Common Interest Communities:  
Private Government and the Public Interest Revisited 

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Twenty-five years ago, Stanley Scott asked of the common interest homeowners' association—"Will 'Private Government' Serve the Public Interest?" (1967). Scott argued that large developments with mandatory homeowners' associations might pose certain dangers to a democratic society. They would be socially divisive, increasing segregation by income and housing status. They would be undemocratic, allowing real estate developers undue influence over the community and disenfranchising renters. And they would give priority to private interests, cut the connection between residents and local government, and reduce concern with broader public interests. He called for a slow-down in the use of this means of development while better alternatives were developed.

At the time Scott wrote, there were only a few hundred such associations. Today there are an estimated 150,000. It is undoubtedly too late to slow down the creation of these communities, but surely we have enough experience to evaluate his warning and to discuss potential reforms in the structure and use of the common interest homeowners association. In doing so we will draw particularly on the California Common Interest Development Study (Barton and Silverman 1987).
DO COMMON INTEREST DEVELOPMENTS LEAD TO A MORE RIGID AND DIVIDED SOCIETY?

Scott's first set of concerns were with the effect of the common interest development on the structure of society. The developments he focused on were large, encompassing entire neighborhoods, and were sold to middle- and upper-income homeowners. They typically provided extensive private infrastructure and services, such as guarded entrances, which enhanced their exclusivity.

There is certainly reason to remain concerned about creation of such separate societies. Particularly with the cutbacks in local government's fiscal capacity over the past decade, large new upper-income developments may provide their residents with services, including roads, street lighting, parks, and playgrounds that are simply not available to the residents of older sections of a developing county. In recent hearings before the California legislature, concern was expressed over the development of a "two-tier" society in growing rural counties.

But while creation of large-scale new communities continues, the trend is toward greater numbers of smaller common interest developments. The 1987 California Common Interest Development Study reported a median size of 34 units for developments built in the 1980s, compared to a median of 72 units for those built prior to 1976. The typical common interest development in California today is composed of 34 townhouses occupying all or part of a block in an already developed suburban setting. Its common facilities are typically a small amount of shared green space, a private driveway and guest parking area, and perhaps a pool. The median resale price was $125,000 in 1987, close to the median home price for the state of California at that time. Residents of these developments reflect the racial diversity of the neighborhood in which they live and typically include a minority of renters with lower incomes than those of the resident owners.

While most common interest developments are not large and exclusive, they can contribute to exclusion in another way. The land uses in these developments are set not only by local government general plans and zoning ordinances, but by conditions, covenants, and restrictions that are incorporated into the definition of the property of each homeowner. Where large numbers of low-density, single-family developments have such CC&Rs, this has the potential effect of freezing land uses in place in perpetuity and inhibiting the future growth and development of urban areas.

As the economy and population of a metropolitan area develops, densities gradually increase. People add second units to their homes, and detached homes are replaced by low-rise apartment buildings. This is typically considered a form of urban blight by real estate analysts, whose predecessors developed the early common interest communities precisely to prevent neighborhood change and avoid such a fate. But one person's blight may be another person's home.

The effect of large areas filled with covenanted developments is likely to be quite different from the effect of a mere handful of protected neighborhoods. Such a form of development, in suburban areas with increasing amounts of employment, can prevent increases in housing supply near jobs. As a result, housing prices and rents will increase due to a shortage of housing affordable to ordinary workers. The result can be substantial hardships for renters and new home buyers, although there are financial rewards for the older homeowners whose property increases in value.

The normal political power of homeowners is sufficient to greatly slow development that changes the character of existing neighborhoods. This is entirely appropriate, since rapid change can be psychologically very difficult for people to deal with. Nonetheless, the political system should be able to balance the human costs of in-fill development and the environmental costs of growth pressures that are redirected to the urban fringe and be able to change land uses to higher densities that make efficient use of massive public investments in rail transit. The result of widespread use of private covenants may be to make it impossible to adapt. States may find that they need to override certain covenants legislatively in the public interest.

Finally, even the lower-priced, higher-density developments that are affordable to working class and lower-middle-income buyers bring new problems for those buyers. Traditionally, many such homeowners make substantial use of their own labor and skills in fixing up their homes as well as in adding to their home as children are added to the family. Such flexibility and use of "sweat equity" are not permissible in many common interest developments.

To start with, owners can not change their houses at will—the association has architectural controls and in most townhouse and apartment developments the building structure is common property, requiring permission from all owners in order to make changes. More-
over, the association decides when to make repairs, hires contractors to make them, and decides how they will be paid for. Volunteer labor is sometimes used for unskilled tasks such as road repair, play area construction, and painting, but the association board of directors is legally responsible to all the owners for the quality of the work done.

Traditional homeownership allows the owner whose income is reduced or expenses increased by illness, unemployment, new children, or retirement to defer maintenance and improvements. A major purpose of common interest homeowners' associations is precisely to ensure a uniform standard of maintenance. This may benefit the majority by helping keep up property values in the neighborhood, but at the cost of hardship to homeowners in difficulty. The effect is worsened by the reduced scope for do-it-yourself work by the homeowner.

The governing board of directors of a typical small association manages an annual budget of over $50,000, negotiates with a variety of contractors, and enforces detailed regulations concerning the use of common and individual property without the assistance of a paid professional manager. Thus the association substitutes management for maintenance as the type of skill needed among the homeowners. All of this suggests that the idea of privatizing public housing will prove far more difficult than the simple slogans of homeownership for low-income people might suggest.

ARE COMMON INTEREST DEVELOPMENTS UNDEMOCRATIC?

In the early stages of a common interest development the most powerful influence is the developer. The developer decides on and attaches the conditions, covenants, and restrictions to the property. These covenants establish the association and provide its "constitution." The association normally remains under developer control until 75 percent of the homes are sold. Even after control has formally passed to the owners the developer may continue to exercise disproportionate influence. In a system with one vote for each home, the developer will hold a block of votes until all units are sold. In addition, developer control may be supported by employees or professionals whose services were compensated with ownership of a unit, rather than entirely in cash. And developers may vote the proxies of investor owners who buy units to rent out and then retain the developer to provide management services. In some cases the developer has remained in control of or been represented on an association's board for many years.

Developers of course have a major interest in protecting their investment in the new development while they are selling it, but may also wish to maintain influence in the association in order to keep ongoing costs and monthly assessments low while they sell their remaining units and to prevent litigation over construction defects. Homeowners' associations report widespread problems with construction defects and with monthly assessments that were initially set too low to maintain the property in order to make units more attractive to new buyers. In the California Common Interest Development Study, 24 percent of board presidents reported litigation or threats of litigation over construction defects. Associations with a developer on the board of directors, however, were less likely to have a preventive maintenance plan or to have studied reserve needs, were less likely to report construction defects or excessively low assessments, and were far less likely to have taken legal action against the developer.

Typically the association's constitution makes it very difficult to change rules established while the association is under developer control. Rule changes will typically require agreement of more than a majority, often two-thirds or three-quarters of the property owners. Thus even the failure to vote counts as opposition to any proposed action, making it particularly difficult to make changes in associations with absentee owners as well as those with developer-owned units.

With voting rights in the association based on property ownership, residents who rent are disenfranchised. Only 21 percent of California common interest developments reported being entirely owner-occupied. The median association reported 20 percent of the units occupied by renters, while in 14 percent of associations a majority of the units are rented (Barton and Silverman 1987). As a result, homeowners who expected an association of their peers may find a peculiar situation, in which residents who rent are not members of the association and cannot vote, while owners who do not live in the development are members of the association and can vote. Investors who own more than one unit have more than one vote.

With renters kept outside the association they are less likely to follow its rules. Indeed, renters are generally not directly responsible for rule violations, rather the property owner is responsible to the association and the renter is responsible to the property owner. The absentee owners are typically less interested in the association than resident owners and are
less likely to participate in it or even to vote. The upshot is a serious loss of human resources for the association.

Most industry professionals and government officials we interviewed felt that it was entirely appropriate that developers exercised control over the "constitution" of the association and that voting was based on property ownership. In their view owners in common interest developments are partners and investors in a business that owns and manages real property. These investors have freely chosen to buy in such developments and should take responsibility for their choice.

Each of these views is only a partial truth. In order to have a genuine choice people must also understand what they are choosing. Yet even real estate agents who sell this kind of property often have a poor grasp of the special nature of the common interest development and its owners' association. A survey of homebuyers found that misinformation and lack of understanding were widespread among buyers in common interest developments (Silverman, Barton, Hillmer, and Ramos 1989). Moreover, in some areas very little is available that is not in such a development.

Resident homeowners have both investment interests and use interests in their homes and in the development, while when units are rented these interests are split, with the owner having only an investment interest and the tenant having the interest in the actual use of the home. As a result, absentee owners are likely to oppose changes that increase the quality of life but that cost more than the corresponding increase in the value of the property.

An appropriate recognition of the dual nature of the interests in the common interest development would be to give two votes to each unit, one for the residents and one for the owner, with both being voted by resident owners. An alternative approach used by some associations is to forbid or limit renting out homes in the development. This approach diminishes the pool of rental housing at a time when fewer people are able to buy and is dangerous to the investment value of the home purchase because it forces people to sell if they have to move, even if the market for homes is currently weak.

Finally, common interest homeowners' associations have rule enforcement powers that are commonly exercised in ways that are offensive to normal conceptions of due process of law and the separation of powers. The association board of directors passes rules, prosecutes violators, and then judges the guilt or innocence of the people involved. A few associations use the more appropriate means of employing third-party arbitrators to hold hearings on rule violations. Government assistance is needed to establish such an arbitration system, since few arbitrators are familiar with the specialized problems of common interest developments.

**DO COMMON INTEREST HOMEOWNERS ASSOCIATIONS STRENGTHEN OR WEAKEN CITIZEN INVOLVEMENT?**

On the surface, common interest homeowners' associations represent a flowering of local participation. With 150,000 associations nationwide and an average board of directors of five people, there are 750,000 volunteers serving on the governing boards of these associations and a total membership of as many as 20,000,000 people. There are about 100,000 board members in 20,000 associations in the state of California alone. At least one political scientist has argued that such associations are more durable, better at mobilizing resources and thus preferable to voluntary neighborhood associations (Rich 1980).

But the nature of involvement in an "involuntary association" is different from that of the voluntary association in important ways. To start with, the associations' governing board exists to maintain the association and provide services to the homeowners. It is an inward-looking form of organization, unlike the voluntary association, which is primarily concerned with mobilizing neighbors to influence the local government that is the primary provider of local services. The associations we have studied generally avoided taking stands on electoral issues outside the development on the grounds that this was the prerogative of the individual member. They feared that conflict over outside issues would weaken the association. Government affairs committees were rare, usually composed of a single individual who wanted to be involved in local issues. Association activism was limited to zoning and permit issues with immediate impact on the development itself. Mandatory membership seems to depoliticize the association.

In certain areas, however, entire cities or unincorporated areas are composed of common interest developments. This is particularly true in certain parts of southern California, with cities such as Irvine. In such cities, local government usually has regular and formal ties with the homeowners' associations. In addition, common interest homeowners' associations in unincorporated areas have taken the lead in working to incorporate as cities, in order to gain control over public services and land-use decisions in neighboring areas. Most of the small number of elected officials who come out of common interest homeowners'
associations in California come from cities in which virtually every neighborhood is a common interest development (Boyer-Stewart 1991).

Some have argued that homeowners' associations do encourage participation, but only of a sort that builds on their inward-turning and exclusionary nature. Mike Davis, in his history of Los Angeles, has argued that homeowners' associations played an important role in exclusionary use of environmentalism to prevent construction of rental housing, to try to keep out minorities, and to lower taxes (Davis 1990).

Scott was concerned that common interest developments that provided their own services would break the connection between citizens and local government. Especially with limits on local property tax revenues, common interest developments have been used by local governments as a way to require residents of new developments to pay for some of their own services while still paying local taxes. Residents in such developments have an incentive to oppose taxation that supports public services that they already provide and pay for themselves, however.

"Double taxation" is a frequent concern within publications aimed at common interest homeowners' associations and their managers, and in New England a large number of associations did begin a campaign to get tax credits for the services they provided. We know that mandatory homeowners' associations played an important role in the antitax movement that helped pass Proposition 13, the California property tax limit, in 1977 (Lo 1990). Unfortunately, public opinion surveys do not ask about membership in mandatory homeowners' associations, so we have no clear evidence about the influence that membership in such associations actually has on voting on tax and bond issues.

Finally, the transfer of responsibilities from local government to the homeowners' association creates important problems for the membership. The processes of representative democracy insulate neighbors from many direct conflicts. In most cities, neighbors who disagree with each other on a proposed second story addition or the necessity of street repair confront a third party such as a planning commission or a city council. In common interest developments these neighbors confront other neighbors. The board of directors is seen not as trustees of the public interest, but as neighbors with unfair powers over others, and the mixture of political and personal conflict can poison neighbor relations.

Similarly, in local government the use of a professional police force and a staff of inspectors to enforce building, health, and fire codes helps insulate neighbors from direct confrontation over local regulations. But in many common interest developments the board of directors of the association takes on the task of enforcing association rules. People whose cars are ticketed or towed for parking in the wrong place sometimes react with great hostility, including threats of violence, against what they see as the abuse of power by a neighbor rather than as the necessary enforcement of association rules.

Social scientists commonly argue that skills in participation, knowledge of the democratic process, and concern for the public interest are learned in America's many types of association memberships. One must wonder what is actually learned in an association based on property ownership rather than residence or citizenship. They are, however, one of the most widespread and rapidly growing types of associations in the United States and an integral part of the housing available to its citizens.

CONCLUSIONS

Common interest developments are intricately intertwined with local, state, and larger quasi-governmental bodies. As we have said above, many associations would not have been formed, save for local government requirements. Local communities require developers to use the common interest form since it permits the infrastructure to be privately owned and maintained and thus reduces municipal costs. Associations' legal status and quasi-governmental powers are established and increasingly regulated by state government. Finally, secondary mortgage market lending restrictions affect the ability of people to sell their units and the subsequent quality of life in the association.

The growth in common interest developments is transforming the urban and suburban landscape, not just physically but also politically, yet the consequences have not been sufficiently recognized. When these larger issues are considered, as was the case in special state assembly hearings in California in 1989, the dominant impulse is to write such developments off as private—and not properly a subject for government concern. Yet, as we have argued, the common interest development is shaped by local governments through their land-use powers, and the state that regulates their governing structures. Inattention now has long-term consequences in the future as common interest developments comprise ever increasing percentages of residences in the United States.
REFERENCES


III. The Public Regulation of a Private Government