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**"Homeowner Association Private
Governments in the American
Political System"**

Evan McKenzie

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**HOMEOWNER ASSOCIATION PRIVATE GOVERNMENTS
IN THE AMERICAN POLITICAL SYSTEM**

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ABSTRACT

This is a review and analysis of public policy approaches in the United States regarding the proliferation and activities of common interest housing developments (CIDs) and their residential private governments, known as "homeowner associations," or "HOAs".

I begin by setting out basic introductory information on CID housing and the particular policy challenges it presents.¹ These challenges fall, not always neatly, in two categories which I call "micropolitics" and "macropolitics." The former category included issues pertaining primarily to the internal workings of CIDs and their residential private governments, such as concerns about due process, free speech, and dispute resolution. The latter category includes issues arising from the interaction between CIDs and the rest of society, including local, state, and national government. Of particular importance in that regard is the evolving, and apparently permanent, role of CIDs in the intergovernmental system of many metropolitan areas as yet another form of "special district." In effect, CIDs privatize government functions and services and place them in the hands of untrained, unpaid, amateurs, aided and advised by paid professionals such as property managers and lawyers.

Next, I describe CID policies adopted by the Federal Housing Administration and the states of California, New Jersey and Florida. I try to present an overview and survey that reflects the diversity of approaches in different regions and at different levels of government. I also try to set forth the political context which has begun to shape these policy approaches, emphasizing the growth of CID related interest groups whose agenda has become very influential.

I then consider these existing policies in light of some CID policy approaches suggested by a number of analysts, primarily social scientists, from the early 1960s to the present. These suggested approaches provide a historical perspective and a context within which to critically evaluate current practice. I take the position that current policy approaches do not address certain fundamental issues presented by CID housing--issues which were raised nearly thirty years ago.

¹I have treated this subject at greater length in Evan McKenzie, *Privatopia: Homeowner Associations and the Rise of Residential Private Government* (New Haven: Yale University Press, 1994).

THE RISE OF COMMON INTEREST HOUSING

In rapidly growing urban and suburban areas across America, and particularly on the east and west coasts, the last three decades have witnessed explosive growth of a particular form of housing known as "common interest developments," or "CIDs." CID housing, consisting primarily of condominium complexes and planned unit developments² (or "PUDs", comprised of single family homes, row or townhouses, or cluster subdivisions), has become increasingly the norm in new housing construction in urban and suburban California, Florida, Texas, Maryland, Virginia, New York, and elsewhere since the early 1970s. In the 50 largest metropolitan areas, 50% or more of new home sales are in CIDs. (Dowden 1989) Officials of the Community Associations Institute, the leading trade association involved in the growing CID industry, estimate that about 80% of the new homes built in the Washington, D.C., metropolitan area are in CIDs. The director of CAI's Washington chapter (which has 750 associations as members) said in 1992 that, "There's probably nowhere in Northern Virginia today that you'd find a new single-family home that is not in a homeowners association." (Fehr 1992)

Although CID housing has been available in America since the middle of the nineteenth century,³ it is estimated that as late as the early 1960s there were only a few hundred CIDs,

²It is estimated that 51% of all CIDs are PUDs, 42% are condominiums, and 7% are housing cooperatives, or "co-ops." PUDs are clearly on the rise, while the other forms are diminishing relatively speaking. In 1975, the PUD share was only 17%, while the condominium and co-op shares were 61% and 22% respectively. In short, the post-1975 boom has been heavily oriented toward construction of planned communities of single-family homes. (Community Associations Institute 1993, 13)

³CID housing has a long history which I recount in *Privatopia*. It has a heritage in utopian thought, particularly that of Ebenezer Howard, the Englishman whose *Garden Cities of Tomorrow*, first published in 1898, had a great deal of influence on the planning profession in Europe and the United States. Howard advocated the construction of entirely new, master-planned, self-sufficient cities on undeveloped agricultural land as a way to peacefully reform society. He considered the unplanned, industrial cities he saw around him--London, particularly--to be hopeless abominations that would die out once the Garden City idea became widespread.

primarily in luxury subdivisions for the rich. However, in the early 1960s big builders, aided by the Federal Housing Administration, began to extend this type of ownership to housing for the middle class, and thereafter the growth rate accelerated. By 1970, there were about 10,000 CIDs; there were 20,000 in 1975; 130,000 in 1990; and, in 1993, there were some 150,000 homeowner associations (HOAs) in the nation, with annual operating expenses totalling \$17 billion, and housing 32 million people, or nearly one-eighth of the American population. In 1990, nearly 12 million of the nation's 102 million housing units (11.38%) were in HOAs. (Community Associations Institute 1993)

In CID housing, residents share ownership of residential property (hence the term "common interest") through a private, non-profit homeowner association which enforces a set of restrictive covenants regulating life and property use within the development. CIDs are constructed by large-scale real estate developers who have the capital and expertise to master plan and build hundreds, or even tens of thousands, of homes at a time.

The homeowner associations, which function as private governments in CID housing developments, carry out privatized local government functions for their members. Working through elected boards of directors, they manage and maintain commonly owned amenities such as recreation centers and parks, arrange for delivery of services such as street maintenance, trash collection, and police protection, tax their members to pay for the services they provide, and enforce deed restrictions that regulate conduct and property usage within the development (Dilger 1992, 20-23).

These functions "are in effect private government equivalents of (1) proprietary activities of government, (2) land use controls, (3) taxation, and (4) the police power." (Hagman and Juergensmeyer 1986, 521)

Homeowner associations as used in this context are usually non-profit mutual benefit corporations set up by real estate developers during the planning of the development. All purchasers of CID housing automatically become members of the association, cannot withdraw from membership except by selling their unit, and, by virtue of taking their deeds of purchase, are bound by sets of developer-drafted deed restrictions, generally known as "covenants, conditions, and restrictions," or just "CC&Rs," which limit the owner in his or her use of the property. Association members annually elect from among their number a board of directors that enforces the CC&Rs throughout the project and manages the association's funds, raised in the form of monthly and special assessments from the members. The board of directors generally retains a professional "property manager" who carries out most of the functions of running the development. This structure is a privatized version of the council-manager form of municipal government, empowered through legal principles of contract and property rights, and it was originally developed by a team of Progressive Era political scientists for Radburn, a CID built in New Jersey in 1928.⁴ The Radburn model of government became the model for post-World War Two CIDs and has not been significantly modified since. (McKenzie 1994)

However, despite these similarities to cities, HOAs are generally viewed by the courts as private, voluntary associations, and no more subject to constitutional restrictions than the Kiwanis Club. Consequently, their boards of directors are able to carry out traditional local government functions free of the normal limitations. This leads to problems of micropolitics including a relatively high level of conflict between boards and residents. In one study, 44% of board members

⁴Among the distinguished political scientists who designed Radburn's private government were Louis Brownlow, who lived at Radburn and was a member of its board of trustees, Richard Childs, the leading exponent of council-manager government, and Luther Gulick. Their efforts were coordinated by Charles S. Ascher, who was to become chair of the political science at Brooklyn College and a founder of the Maxwell School of Public Administration at Syracuse University. (McKenzie 1994)

reported being threatened with lawsuit, harassed, or personally attacked at meetings within the preceding year. (Barton and Silverman 1987) Newspaper stories about seemingly authoritarian and intrusive CID activities are legion, including prohibitions on flying the flag, delivering newspapers, parking pickup trucks in the driveway, kissing outside the front door, using one's own back door too much, building fences, painting the exterior certain colors, having pets, working from one's home, marrying people below a certain age, and even having children. (McKenzie 1994)

While press accounts typically blame overzealous board members for these draconian measures, it should be kept in mind that the restrictions are typically written by the developer, not the residents, are recorded with the original deeds to the properties before any lots are sold, and cannot be changed without "supermajority" vote of, typically, 75% of all owners. Moreover, lawyers and property managers typically advise boards to practice strict covenant enforcement procedures. The result, for all practical purposes, is that the developer's original plan controls life in the project forever. (McKenzie 1994)

The reasons for the sudden spread of CIDs since the early 1960s relate directly to the policy challenges they present in the area of macropolitics. First, the real estate industry has become increasingly dominated by big, corporate, "community builders" capable of building in this scale and thereby realizing larger profits. Historically, the rise of big, master planned, developments has paralleled the "rise of the community builders" within the real estate industry. These large corporations are conducting land planning, and, to a large extent, deciding how our cities and suburbs will be laid out. (Weiss 1987) To some, this privatization of the land planning process represents an abdication of what should be, in large part, a public responsibility. For example, it is argued that post war land planning was guided too much by the calculus of private profit and has had unfortunate consequences for the natural and man-made landscape, as well as American culture

and politics. (Kunstler 1993)

Second, by the early 1960s the post WWII housing boom had begun to exhaust the supply of suburban land, causing an increase in the cost of land as a percentage of total housing cost. This threatened to make home ownership unaffordable for the middle class. Moreover, cities were becoming concerned about sprawl and the loss of open space, and there was talk of "down zoning," or prohibiting more residential construction, to combat these problems. This led the building industry to search for alternatives to the "big lot" suburban home that preserved some of its essential characteristics. The Urban Land Institute and other organizations resurrected the planning ideas used in luxury CIDs built before World War Two, and coupled these ideas with the inexpensive construction methods developed after the war. The result was CID housing for the middle class. The idea was sold to the Federal Housing Administration, which began to promote the concept. In short, CIDs became a way of increasing density, or squeezing more people on less land, while preserving some of the feel of a suburban single family home. (Urban Land Institute 1961, 1964, 1978; Federal Housing Administration 1964).

Third, CID housing offers the middle class the promise of an escape from the perceived ills of cities to a greater degree than does the ordinary post-war suburb. CIDs may have such amenities as private streets, parks, swimming pools, golf courses, tennis courts, lakes, trash collection, leaf and snow removal, and elaborate security measures including gates, walls, private police, and video camera systems--all built by the developer, funded through the private assessments CID owners pay to their homeowner association, and maintained by the association. This capability to give the CID dweller a higher level of public services than what is available to the general public, coupled with the legal ability to exclude the public from using the facilities, makes CID life attractive to many people.

Fourth, the well-documented decline in local government fiscal capability since the mid-1970s gives cities and counties a powerful incentive to allow CID construction rather than traditional single family housing. Middle class tax revolts, declining federal assistance, and increased mobility of capital threaten the revenue base of local government. At the same time, rising demands for and costs of services, coupled with federal and state burden shifting and "unfunded mandates," increase the pressure on these shriveling resources. Because CIDs include elements of privately constructed, owned, and maintained infrastructure, they offer local governments a tempting opportunity to acquire more property tax payers without having to incur the governmental costs normally attendant upon granting building permits. At times, this *quid pro quo* logic--i.e., "we'll give you a permit if you build the following things..."--has led to what many builders consider virtual extortion, and tests the limits of the law. (Hagman and Juergensmeyer 1986, 202-213) For example, local governments have been known to require builders to construct public schools and freeway ramps as a condition of receiving permits. (Santos 1989)⁵

For all these reasons, CIDs are now coming into their own as, apparently, a permanent part of the intergovernmental system. (Dilger 1993) ACIR locates them squarely within the trend toward an "ever-growing intergovernmental family," calling them "part of a growing phenomenon in American society; namely, the proliferation of organizations that lie within the border regions between the public and private sectors." (Advisory Commission on Intergovernmental Relations 1989, ii) We can view CIDs as a sort of residential special district, making them one more ingredient in the privatization "alphabet soup" that now includes business improvement districts (BIDs), downtown improvement districts (DIDs), special improvement districts (SIDs), and special

⁵It should be noted that the June 24, 1994, United States Supreme Court decision in *Dolan v. City of Tigard* may make it more difficult for cities to engage in this practice.

assessment districts (SADs). All these acronyms reflect various forms of private government made up of property owners who are dissatisfied with the level of services they receive from their municipal government, and who wish to "maintain the value of their properties and their business...by improving local public services beyond what the city can provide." (Pack 1992)

Consequently, now "local governments have a substantial economic stake in the success of [CIDs]" and are taking a generally accepting attitude toward them. (Dilger 1993, 158) However, there are no reliable data on the actual savings to local government. The ACIR report concluded that "very little is actually known about the extent to which [CIDs] substitute private for public expenditures." Nonetheless, the report found that

In all probability, [CIDs] account for the most significant privatization of local government responsibilities in recent times, as measured by the amount of expenditure relief given to the public sector for capital investment and operations. (Advisory Commission on Intergovernmental Relations 1989, 18)

CURRENT POLICY DIRECTIONS AT THE FEDERAL, STATE, AND LOCAL LEVELS

While CIDs moved from being a form of specialty housing, available only to rich people wishing to live in splendid isolation, to the norm in housing construction throughout most rapidly growing areas in America, a set of what might be called CID policies evolved at various levels of government. The most important of these was that of the Federal Housing Administration. The states have a variety of approaches, depending upon the nature and extent of CID housing within their borders and the level of interest group activity, and a few local governments have been so heavily impacted by CID construction that they have county-level agencies in place.

As a matter of terminology, Theodore Lowi's policy typology offers a convenient and analytically familiar way of categorizing the various policies. In Lowi's framework, *distributive*, or promotional, policy awards benefits, subsidies, insurance, or other reward for behavior the government wishes to encourage. It works through individual behavior and the likelihood of coercion is remote. *Regulative*, or regulatory, policy also tries to influence individual behavior, but does so by applying some form of direct coercion, or sanction, for behavior the government wishes to discourage, through administrative agencies or even the criminal courts. *Redistributive* policy works through changing the environment of conduct rather than individual behavior directly, by means such as the system of taxation and the Federal Reserve's influence over interest rates. *Constituent* policy changes the environment of conduct by changing the structure of government itself, such as by creating a new agency. (Lowi 1972)

As will be seen, there are examples of all four types of policy to be found in the ways governments have responded to the rise of CID housing. It is impossible in a paper of this length to fully set forth the complex legal and political relationship between a particular government and CIDs. But it is possible to sketch the broad contours of the policy approach taken by that government, and the political dynamics which support that approach.

Federal Policy: The Federal Housing Administration

Federal Housing Administration policy regarding CIDs has been overwhelmingly promotional for decades. FHA policy has elements of regulation as well, and recently the Federal Trade Commission has adopted a regulatory posture regarding the leading CID trade association and interest group, the Community Associations Institute. Still, on the whole the federal policy approach regarding CIDs can only be characterized as essentially promotional.

Shortly after its founding in 1935, the FHA, which issues mortgage insurance and can thereby influence building industry practices, began promoting the use of restrictive covenants, including racial restrictive covenants, to create neighborhoods populated by people of the same race and class.⁶ (Federal Housing Administration 1938)

FHA acquired the belief that homogeneous neighborhoods, enforced by homeowner associations through restrictive covenants, were good for property values through the heavy influence of the real estate industry over the agency from its inception. (Abrams 1971; Jackson 1985; see also Weiss 1987) The National Association of Real Estate Boards maintained a "code of ethics" that discouraged selling houses in white neighborhoods to racial or ethnic minorities, enforceable by loss of license, and published a textbook (Atkinson and Frailey 1947) which fully expounded what Charles Abrams called the "racist gospel" of the real estate profession. (Abrams 1971)

As early as 1947, encouraged by the building industry, FHA was explicitly promoting the use of homeowner associations to enforce regimes of restrictive covenants in the stated interest of maintaining property values (Federal Housing Administration 1947).⁷ However, CIDs remained a small segment of the housing stock from the end of World War Two, when the housing boom began, until the early 1960s, because suburban land was in ready and inexpensive supply during those years. It was not until builders became concerned about rising land costs, and local governments saw open space vanishing, that ULI began to promote CIDs anew, and then FHA was

⁶The relevant 1938 *Underwriting Manual* sections are 934, 937, 973, 980[3], and 1032.

⁷The relevant section in the 1947 *Underwriting Manual* is 1365[4]. In *Privatopia* I discuss the close relationship between large-scale builders, particularly the Urban Land Institute and the National Association of Home Builders, and the Federal Housing Administration, and try to show the remarkable degree to which ULI and NAHB have been able to influence FHA policy. To the same effect, see Abrams 1971, Weiss 1987, and Jackson 1985, as well as Scott 1967, discussed below.

quick to respond with a new and ringing endorsement of CID housing. FHA approved condominium housing for federal mortgage insurance in 1960, and approved PUDs for insurance in 1964. (Federal Housing Administration 1964)

Since at least 1964, if not earlier, FHA's policy regarding CID housing has been unabashedly promotional, including co-publishing the first press run of the Urban Land Institute's *Homes Association Handbook* in 1964. This massive work, which is intended to tell a builder all he or she would need to know in order to build a CID that will receive FHA mortgage insurance, was written under the supervision of Byron R. Hanke, chief of FHA's Land Planning Division, who was on leave from the agency for two years and assigned to ULI to complete the work. (McKenzie 1994) The handbook includes a set of recommended restrictive covenants and other documents and advice needed to set up a CID and a homeowner association.

FHA still issues recommended organizing documents for CIDs, including articles of incorporation, bylaws, and sets of deed restrictions. One set is intended for condominiums and the other is for PUDs (Federal Housing Administration 1973a, 1973b. Both were issued in 1973, and have had some updating since then, but they are hopelessly outdated in light of current building practices,⁸ and a wholesale revision of these documents is now underway. (Curry 1994)

The most dramatic examples of federal promotional policy regarding CIDs were two episodes of new community construction. One featured the national government as community builder and the other as insurer of private new town builders. In the first, the Depression-era Resettlement Administration, under the leadership of Rexford Tugwell, built three "Greenbelt Towns," which were planned communities on the model of Radburn, New Jersey. (Arnold 1971)

⁸The secondary mortgage market has also had considerable influence over the standardization of CID regimes and governing documents, and their approach is similarly in need of revision in light of current industry practices and the many obvious problems with the existing approach. (Kleine 1992)

In the second episode, from the early 1960s through the mid-1970s, private developers planned and built many large "new towns," thirteen of which were supported with federal loan guarantees and other assistance. (Clapp 1971) Many of these were financial disasters. Of the thirteen new towns that received federal assistance, twelve ran out of money, most within two or three years of signing the project agreement. The New Communities Program ended up costing the federal government \$561 million, of which \$445 million represented repayment of defaulted loan payments. (Department of Housing and Urban Development 1984)⁹

Recently, another federal agency became involved with the booming CID industry in a regulatory role. In June, 1994, the Federal Trade Commission issued a complaint against the Community Associations Institute, charging CAI with being a "combination" or "conspiracy" to restrain trade and competition in the provision of homeowner association management services. The complaint was resolved with a consent order requiring CAI to "cease and desist" from the particular activities involved and with other conditions, including a five-year period of federal monitoring. (Federal Trade Commission 1994)

This FTC action was an indication that the federal government may at some point take an interest in regulatory activity regarding CIDs. Along the same lines, in the summer of 1993, there were reports that Senator John Glenn's Committee on Governmental Affairs would conduct public hearings on homeowner associations which would take a comprehensive look at the subject, including testimony from the industry, homeowners, and academic experts. These hearings could have been an opportunity to develop coherent federal policy on the subject, and, given the jurisdiction of Glenn's committee, would undoubtedly have addressed the role of CIDs in the

⁹Rather than abandon the CID concept, community builders from the mid-1970s on took a different lesson from the new town experience, and decided simply to build smaller CIDs, or to build them in phases, thereby incurring smaller front-end expenditures and less financial risk. (Weiss and Watts 1989)

intergovernmental system. However, the hearings never took place, allegedly because of the press of other matters. (Twomey 1994)

In short, FHA's breathless enthusiasm for CIDs in the 1960s set in motion promotional policies which clearly were important in the rise of CID housing. (Community Associations Institute 1993) However, what has been lacking to date is a meaningful and objective inquiry into the consequences for urban and suburban America of this promotion.

State Policies: California, New Jersey, and Florida

Despite the efforts of the National Conference of Commissioners on Uniform State Laws, which has been promoting uniform codes on CID housing since 1977 (National Conference of Commissioners on Uniform State Laws 1982), there is enormous variation from state to state in CID policy. Many states have few CIDs and, in truth, no real purposeful or directed policy at all. Others have been heavily impacted and have responded in different ways. I have selected three states--California, New Jersey, and Florida--because all three have been heavily impacted by the rise of CID housing, and each has reacted differently. They illustrate important and varying approaches.

1. California: Ad Hoc Regulatory Policy

California has been virtually inundated with a wave of CID construction during the last two decades. It is currently estimated that there are at least 25,000 CIDs in California, housing an estimated one-sixth of the states thirty million people. (Community Associations Institute 1993) The impact has been heaviest in the counties of the San Francisco Bay Area and in the Southern California coastal counties ranging from Ventura County through Los Angeles, Orange, and San

Diego counties and down to the Mexican border. In these two sets of counties, between 40% and 80% of the new housing built in recent years is in CIDs. (Construction Industry Research Board 1993)

Both builder preferences and extraordinary government fiscal problems contributed to this phenomenon. In 1978 the voters passed Proposition 13, the property tax-slashing initiative that radically reduced local governments' main revenue source. This created critical budget shortages for local government, and state efforts to make up the difference helped to exhaust the state's budget surplus by the early 1980s. (Sears and Citrin 1985) Preparation of the annual state budget has now become annual and nationally-publicized embarrassment, involving brinkmanship between the governor and legislature, cutbacks in essential services, and issuing of "I.O.U.s" to pay state employees. In this nightmare environment of perpetually impending insolvency, cities and counties found CID housing particularly attractive as a way of inducing developers to construct parks, schools, roads, and other facilities that government can no longer afford to build. (Stewart 1991)¹⁰

Clearly, this rapid rise of CID housing in California has had a number of important impacts on society, politics, and government, and the state has made some significant efforts to respond. At the same time, the industries and professions affected by these changes have organized to shape public policy. The configuration of CID related interests, and interest groups, in California is similar to that in other states with a substantial amount of CID housing, including New Jersey and Florida.

Three kinds of interest groups seem to be involved in CID-related issues in California. The first, which I call "regulars," are substantial organizations whose activities are not limited to CID-

¹⁰As noted above, this approach to building infrastructure is now facing possible extinction as the United States Supreme Court responds to entreaties from the building industry to stop or severely limit the practice.

related issues but whose interests are often directly or indirectly affected by legislation and judicial action on CID issues. These groups include the California Trial Lawyers Association, the California Association of Realtors, the California Mortgage Bankers Association, the California Land Title Association, the Building Industry Association, and others. Because of their day-to-day legislative clout, these groups are important players when CID issues impact their interests.

The second group, which I call "specialists," are groups which have come into existence as a result of the rise of CID housing, generally due to the proliferation of specialty professions, and subspecialties within existing professions, serving CIDs and their boards. These groups include the Community Associations Institute (CAI), a national organization with several California chapters and a California Legislative Action Committee (CAI-CLAC); the Executive Council of Homeowners (ECHO), based in San Jose; the Council of Condominium and Homeowner Associations (COCHA); the California Association of Community Managers (CCAM), a group representing property managers who specialize in CID management, and others. These groups are important players because of their specialized knowledge of the arcane and complex legal issues arising from CID housing, and because they often make the unsubstantiated but potent claim that they represent a vast constituency of millions of CID owners. CAI and ECHO have paid lobbyists at work constantly in the legislature.

The third group I call "outsiders," because these groups claim to represent only individual CID owners, who, they argue, are unrepresented by the "specialist" groups. The outsiders often contend that groups such as CAI have been taken over by professionals (lawyers, property managers, landscapers, accountants, etc.) who make their livings from CIDs through an unholy alliance with CID boards of directors. Outsiders tend to see individual CID owners as hapless victims of their boards of directors and the attorneys and managers who advise them. Such

"outsider" groups would include the American Homeowners Association (AHA) located in Orange County, and others. Outsider groups are largely devoid of influence, although their existence is widely known. They operate primarily through angry telephone calls to legislative staff members and newspaper reporters, and distribution of photocopied flyers making dramatic claims about the allegedly pernicious activities of board, lawyers, and the legislature. (Inman 1993)

The outsiders' claim that owners are unrepresented in interest group politics is not without merit. There is, at present, no interest group which can truly claim membership of a significant percentage of California's CID residents. Instead, CAI, ECHO, and other specialist organizations have some associations, meaning directors, as members, and many professionals who serve CIDs, but relatively few individual association residents.

The diverse interest group configuration and the relatively sudden emergence of this type of housing in the state contribute to a fragmented policy approach. While the approach taken by the state of California is best characterized as regulatory, it is a sort of *ad hoc*, stop and go, back and forth regulation which has sputtered and lurched between the courts and the legislature.

Although the Department of Real Estate regulates builders during the construction and sale phase, there is no state regulatory agency body to oversee the activities of CIDs after the units are sold to the public. The state does not require CIDs to register with any agency, and can only estimate how many CIDs and CID residents there are in the state. The volunteer boards of directors operate free of administrative scrutiny, and the property managers who service them (the CID analog of city managers) are not required to be licensed by the state.

Given the lack of administrative oversight, a sort of "regulation by lawsuit" has evolved. Disputes arise between residents and boards, boards and developers, boards and property managers, associations and municipalities, or some other set of participants in CID living. Many of these

disputes--over the association's finances, rule enforcement, or other activities-- become civil lawsuits, and because of the newness of the issues and the lack of clear legislative or administrative guidance, appellate judges sometimes make rulings on matters of law which amount to judicial policy making. Then, if CID interest groups see the issue as one of sufficient importance, they seek legislation. For example, if they are dissatisfied with the ruling, they petition the legislature to change the law. In short, to the extent that the legislature has made CID policy, it has generally been as a result of interest group activity, which, in turn, often was generated because of a judicial decision.

Some examples of this approach include the following:

-In 1973, the Second District Court of Appeals, in *Friendly Village Community Association v. Silva & Hill Construction Co.* (31 Cal.App.3d 220), ruled that homeowner associations did not have standing to sue a developer for defective construction, holding that the individual owners were the real parties in interest. In response, the legislature enacted Code of Civil Procedure Section 374, giving HOAs standing to sue without joining the individual owners.

-In 1983, the California Supreme Court, in *O'Connor v. Village Green Owners Association* (33 Cal. 3d 790), held homeowners associations could be sued under the Unruh Civil Rights Act for practicing age discrimination, ruling that they were "business establishments" within the meaning of the act. The legislature then enacted Civil Code Section 51.2 exempting senior citizen CID developments from that provision.

-In 1986, the California Supreme Court, in *Frances T. v. Village Green Owners Association* (42 Cal.3d 490)) held that members of a CID boards of directors could be held personally liable in tort under certain circumstances. In the *Frances T.* case, a board had made a resident remove security floodlights, and she was later robbed and raped in her residence. In response to the

Frances T. decision, the legislature enacted Civil Code Section 1365.7, establishing personal tort immunity for CID directors, and exempting them from such suits.

-In 1989, the Second District Court of Appeals decided *Daon Corporation v. Place Homeowners Association*. 207 Cal.App. 3d. The case allowed real estate developers sued by homeowner associations for defective construction to cross-complain against the association for negligent maintenance of the buildings. This decision was overruled in 1993 by Assembly Bill A.B. 3708, drafted and promoted by CAI-affiliated attorneys.

-In 1992, a California appellate court ruled in *Nahrstedt v. Ladeside Village Condominium Association* that associations trying to enforce deed restrictions (in this case, a "no pets" provision) had the burden of proving in each case that they were acting "reasonably," meaning that the offensive conduct actually impaired property values or the other residents' lives. CID interest groups were aghast, feeling that the ruling undermined the enforcement power of CID private governments, and on February 18, 1993, Dan Hauser, chair of the Assembly Housing Committee, introduced A.B. 530 to legislatively overrule the *Nahrstedt* decision if the California Supreme Court fails to do so.

-At the behest of the Community Associations Institute, State Senator Charles Calderon introduced S.B. 2072 on February 25, 1994, to overrule *Ruoff v. Harbor Creek Condominium Association*, an appellate court ruling that allowed people suing homeowner associations for personal injury to reach the insurance policies of individual members if the association's liability coverage was insufficient.

There have been two significant departures from this reactive and piecemeal approach. The first was a the 1985 Common Interest Development Act; the second was a 1992 Assembly Select Committee on Common Interest Subdivisions.

Through the early 1980s, pressure was building for comprehensive legislation regarding the place of CIDs in California law. Court decisions, with their case-by-case, piecemeal approach, were leaving many questions unanswered and sometimes, from the perspective of the CID movement, creating more problems than they solved. This pressure led to creation of a legislative task force which ultimately produced the Davis-Stirling Common Interest Development Act (CIDA), enacted in 1985 and located at Sections 1350, et seq., of the California Civil Code.

The CIDA was the work product of the Assembly Select Committee on Common Interest Subdivisions, which was formed to identify problems with the law of condominiums, planned developments and cooperatives and to suggest changes to correct the problems. (Rosenberry 1985) The CIDA consolidated the law on CIDs and solved a number of technical problems, in effect better integrating CIDs into the existing legal and governmental framework, but did not create a new agency to oversee CID activities.

After the Common Interest Development Act became law in 1985, debate continued in legal and legislative circles about many other issues left unresolved by the Act. Assemblyman Dan Hauser, chair of the Housing Committee and a member of the 1985 Select Committee that drafted the CIDA, headed a new Select Committee on Common Interest Subdivisions convened in 1990.

The committee considered dozens of proposals for new legislation, and could potentially have made sweeping changes in the law governing CIDs. However, the passage of a voter initiative mandated slashing the legislature's budget by 40%, leading to mass layoffs of professional staff, and in the carnage which followed, the select committee was dissolved without producing comprehensive legislation.

Since then, the most significant legislative action was passage in 1993 of an alternative dispute resolution bill which encourages voluntary, non-binding, arbitration of CID rules disputes.

Typical of the California approach, the bill simply ordains ADR into existence, but does not make anybody responsible for administering it. The parties to a dispute are supposed to enter into ADR on their own, somehow, and if a party refuses to participate, and then loses in court, he or she can be ordered by the trial judge to pay the other party's costs. Ironically, ADR will be enforced by the courts whose time it is designed to save.

2. Florida: Constituent and Regulatory Policy

Like California, Florida has a CAI Legislative Action Committee that is powerful and active, and the state also has local organizations of CID owners who become involved in politics. CID interests are well articulated in Florida, and for good reason given the size of the CID housing sector in senior housing, time-share vacation homes, condominiums, and PUDs.

However, California's headless regulation contrasts with Florida, which has a permanent regulatory agency for condominium housing. The Florida Bureau of Condominiums is located within the Division of Florida Land Sales, Condominiums, and Mobile Homes, which is in turn part of the Department of Business Regulation. The bureau was established in 1975 and in 1990 had a staff of about 38 employees. Its activities were intended to involve an educational program for owners, and the bureau distributes pamphlets to that end. However, in 1987 there was a major reallocation of assets toward administering a new law requiring state licensing of all property managers working with associations of more than fifty units or a budget of over \$100,000. The Bureau of Condominiums does not regulate PUDs or co-ops, or indeed any form of CID except condominiums, but the licensing law required the Bureau to handle licensing for all CID property managers. In assuming this burden, "virtually all of the Bureau's educational programs were eliminated." (Knight 1990)

The Bureau and the Division of which it is a part are charged with enforcing the Florida Condominium Act, which is Chapter 718 of the Florida Statutes. This chapter covers the development, construction, sale, lease, ownership, operation, and management of condominiums. In 1982, Florida instituted voluntary binding arbitration of internal condominium disputes involving developers, unit owners, associations, boards of directors, and managers. This arbitration is conducted by Division staff. The Bureau also prosecutes violations of the Condominium Act in administrative courts and state and federal court systems.

The Bureau of Condominiums is funded in large part by collecting fees of \$1.00 per condominium unit from all associations every year, and \$15.00 per unit from the developer at time of original construction. The Bureau's budget for 1990/91 was approximately \$2.7 million. (Knight 1990)

This decision to engage in constituent policy in 1975 and create a permanent agency was in large part an effort to save Florida's condominium industry from collapsing under a wave of bad publicity fed by legislative investigations. Newspapers and magazines were reporting examples of developer fraud, serious construction defects, and mismanagement of associations by volunteer directors and property managers.

The assumption by the state of an obligation to oversee and regulate CIDs was undoubtedly a factor in preventing popular rejection of condominium living. By 1990, Florida had more CIDs than any other state, with 40,000 associations. The precise number of PUD units is unknown, but there were almost one million condominium units in Florida, representing 15% of the state's housing units. (Community Associations Institute 1993)

3. New Jersey: Redistributive Policy

On January 1, 1993, in New Jersey, the CID industry reached a sort of high-water mark by writing into law one of the most fundamental doctrines of redistributive policy in the CID lexicon. This was a major victory for the Community Associations Institute, which brokered the legislation and figured prominently as *amicus curiae* in the litigation over its constitutionality, and a major defeat for the New Jersey League of Municipalities, which strenuously opposed it in the legislature and the courts.

The redistributive issue, which is referred to as the "double taxation" issue, goes to the heart of what role CIDs are to play in the intergovernmental system. CID advocates have long contended that the assessments CID residents pay to their associations are the equivalent of property taxes, because these private assessments go toward the maintenance of services and facilities ordinarily provided by local government. They contend that if they are paying for their own trash removal, for maintenance of their own private streets, and for upkeep on their own park, they should not have to pay through their property tax assessments for the maintenance of services such as public trash removal and street and park maintenance. Paying both the full measure of property tax and common areas assessments is, they feel, unfair. The solution, from their perspective, would be to permit CID residents to deduct some or all of their assessments from their property tax bills. In areas with large numbers of CIDs, this could amount to a serious loss of local government revenues.

The "double taxation" argument does not emphasize the fact that CID residents have access to the public streets and other facilities supported by their taxes and those of non-CID residents, while non-CID residents do not have access to the private facilities supported by CID assessments.

Whatever its difficulties, the double taxation argument has been like a steady drumbeat in CID circles and legislatures across the nation for over a decade. In New Jersey, the proposal,

known as the "Municipal Services Act," was first passed in 1989. It provided that all municipalities in New Jersey had to provide CIDs, which it called "qualified private communities," with the same municipal services¹¹ it provided elsewhere, or reimburse the CID for the cost of the services. The reimbursement was to phase in over a five year period by increments of 20%, reaching full reimbursement by 1995.

This law was challenged in February, 1990, by the League of Municipalities on a variety of constitutional grounds, and was declared unconstitutional by the trial court on November 5, 1990. However, this decision was reversed by a New Jersey appellate court on June 29, 1992.

The League of Municipalities and CAI reached a bargain to end the matter rather than continue litigation, and the bargain was enacted by the legislature. CAI agreed to abandon a claim for retroactive payment of "double taxes" which accrued from 1990 through 1993, and the five year phase-in period started again in 1993 or 1994 (depending upon whether the city was on a calendar or fiscal year budget). The League agreed to drop the litigation and accept the new redistributive policy and the legislature's purpose, which was, the court said, "to relieve condo owners of the burden of paying twice for municipal services."¹² (Carew 1994)

Significantly, the legislature rejected the League's argument that it was fundamentally unfair for cities to be forced to make these tax rebates or provide services, because building permits had been granted for these very CIDs on the explicit understanding that the CIDs, not the cities, would pay for their own services. In short, their building permits were granted on an agreement for self sufficiency that was now being legislatively abrogated. Moreover, the legislature rejected the

¹¹The listed services included snow and leaf removal, garbage collection, street lighting, and recycling.

¹²This is from Justice Shebell's majority opinion in *New Jersey State League of Municipalities v. State of New Jersey* (1992) 257 N.J. Super.509, 517. Elsewhere in the opinion he says "The trial judge...correctly concluded that the Act's purpose was to avoid 'double taxation' of condo owners." (ibid.)

League's argument that the cost to cities would be enormous, and should be precisely determined before passing the legislation. The League claimed the cost would be over \$100 million per year. (Wyman 1992) The League representative who made the request for a full study of the numbers of CIDs in each city in the state and careful calculation of the costs of compliance said the legislators present "looked at me as though I had suggested hanging their mothers." (Carew 1994)

The legislation did not make any state agency responsible for monitoring compliance. Each city in the state is simply obligated to work out an agreement with every CID in its borders. The result is a wide range of unstandardized contractual agreements to repay, provide services, or some combination. Some cities are heavily impacted because they have large numbers of CIDs, while others have none. It is too early to provide an assessment of the consequences of this major redistributive policy.

POLICY RECOMMENDATIONS REGARDING RESIDENTIAL PRIVATE GOVERNMENTS

Despite rapid proliferation and institutionalization of CID housing, the subject of CID policy has received surprisingly little attention from social scientists until very recently. (Dilger 1993) Apart from some outdated FHA publications, the ACIR study, a substantial number of law review articles, and a few state-sponsored surveys, the literature on this subject consists largely of "how-to" industry publications generated by the Urban Land Institute and its offspring, the Community Associations Institute.¹³ To the limited extent that these industry publications consider the policy

¹³The Community Associations Institute was established in 1973 by the Urban Land Institute and the National Association of Home Builders, under the guidance of Byron R. Hanke, who was chief of the Land Planning Division of the Federal Housing Administration from 1945 to 1972. I recount this episode in *Privatopia*, ch. 5.

implications of endlessly replicating CIDs across the country, they regard it as an unqualified good. To date, CID housing has had little treatment by scholars without an economic stake in the outcome.

Yet, a number of serious public policy questions are presented which have been raised repeatedly by the few social scientists who have become involved in this area of research. These issues involve both the micropolitics of life within CIDs and the macropolitics of their impact on the larger society. In closing, it is helpful to consider the policies discussed thus far in the context of this social science research.

At the core of this policy area is a fundamental fact: in building CID housing, developers and local governments in effect collaborate to privatize government functions by dumping the responsibility on the residents--unpaid, untrained, and without institutional support--to run their own mini-cities. What support exists consists of specialized professionals, mainly property managers and lawyers,¹⁴ who make their livings advising CID boards on the complex matters of local governance, and the organizations these professionals control, such as the Community Associations Institute.

To these professionals, problems of governance are merely matters of property management, sound business practice, or litigation. Yet, to many non-board-member residents these governance matters are seen as neighborhood disputes among individuals. This use of private models--the business model adopted by boards of directors and their professional advisors, and the neighborhood model held in the minds of many residents--in the context of what are really public, governmental

¹⁴A more comprehensive listing of the new and burgeoning coterie of CID service specialists would include landscape architects and maintenance contractors, pool cleaning firms, building contractors of every conceivable specialty from roof to foundation repair, and bug and rodent killers, as well as computer bulletin boards, accountants, insurance salespeople, stockbrokers, and banks that specialize in CID services.

functions, results in serious problems in resolving differences. The problems are aggravated by the absence of governmental support for CID boards. Consequently, a high level of conflict prevails in many CIDs, because, "while the CID includes political functions, the membership is ill-prepared to cope with them." (Barton and Silverman 1989, 36)

The first social scientific analysis of CID housing was one of the most perceptive. In the early 1960s, while CIDs still numbered in the hundreds, and at the height of industry and government concern over the rising cost of land and the loss of open space, Stanley Scott, then Assistant Director of the Institute of Governmental Studies at the University of California, Berkeley, published several papers on the rise of CID housing and its relationship with local government. In the most systematic of these papers, he framed his thoughts as a critique of Federal Housing Administration policy regarding CIDs, which he saw as so thoroughly permeated with the views of the Urban Land Institute that he called it the "FHA-ULI homes association policy." (Scott 1967)

Scott criticized the way CID ownership of common property "bypasses the local governments that could appropriately be designated as custodians of such property," and he decried the "policies of exclusiveness" that were "only thinly veiled as efforts to 'maintain high standards,' or 'insure property values,' or provide a 'private community.'" With renters disenfranchised and FHA recommendations against mixing single family homes and apartments in the same development, he anticipated "'institutionalization' of segregated housing patterns." He expressed concern that developers had too much control over homeowner associations, and that the difficulties in making them work effectively and responsibly had been understated. Scott also felt that the emphasis on property values "may obscure other equally important goals," and that ULI and FHA were promoting CIDs "despite their drawbacks...partly because there has been a failure to invent more desirable alternatives." (Scott 1967)

In a memorable and prescient passage, Scott tried to emphasize that the nation's housing policy was at a pivotal point:

Our society has important goals other than the creation of high-quality, upper-class, single-family, amenity-filled neighborhoods whose property values are secure and whose home owners never fail to meet a mortgage instalment--laudable as some of the latter objectives may be. In the next two or three decades residential patterns will be established or rearranged, and many other features of existing and future urban communities determined. The policies under which this is done will influence fundamentally the quality and nature of future urban life. Decisions made during this period will also influence the role, strength, effectiveness and perhaps even the survival of our institutions of *public* local government. (Scott 1967) [emphasis in original]

Scott recommended that homeowner associations be viewed as "a stop-gap alternative that should be employed cautiously until better arrangements can be worked out." In their stead, he suggested the temporary use of special taxing districts to maintain the common open spaces and other facilities, or "an initial period of joint public-developer stewardship," with eventual transition to public ownership. He felt the Advisory Commission on Intergovernmental Relations and other bodies interested in urban policy should examine the matter, and he urged,

Whatever is done, it should be done soon. Meanwhile FHA and the developers, for lack of a superior prototype, are methodically seeding many of the best new urban communities with long-lasting automatic homes associations. (Scott 1967)

A 1987 review of his early work on CID policy found that "the past twenty years has not only largely validated Scott's analysis, but also witnessed the development of new problems." (Barton and Silverman 1987) Nonetheless, Scott's recommendation to undertake comprehensive study of CIDs, and his view that developers should not be allowed to institute permanent private governments, were not heeded, and the spread of CID housing proceeded rapidly, including the new towns assisted by the federal government.

In 1971, the Twentieth Century Fund sponsored a thorough review of the way the new towns were and should be governed. The report this project issued emphasized that "new towns are not the answer to all the urban problems plaguing the nation," and "cannot be regarded as a realistic alternative to either cities or suburbs." However, the report said,

They offer opportunities for experimentation that may ultimately prove of greater benefit to older, entrenched localities that have been either slow or reluctant to innovate and change. In fact, the Task Force points out that new towns should not be considered as separate and apart from existing cities. On the contrary, it points out that new towns take many forms and may well be considered as part of present cities or metropolitan areas. (Twentieth Century Fund 1971)

The study was premised on the idea that developers had paid a great deal of attention to perfecting the physical and financial aspects of new town development but had "neglected the problem of governance." (Twentieth Century Fund 1971, 7). To remedy this defect and also spur innovation for existing cities, the task force recommended that new towns become "laboratories for testing new forms and processes of local self-government." This should involve experimentation with "different and novel means of broadening and strengthening participation by people in planning, developing and governing their urban environment." The new communities "must have

a diverse population and a broad range of economic and social activities." In order to help private community builders accomplish all this, local and state government should make it easier for new towns to be developed, and state governments were urged to "adopt imaginative legislation to assure that new towns realize their full potential for self-government." (Twentieth Century Fund 1971, 8)

Unfortunately, these have not been the guiding principles in CID development, and there is little evidence to suggest that these policy recommendations have been heeded in any jurisdiction.

Perhaps the most dramatic recommendation for the role CIDs might play in the intergovernmental system comes from Robert H. Nelson, an economist with the U.S. Department of the Interior. In 1989, Nelson recommended that existing neighborhoods be encouraged to turn themselves into CIDs and gradually replace municipal governments. CIDs would "become the prevailing mode of social organization for the local community." (Nelson 1989) This proposal amounts to taking privatization as far as it can go and privatizing local government as we know it out of existence.

CONCLUSION

Stanley Scott's concerns about CIDs, expressed in the mid-1960s, are well worth considering today. Scott saw them as socially divisive, leading to racial and class segregation; he felt that they were undemocratic and unfair to residents, and especially to renters; he felt they gave developers too much power; and he thought CID housing emphasized private profit and property values over other, more important community interests. He decried the lack of independent study by government and social scientists of what he knew at the time was a vitally important phenomenon in American urban history. He also felt that the building industry had too much influence over public policy making on the subject.

These were sound observations. Today we can see examples of promotional, regulatory, constituent, and redistributive policy in place, and these represent efforts by government to respond in one way or another to the spread of CID housing. However, there is little evidence that these policy approaches address the more fundamental questions Scott raised. The challenges posed to American cities by the rise of CID housing deserve more comprehensive attention than they have received to date. However, as CID interest groups grow in size and impact, issues related to the micro and macropolitics of this form of privatization may be more likely to receive serious consideration by policy makers and scholars.

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