Common Interest Communities: An Introduction

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THE COMMON INTEREST DEVELOPMENT or community in the United States raises a host of concerns about exclusion, social fabric, control, and governance.[1] It is a permutation and extension of the private covenant relationship between private landowners, designed to ensure (or guard against) certain uses of land with which public land use controls in the form of zoning, land development, and building controls fail to deal. At bottom a private contractual relationship affecting land between a promissor (usually a buyer of an interest in land) and a promissee (usually a seller of an interest in land), the so-called "real" covenant lasts (is enforceable) beyond the lives or ownership interests of the original parties to the covenant, "running with the land" on both the burden and benefit side, with the interests of the land as they are transferred by the original parties to subsequent buyers, devisees, and other transferees. Thus, for example, if A, the owner of a 2-acre parcel, sells 1 acre to B on condition that B build only a single-family residence not to exceed one story or 15 feet in height, colored only some shade of white and only with a red-tile roof, then that is the only use which B can make of that 1-acre parcel unless prevented from doing so by public laws, which may restrict the use even further. Moreover, anyone buying the one-acre parcel so restricted is bound by B's promise, and anyone purchasing A's remaining one-acre parcel may enforce it, even though neither of these parties so promised each other.

A major user of such real covenants is the property developer of large residential communities who wishes to guarantee a certain measure of uniformity (or difference) in the houses that make up its projected residential community. Commonly known as "covenants, con-

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1. See for further recent analysis and criticism, Sheryll D. Cashin, *Privatized Communities and the "Secession of the Successful": Democracy and Fairness Beyond the Gate*, 28 FORDHAM URB. L.J. 1675 (2001); Paula A. Franzese, *Does It Take A Village? Privatization, Patterns of Restrictiveness and the Demise of the Community*, 47 VILL. L. REV. 553 (2002); David L. Callies, Paula A. Franzese & Heidi Kai Guth, Ramapo *Looking Forward: Gated Communities, Covenants, and Concerns*, 35 URB. LAW. 177 (2003).

ditions and restrictions" (CC&Rs), the land developer will append a list of covenants dealing with homeowner assessments, design controls, and use and upkeep of common areas such as private roads, parks, and recreational facilities both to whatever plan or plat of subdivision local government authorities require to be filed as a condition of land development, as well as to the deed to each lot or house sold. Sometime following the selling of the last lot (or the construction of the last home if the developer is building them) the developer transfers the enforcement function to some sort of association of homeowners, thus forming what the ALI *Restatement (Third) of Property: Servitudes* calls a "common interest community."[2] The elected board of directors of that common interest community then sees to the enforcement of the CC&Rs in accordance with the terms and the bylaws of the association. The common interest community closely approximates in many ways a small municipal government as it maintains private streets and parks, provides homeowner security, and collects homeowner assessments for the purpose of financing the aforesaid activities.

Professor Michael Heller examines the theoretical basis for common interest communities in *Common Interest Developments at the Crossroads of Legal Theory*.[3] The intersection, according to Heller, is between the axis of rights allocation and the axis of governance institutions. We have posed here, in other words, a collective action dilemma, or CAD. He places the CID in the context of other methods for solving "blended, intermediate level collective action dilemmas." He points out that liberal commons forms include not only CIDs but also corporations, partnerships, family property, trusts, and co-ownership. Heller sees CIDs as particularly useful as a group resources regime that solves complex problems of property governance—in other words, classic examples of a successful liberal commons.

In her article on *Privatization and Its Discontents*,[4] Professor Paula Franzese describes the parade of horribles that passes for common interest community regulation. Observing first that 50 million of us live in 250,000 covenanted communities (that's nearly 20 percent of the population), Franzese describes the CID or CIC as "government for the nice." Rules go beyond exterior design, extending not only to interiors (piles of magazines are a no-no) but to guest appearance (no flip-flops in the elevators) and even the weight of pets (when allowed at all).

2. RESTATEMENT (THIRD) OF PROPERTY: SERVITUDES § 6.1 (2000).
3. 37 URB. LAW. 329 (2005).
4. 37 URB. LAW. 335 (2005).

Such private regulation—even if technically agreed-to by the homeowner—result in unwarranted intrusion into the lives of residents far beyond what was envisioned in the common law of covenants and servitudes. Franzese points us toward limited state reform of CICs in Nevada, Florida, Arizona, and California as well as suggestions from the ALI *Restatement (Third) of Property: Servitudes*, and relevant analogy to state ethics reform in states like New Jersey, as promising avenues of investigation.

In *Making Common Interest Communities Work: The Next Step*,[5] Professor Susan French draws on her wealth of accumulated experience as reporter for the aforementioned ALI *Restatement: Servitudes* project to suggest further reform of the CIC. French commences by noting that there is an inherent contradiction in the added value that owners in CICs are likely to obtain and what increasingly financially strapped communities require the CIC developer to provide. While the homeowner may well obtain more by pooling assets and sharing resources than she could obtain separately, local government usually forces the CIC developer to assume a greater share of infrastructure/public facility burdens such as streets, parks, water, sewer, and so forth, than those developing outside a CIC.

These and other factors lead French to conclude that CICs are increasingly like private governments, though she is quick to point out that there are significant differences as well. After setting out relevant portions of the 1998 *Restatement* that would help guarantee at least a measure of due process for homeowners plagued with an overzealous regulatory association, French nevertheless observes that most homeowners in CICs are ultimately left to the mercy of courts for redress—a process that is both time-consuming and costly. French suggests state statutory reform providing, inter alia, an alternate venue (to the courts) in settling CIC disputes coupled with a training program for CIC governance, both of which were recommended in 2004 by the California Law Revision Commission, together with the creation of a Common Interest Community Development Bureau to provide more general support to California's 36,000 common interest communities.

Reform of CICs appears to be in the air. At some point, standards more appropriate to public governance of the use of land may in some measure need to be engrafted onto the private running covenant body to forge a new theory of CIC governance. Thus, for example, why should a neighbor be forced to accept a dwelling next door that violates

5. 37 URB. LAW. 359 (2005).

applicable covenants on height, design, color, and lot coverage because an association design committee grants a series of variances as permitted under an "exceptions" paragraph so permitting, and to which all residents of the CIC are signatory? Public land use controls would require demonstration of unique hardship and minimal effect on neighboring property owners. Without such standards, what value are the covenants in the first place?