearance of a community certainly does have an economic impact, but that is the result of the overall affluence of a neighborhood rather than a set of rules.

ALTERNATIVE DISPUTE RESOLUTION MECHANISMS

CAI recognizes the need for and supports the use of alternative dispute resolution mechanisms to resolve disputes arising in community associations in appropriate cases.

I basically agree with their position, with one caveat. They make no mention of Small Claims Court. Why? Small Claims Court is open to everyone for a small filing fee and can be used for claims, in the case of my state, up to \$5,000.00. This is just another example of the disingenuous nature of the CAI. What their position doesn't tell you is that lawyers administrate ADR, and since HOA legal firms make up a sizeable share of the CIA membership it's no wonder that Small Claims Court would be "overlooked" as attorneys aren't permitted to take part in their proceedings.

ASSESSMENT COLLECTION FROM OWNERS IN BANKRUPTCY

CAI supports an amendment to the United States Bankruptcy Code to provide for the payment of post-petition common expense assessments by debtors solely on the basis of an ownership interest in property in any type of community association. Additionally, CAI supports clarification so that community association assessments are not considered executory contracts.

One of the primary principles that the CAI promotes is that an HOA is a business and it should be run like one. It seems a little odd to me that when it comes to bankruptcy they want to be excluded from that classification.

ASSESSMENT INCREASE LIMITATIONS

CAI supports the elimination of any requirement that community association documents prohibit the increase of assessments by the board of directors above a fixed percentage without approval of a vote of owners.

This is a perfect illustration of the separation between the residents and the HOA and circuitous reasoning behind it. What it is saying is that the BOD should have the power to spend the unit owner's money **even if a majority of the owners decide against it**. Kind of makes you wonder who owns what.

COMMUNITY ASSOCIATION MANAGER CREDENTIALING

CAI encourages the national certification of community association managers. In states that propose mandatory regulation of community association managers, CAI will support a regulatory system that incorporates adequate protections for homeowners, mandatory education and testing on fundamental management knowledge, standards of conduct and appropriate insurance requirements. CAI opposes the licensing of community association managers as real estate brokers, agents or property managers.

This is the "poster child" for how incestuous and self-serving the CAI and all its attendant factions are. You have to read this very carefully as the language is very precise in its intention to misdirect. The CAI supports certification by the National Board of Certification for Community Association Managers (NBC-CAM) in lieu of state oversight. The CAI created the NBC-CAM. The end result is that the CAI is essentially certifying itself.

COMMUNITY ASSOCIATION MEMBERS' & AND RESIDENTS' BILL OF RIGHTS

CAI supports a balance of the rights of an individual owner in a community association with the need for effective management of the affairs of the association for the benefit of all the owners. Reasonable association procedures which empower the board of directors and staff of the community association to perform their obligations efficiently must take into account the rights of an individual owner to privacy, enjoyment of his or her home and full participation in the community association.

This is another case, which illustrates the inherent inequity between the HOA and the owners. Again, be very suspect of the words chosen to explain their position. For instance, the first sentence should really say: CAI supports a balance of the rights of an individual owner in a community association with the **rights** of the association for the benefit of all the owners. Why? Because an HOA is a corporation it has "rights" just like any real person. The CAI avoids using that language however because it just doesn't sound very good. This is another one of their "life style" statements. Along with all the "feel good" pabulum however, the overriding theme is that the HOA controls and the residents obey. You really should read this in total to get the whole effect.

DISPLAY OF THE AMERICAN FLAG

CAI strongly supports the elimination of community association restrictions that prohibit the display of a reasonably sized, removable American flag from a resident's exclusive use or limited common element areas, so long as the flag is displayed in accordance with the Federal Flag Code, 36 U.S.C. Sections 171-178, as amended. CAI further believes that community associations — not a state law — are best suited to determine the appropriate size, placement and installation of a flagpole.

This is kind of interesting since as I stated in the main body of the paper, a few years ago they bragged of victory in defeating a bill that provided for exactly the same thing.

EFFECTIVE COLLECTION OF COMMUNITY ASSOCIATION ASSESSMENTS

CAI supports effective, fair and reasonable collection methods, including lien rights and due process protections, and opposes government limitations on their efforts. CAI also supports reasonable procedures to accommodate unit owners experiencing temporary financial difficulties.

This is a prime example of an abuse of language. If you notice they use the word **reasonable**. One has to be very careful when dealing with this word in a legal context. Remember the case I cited in the main body where an attorney was awarded **reasonable** fees of \$46,000.00 over a \$500.00 dispute. Their position is pretty straightforward. They do not want any interference or oversight from the state, period.

FAIR DEBT COLLECTION PRACTICES ACT

CAI supports legislative, regulatory or judicial actions to establish that community association assessments are not "consumer debt" as defined by the Fair Debt Collection Practices Act or similar state statutes.

I have to give credit to CAI for at least being honest about this. Their position is simple; they want HOA assessments to fall outside the definition of "consumer debt" so that the collection methods used would not have to comply with the FDCPA. By the way, the Fair Debt Collection Practices Act (FDCPA) was enacted in 1979 to deter unscrupulous creditors from using harassment techniques to recover debt.

GOVERNMENT REGULATION OF COMMUNITY ASSOCIATIONS

CAI supports effective state legislation—when it is deemed necessary for consumer protection, conversion limitations, protections for ongoing operations or other additions to existing statutes or common law, to ensure that community association housing is developed and maintained consistently with legitimate public policy objectives and standards that protect individual consumers, balancing the legitimate rights of the development industry. Local legislation concerning the creation or governance of community associations is antithetical to a balanced, well-considered weighing of all issues and interests affecting community associations, encourages a patchwork of regulations within an individual state and is, therefore, better dealt with at the state level.

On the surface this sounds reasonable enough, but the actions of the CAI clearly favor their members, who happen not to be the actual

owners of the properties. For instance, their position supports consumer protection and disclosure yet the reality is that there is virtually no disclosure required. Furthermore, even if you purchased your property with no prior knowledge whatsoever that it was part of a CID you would still be bound to the CC&Rs. How is that possible you might ask? As it turns out, because the laws regarding CIDs are written by the same lawyers who practice CID law, the statutes are crafted in such a way that simply because the CC&Rs are recorded by the county you, as the owner, are bound to them whether or not you were even aware of their existence. This is the CIA's concept of a "fairly executed contract". This policy is also one that should be read in its entirety.

HOMEOWNER INVOLVEMENT IN COMMUNITY ASSOCIATIONS

CAI believes in direct homeowner involvement and participation in community associations and should be encouraged throughout the developmental process and operational phases of community associations.

Of all the CAI polices this one illuminates the failure of the CID concept more than any other. It clearly shows evidence of the division that inherently exists between an HOA and the residents who are subservient to it. Because this is central to my position I have included the body below.

It is inherent in the legal documents and conceptual framework of community associations that the association exists to assure that business, governance and community responsibilities are carried out. The association, through a governing body selected by the owners; acts on behalf of the owners to carry out these responsibilities. A workable, effective and responsive governance process is necessary for the association to achieve its mission. The association's organization and structure should encourage homeowner involvement and participation. For that involvement to be effective and successful, the following must be established:

- *The governing structure must be explicitly defined, with the rules and responsibilities and authority of the board, committees and agents clearly delineated.*
- *Organizational goals, which respond to the needs of all owners, must be established and these goals must be reviewed and reevaluated on a periodic basis.*
- *An open communications process must be maintained on a continuous basis and should encourage information flow between the board, committees and individual residents.*
- *A committee process should be established to assure an opportunity for effective owner participation in meaningful activities and decisions to support the governance process.*

The theme of this endeavor is to show that no matter how hard people of good will try, on either side, CIDs will ultimately fail. As more and more resentment builds in the residents, the result of HOA boards treating them like subjects, the more vain and desperate the attempts of the CAI to defuse the situation become. For example: In California,

the largest state in the union, 75 percent of the HOAs are currently involved in litigation with their residents (<http://loan.yahoo.com/m/primer13.html>). Do you think that this is what the CAI means by "homeowner involvement in community associations"? If you access the CAI's website you can see the impending failure of this misguided idea in some of their latest publications and papers such as "Viva Community" and "Be Reasonable". The fact is that this "conceptual framework", as they like to call it, is a failure by design and no amount propaganda can change its ultimate demise.

LIABILITY OF COMMUNITY ASSOCIATION VOLUNTEERS

CAI supports legislative protections against unwarranted legal liability for volunteers serving as members of a community association board of directors or committee, to enable them to make responsible judgments without fear of personal loss interfering with the judgment or decision making process. CAI further supports indemnification of community association volunteers and the provision of directors and officer's insurance coverage as a common expense.

Yet another demonstration of the grossly imbalanced power structure incorporated into a CID. As it turns out the only people subject to any serious harm are the owners themselves. While no one would doubt the notion that volunteerism is, in general, a good thing, that does not mean that every case of volunteerism should be indemnified against wrongdoing. In essence, except for outright illegal acts, this policy is license for the BOD to make life miserable for whomever they please with virtually no fear of consequences.

LIMITED LIEN PRIORITY FOR COMMUNITY ASSOCIATION ASSESSMENTS

CAI supports a six-month priority lien over the first mortgage for regularly paid assessments and modification of any laws restricting lending institutions from making loans which are subject to the community association assessment lien priority.

This is just simple greed. In the case of some hapless homeowner who is being foreclosed on the CAI would like authority to "butt in and go to the front of the line".

RULES DEVELOPMENT AND ENFORCEMENT

CAI supports legally sound, fair and equitable rules development and enforcement procedures in community associations.

Again, because this issue drives right to the heart of my position I will quote the entire CAI policy statement.

Community Associations Institute (CAI) supports legally sound, fair and equitable rules development and enforcement procedures in community associations, according to the following principles:

1) All rules and regulations should be based upon proper legal authority as contained in applicable legislation, court precedent and the governing documents of the community.

2) Rules and regulations should be adopted solely to serve legitimate needs of the community, taking into consideration the personal and property interests of the homeowners.

3) Homeowners should be afforded the opportunity to review and comment upon proposed rules and regulations prior to their adoption by the governing body and duly adopted rules and regulations should be regularly communicated in writing to members and residents.

4) The community's enforcement process should make adequate accommodation for due process requirements.

5) The governing body should enforce all rules and regulations in a consistent, even-handed manner with common sense and compassion

Background

The community association form of housing results in unique legal and social inter-dependence among property owners and residents. The characteristics of shared property ownership and mutual governing responsibilities create the need for rules and regulations dealing with both property rights and standards of personal conduct. The long-term operation and social success of a community association is heavily dependent upon a rules-making and rules-enforcement process which operates in the best interest of the community, enjoys the consent and support of community members and ensures fair and consistent treatment of all members. The rules enforcement process, as with governments, must be open in all respects and the rules process must be soundly based on legal authority and legal principles and practices as guided both by statute and court decisions.

As I stated in the main body of the paper, this is what really insures the ultimate abandonment for this type of housing. The entire premise of this is fraudulent in that it fails to take basic human behavior into account. It is, in fact the very embodiment of "The Fatal Flaw". It speaks to "due process requirements". How could that ever possibly be fulfilled when the appellate body is the same one that passed judgment in the first place? You have to understand; the CID industry doesn't really care about the homeowner at all. It doesn't have to. Since "membership" is mandatory and the money is guaranteed, if a personal relationship is destroyed along the way, who cares. If somebody moves because of the BOD's actions, what does it matter? There will always be somebody there to pick up the tab. How could you question the CAI's desire for "homeowner involvement" as stated in a previous policy when they offer to afford the homeowner the opportunity to "review and comment" on the rules, iterated in point 3. How magnanimous of them. Imagine, the actual owners of the property being able to comment on and review the rules. The entire tone of this simply drips with hubris.

In 1992, before I even knew what an HOA was, Oliver Stone made a biographical movie about the life of Jimmy Hoffa. At one point in the movie, Jimmy Hoffa (Jack Nicholson) is speaking to Bobby Ciaro (Danny DeVito) after his losing a run for office in the local union. Bobby Ciaro is upset with Hoffa because he didn't challenge the

outcome of the election by confronting the winner, one of Hoffa's associates. This was Hoffa's reply:

*"If a guy's close to you, you can't slight 'im. You can't slight that guy. A real grievance can be resolved; differences can be resolved. But an imaginary hurt, a slight - that mother***** gonna hate you 'til the day he dies."*

The whole world seems to understand this. Why can't the CAI?

Appendix C - Definitions

According to Law.com here is the definition for an adhesion contract:

n. (Contract of adhesion) a contract (often a signed form) so imbalanced in favor of one party over the other that there is a strong implication it was not freely bargained. Example: a rich landlord dealing with a poor tenant who has no choice and must accept all terms of a lease, no matter how restrictive or burdensome, since the tenant cannot afford to move. An adhesion contract can give the little guy the opportunity to claim in court that the contract with the big shot is invalid. This doctrine should be used and applied more often, but the same big guy-little guy inequity may apply in the ability to afford a trial or find and pay a resourceful lawyer.

Also, as I stated in the paper, the recording of the CC&Rs is deemed by the law to be sufficient notification. In other words, it is conceivable that you could own a property in a CID and never even be aware of it, but still be bound to its covenants.

Article 7 Section 12. Association Easement states:

*Declarant hereby grants an easement in favor of the Association for inspection of the *Units, Common Elements, and Limited Common Elements in order to verify the performance by Unit Owners of all items of maintenance and repair for which they are responsible, for inspection, maintenance and repair of the Common Elements and the Limited Common Elements as may be required under this Declaration and the Bylaws, and for correction of emergency conditions in the Units, Common Elements, or Limited Common Elements.*

*Definition of Unit in the Declaration:

"Unit. Any portion of a residential structure situated upon the Property and designed and intended for use and occupancy by a single family, as that term is defined in the Concord Township Zoning Code."