COLLECTIVE PRIVATE OWNERSHIP OF AMERICAN HOUSING:

A SOCIAL REVOLUTION IN LOCAL GOVERNANCE*

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Abstract

In 1970 only one percent of American housing units were located in a homeowner association, condominium or cooperative – the three main instruments of collective private ownership of housing. By 1998, this figure had risen to 15 percent. In major metropolitan areas, 50 percent of new housing units is being built and sold as part of a collective ownership regime. The rapid spread of collective private ownership of American housing is creating a social revolution in local governance. Private organizations are becoming responsible for collecting garbage, providing security, maintaining common recreation areas and many other collective tasks within the neighborhood area of common property ownership. The private enforcement of covenants takes the place of municipal zoning in regulating the quality of the immediate exterior environment. Private neighborhoods operate under different "constitutional" groundrules than traditional local governments in the public sector. The allocation of voting rights in private associations, for example, is based on property ownership rather than numbers of adult residents. The greater flexibility in governing arrangements of private neighborhoods has many advantages. The paper concludes by suggesting that collective private property rights should be made available to many existing neighborhoods in place of their current zoning controls. It would amount to the "privatization" of zoning.

Key words: Housing, Local Governance, Collective Action, Community Associations, Privatization

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A social revolution is taking place today in the arrangements by which Americans own and manage their housing. The housing model for most of American history was a single unit owned or rented by an individual person or family. If there was a need for collective action among individual home owners, it was met by government. Local governments provided services such as the construction and upkeep of streets, collecting the garbage, maintenance of law and order and many others. Following the introduction of zoning in the United States in 1916, they also regulated interactions among individual properties that could significantly affect the quality of the exterior environment.

Since the 1960s, however, this historic role of local government has increasingly been replaced by the exercise of collective private property rights. At present 15 percent of all Americans are living in a homeowners association, condominium or cooperative, up from one percent in 1970. It is likely that 25 percent of Americans will be living under an arrangement of collective private property rights by 2020.[1] In terms of absolute numbers, collective private ownerships have grown from fewer than 500 community associations in the United States as recently as 1962 to more than 200,000 today. This includes more than 42 million Americans.[2]

In the State of California – always a bellweather for the rest of the nation -- more than 40 percent of existing housing units by the late 1980s were included in a common ownership regime.[3] Across the 50 largest metropolitan areas in the United States today, more than 50 percent of new housing is being built under arrangements for collective property ownership. As law professor Robert Natelson has observed, the several forms of collective private ownership of residential property have "emerged from the legal periphery to become a central feature of modern society."[4]

The operating rules and management of these collective private ownerships differ in significant ways from conventional local governments in the public sector. The assignment of voting rights, for example, is based in most private communities on the extent of ownership of property and excludes renters from a vote. The residents of some private communities are limited to senior citizens, a form of social discrimination that would be impermissible for a local town government. Although it is an area of continuing legal scholarship and evolution of court opinions, private actions typically are regarded in the law in a much different category than governmental acts.

As a result, the transformation of local collective actions from a governmental to a private property status has the potential for significantly altering the basic character of local collective action in the United States. The far reaching consequences, two researchers in the housing field declared, have amounted to a "quiet revolution in the structure of community organization, local government, land-use control, and neighbor relations."[5]

Neighborhood Associations

The two most important legal instruments for collective private ownership of residential property are the homeowners association and the condominium. In a homeowners association, each person owns his or her home individually, often including a private yard. The homeowners association -- which any new entrant into the common neighborhood area is required to join -- is a separate legal entity that holds the streets, parks, recreation facilities, and other "common areas" of the neighborhood. It also enforces the neighborhood covenants with respect to the allowable uses and modifications of the individually owned homes and other buildings. The individual owners of neighborhood

homes are the “shareholders” who collectively control the activities of the homeowners association.

The other main instrument of collective private ownership is the condominium. In a condominium, all the individual owners both have title to their own personal units and, as "tenants in common," automatically share a percentage interest in the "common elements." These common elements can include things like dividing walls, stairways, hallways, roofs, yards, green spaces, and other parts of the project exterior to the individually occupied units.[6] As of 1990, 42 percent of neighborhood associations were under condominium ownership and 51 percent were homeowners associations. Despite the somewhat different legal frameworks, the operating rules and forms of management of homeowners associations and condominiums are generally quite similar.

Most of the remaining collective ownerships in the United States are cooperatives. More likely to be a single building, cooperatives became popular in New York City in the decades after World War II -- one device for avoiding problems that rent control was posing for owners of apartment buildings. A cooperative is the truest form of collective ownership in that the entire property, including the individual housing units, are owned collectively. Individual occupants of apartments have legal entitlements to the use of their units but are not, strictly speaking, the legal owners even of the interior portions. Cooperatives typically exercise the tightest controls over new entrants, often screening proposed buyers for professional background, age and other personal characteristics, financial viability, and other specific concerns of the cooperative members.

The homeowners’ association and the cooperative have a long if modest place until recently in the history of housing in the United States. The legal foundations for

condominium ownership were set in place only in the 1960s. In describing these several forms of ownership, different commentators have grouped them together under terms such as "residential community association," "common interest community," "residential private government," "gated community" and others. In this paper I will refer to all such arrangements for collective private ownership of residential property as a "neighborhood association" -- recognizing that in practice collective ownerships may be as small as a single building or as large as a full-sized city. The average collective private ownership, however, is of neighborhood size, containing about 200 housing units.

Privatizing the Neighborhood

Neighborhood associations typically have the right to control most structural alterations that could affect the exterior quality of the neighborhood environment. One function of the neighborhood association might be described as a private form of zoning -- the exclusion of unwanted uses from the neighborhood. One of the most important tasks of neighborhood associations is to maintain restrictions on the use of property that are designed to maintain the character of the neighborhood, as it attracted residents in the first place. Much like zoning, as law professor James Winokur comments, "concern for segregation of land uses," providing protection from "industrial, commercial and even multi-family residential uses," is a leading motive in private land use agreements.[7]

Yet, most neighborhood associations go well beyond conventional municipal zoning, operating more in the manner of an historic district. Thus, in the typical neighborhood association the residents collectively can control the color of house paint, the location of fences and shrubbery, the parking of vehicles in driveways, the placement of television antennas and receivers, the design of new decks, and in fact virtually any exterior

features of the physical structures of the neighborhood. Some associations require, for example, that garage doors must be kept closed when not in use. In the typical neighborhood association, these matters are controlled by the "conditions, covenants and restrictions" (CC&Rs) to which each resident must agree.

Collective control may extend into various realms of social behavior such as the playing of loud music or the holding of late-night parties. One Florida neighborhood association banned the use of alcoholic beverages in the neighborhood clubhouse and nearby areas. Many associations have restrictions on the ownership of pets, sometimes based on their size and weight. Other aspects of behavior that have been restricted by neighborhood associations include: the use of patio furniture and barbeques, the frequency of toilet flushing, and the type of soap used in dishwashers.

Part of the terms of ownership may be mandatory membership in a recreational unit such as a golf course or tennis facility. Some neighborhood associations also impose restrictions on the transferability of housing units. They may prohibit leasing of a unit to another party; another provision found in some association documents is a neighborhood right-of-first refusal on the sale of an individual unit.

Although regulation of such matters can obviously be intrusive, the rapidly growing numbers of people choosing to live in a neighborhood association shows that many people are willing to sacrifice elements of their personal autonomy for the resulting greater control over the actions of their neighbors. As one person observed, "your neighbor will probably be prevented from rebuilding his '57 Chevy in his front yard, or parking his recreational vehicle for six months at a time." A Southern California professional woman commented that "I thought I'd never live in a planned unit development but then I realized I wanted a

single-family detached home with some control over my neighbors. I looked at one house without a homeowner association. The guy next door built a dog run on the property line. All night long his Dobermans ran back and forth."[8]

Neighborhood associations for senior citizens are common in many parts of the United States; in these associations at least one resident of each housing unit must typically be 55 years or older. Racial discrimination would clearly be illegal privately or publicly but the legal acceptability of other forms of discrimination – whether, for example, it would be possible to create a neighborhood association limited to unmarried adults or to gay people – remains to be determined by courts and legislatures. Church groups now often sponsor private camps and other summer retreats that are limited to believers in the common faith. Perhaps it would be possible to form private neighborhoods for full time residency on a similar model – ranging from neighborhoods of orthodox Jews to Southern Baptists.

The very fact of the high purchase price of housing units in many neighborhood associations inevitably results in consideration discrimination among residents by level of income – a feature that led the former Secretary of Labor, Robert Reich, to criticize private neighborhood associations as the "secession of the successful" from the lives of their less fortunate fellow citizens.[9] Neighborhood associations in this respect, to be sure, largely replicate the longstanding discriminatory impact of municipal zoning exclusions. Both replicate the distributional impact of a system of private property rights. The rich not only live in much better neighborhoods but also eat in fancy French restaurants and drive Mercedes Benzes; the poor eat in McDonalds and drive 10-year old used Fords. This is one of a number of respects in which it is apt to speak of the historical evolution of municipal zoning practice in the United States as the "privatization of zoning."[10]

Most neighborhood associations provide at least some forms of public services. The most common include garbage collection, lawn mowing, street maintenance, snow removal, landscaping, and management of common recreation facilities.* An important function of many neighborhood associations is to protect the personal security of residents through internal patrols, maintaining control over entry points, and other private policing methods. "Gated communities" with restricted entry are estimated to be about 10 percent of all neighborhood associations – a figure that may well rise in the future.[11] Neighborhood associations may also provide services such as bus transportation, child care, nursery schools, health clinics and a community newsletter. The privatization of government functions was a worldwide trend in the 1980s and 1990s but affected the United States less at the federal level. Indeed, over the past quarter century the rise of the private neighborhood association has been the leading form of privatization at any level of government in the United States.

Neighborhood associations pay for their administration and delivery of services by levying assessments on members. There is wide variation but a typical assessment falls in the range of $100 to $300 per month per housing unit. It amounts to a private form of taxation. Total collections of assessments nationwide by neighborhood associations are on the order of $25 billion per year. The levels of assessments and other aspects of the management of neighborhood associations are typically determined by elected boards of directors. There may be various subcommittees such as the architectural review committee that typically oversees enforcement of the neighborhood land use restrictions.

* . Nationally, 69 percent of neighborhood associations provide swimming pools, 46 percent clubhouses or community rooms, 41 percent tennis courts, 28 percent playgrounds, 20 percent parks or natural areas, 17 percent exercise facilities, 16 percent lakes, 4 percent golf

In the normal arrangement, a single vote in a neighborhood association election is assigned to each housing unit, or votes are allocated in proportion to square feet or some other measure of value. Multiple occupants of a single housing unit thus must all share one vote and renters do not have a vote at all. The one-man-one-vote requirement applied by the Supreme Court to local municipal governments does not apply to private neighborhood associations.

The departure from normal democratic practice takes an extreme form in the transitional phase when a private neighborhood is still being developed. In order to protect their investment in the neighborhood, developers normally retain voting control until the construction of the new neighborhood is nearing completion. In a typical arrangement, the developer might retain a majority of the voting shares until the project is 75 percent complete. Thus, the early residents are effectively disenfranchised for a period that may extend for a year or more. By contrast, in a public setting a new adult resident receives full voting rights as soon as he or she moves into a municipality.

Indeed, in a public setting this has caused major economic and social problems in transitional areas where new residents may soon outnumber the older residents, even though it is the older residents who own most of the land and other private property. The new residents may rezone the remaining farms and other vacant land in a developing community to suit their own preferences for low densities or even for open space. The development rights of the vacant land owners are thus effectively confiscated through a municipal zoning action. The social problems of "exclusionary zoning" are closely associated with the workings of such political dynamics in municipal voting on the suburban fringe.[12]

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courses, 4 percent marinas, and 4 percent restaurants.*

The board of directors of a neighborhood association often contracts with a private management firm to administer the affairs of the neighborhood association. Thus, instead of electing a mayor or other one top official to administer the neighborhood functions, the neighborhood picks a private business manager. This person may have no other connection with the neighborhood. Instead of an election, the process of selection more closely resembles competitive bidding – economics here replaces politics. The act of choosing a new private firm to manage the neighborhood association is tantamount to dismissing the entire civil service of a municipal government.

In the commercial retail field, the rise of the shopping center as an important feature in American land use has occurred in about the same timeframe as the emergence of neighborhood associations. Yet, few shopping centers are collectively owned; instead, the individual stores rent their properties from a single owner of the whole shopping center. In concept, residential neighborhoods could operate in a similar fashion. Each occupant of a residential unit might rent his or her unit from a single business owner of the whole neighborhood. Rental agreements could even be as long as 20 or 30 years. In that case, not only the day-to-day administration but all the basic decision making for the neighborhood would be undertaken as a commercial decision by the owner. Collective choice for the neighborhood residents through any form of political process – public or private -- would be abolished altogether.

Yet, most new purchasers of housing have rejected this option. In buying their homes they have opted for common ownership regimes that allow them to maintain the collective control of the neighborhood in their own hands. Rather than tenants of a business owner, they prefer to run their own affairs through a democratic political process, if now

taking place in a newly private setting. It is like a business corporation but the owners of the neighborhood "stock" are the residents of the neighborhood themselves.

The legal terms and operating rules of neighborhood associations are first established before residents move in. After-the-fact creation of a neighborhood association among existing individual owners of housing is usually precluded by the high transactions costs that would be involved. In brand new developments, however, the initial buyers and any subsequent purchasers are required as a condition of their purchase to agree to the common rules of the neighborhood association – to agree to abide by a "private constitution" for the neighborhood, as one might call the founding set of neighborhood association documents. Although John Locke once famously conceived of government as a voluntary compact formed among people previously living in a state of nature, the private neighborhood association is one of the few instances in the real world where any such original contract has ever literally been signed by all the parties.

Various provisions are often included in the rules of neighborhood associations for later amendment in the governing procedures, analogous in some ways to amending the constitution of a sovereign state. Although unanimous agreement might be an ideal, in practice there are bound to be obstinate dissenters and holdouts, some of whom may be pursuing complex bargaining strategies. Thus, a supermajority vote of the unit owners is required in most neighborhood associations for important changes in neighborhood rules. A simple majority may be enough for smaller changes. Neighborhood associations are new enough that the procedures for changing their basic operating rules have not yet been tested very thoroughly or extensively.

Few neighborhood associations have had to address some important transitional issues such as a change in economic circumstance that makes the entire neighborhood much more valuable in a brand new form of land use. The construction of a new subway stop, for example, could double or triple land values in the vicinity. In that case the residents might want to adopt a new constitutional set of agreements for the neighborhood that is better suited to the new land uses that are likely to enter. In concept at least, the private status of the neighborhood association could also permit the members to vote to dissolve their neighborhood association altogether, and for everyone to move away, taking their large profits with them. If a neighborhood were to vote to abolish itself, there would be an issue of the proper voting procedure, exactly how the property in the neighborhood would be sold (house by house, for example, or the whole neighborhood at a time), and how the profits would be divided up (in proportion to square feet, to individualized assessments, or other options).

A New Field of Constitutional Study

The social sciences are often slow to adapt to the real world. The fundamental importance of the corporate form of collective ownership of business property was not acknowledged by many academic economists until long after it had become a central feature of American industry. Indeed, it was not until 1932 that Adolf Berle and Gardiner Means in a much celebrated work captured the full attention of the economics profession, announcing that the rise of the private corporation had transformed the basic relationship in the United States between the ownership of business property and the managerial control over the instruments of production.[13] Even today, much of formal economic analysis is still conducted in a market framework of atomistic firms with individual owners and decision

makers. The analysis of an industry consisting of a small number of large oligopolistic business firms who make management decisions through a complex political process involving stockholders and top executives is ill-suited to most economic methods.

In the ownership of residential property as well, social scientists have been slow to recognize some fundamental changes in American society. They have shown little awareness of the importance of the rise of collective instruments of private residential ownership. To be sure, there is now a considerable body of literature in the law journals that describes the new legal frameworks for collective private ownership of housing and raises issues with respect to possible legal changes and the potential consequences. In 1988 the Advisory Commission on Intergovernmental Relations sought to draw attention to the fundamental implications for future structures of American governance, declaring that the changing patterns of ownership of residential property amounted to "the most significant privatization of local government responsibilities in recent times."[14] Yet, in political science it was not until the 1990s that a small body of literature began to address the rise of the neighborhood association – often finding much to criticize in this development. Among economists the literature today is limited to a few professional articles.

The rise of the neighborhood association can be seen as a fundamental rewriting of the constitutional groundrules for local government in the United States. It is a political experiment today taking place on a grand scale with changed voting rules, altered regulatory regimes, new means of providing local public services and many other institutional innovations. Because of the flexibility afforded by the private status, there is a much wider range of possibilities in local constitutional design than would be available to a governmental entity. Neighborhoods are in concept able to write their constitutions to suit

their particular governmental preferences. A "libertarian" neighborhood, for example, might be one where the constitutional groundrules limit collective controls and the decisions of the local political process to a bare minimum. Other private neighborhoods would be free to experiment with other concepts of collective control and the manner of collective governance. If the 50 American states have been described as the "laboratories of democracy," the potential range of democratic experiment is even much larger still for the many thousands of local constitutions for private neighborhoods in the United States. It is a broad new field of constitutional study.

Early Homeowners Associations

The modern era of collective private ownership of residential property began in London. By the eighteenth century private parks in London sometimes included covenants among the neighboring lot owners, who jointly pledged to support future upkeep and maintenance of the park. These models inspired the first common ownership regime in the United States in Gramercy Park in New York City in 1831.[15] A land developer, Samuel Ruggles, had set aside and fenced in this area for the mutual private enjoyment of the 66 neighboring lot owners. He deeded over Gramercy Park to these owners and named them as the collective trustees.

The first true homeowners association was established to provide for the upkeep of Louisberg Square in Boston. A central common area there had been included when the project was built in 1826 but no special provision had been made for its maintenance. In 1844, the 28 nearby lot owners resolved this problem by signing a mutual agreement to establish the Committee of the Proprietors of Louisberg Square, binding themselves and their successors to keep up the park. This was one of the rare instances in which a

neighborhood association has been formed after-the-fact of separate ownership of individual homes or other properties.

Beginning in the late nineteenth century, housing developers in the United States began building large private communities in greater numbers. In order to protect the character of the community environment, the developers included extensive private covenants attached to the deeds of the initial purchasers, also binding any subsequent owners. However, enforcement of these covenants in many cases depended on some individual willing to shoulder the burden of legal action on his own. It was a typical free rider situation where the collective benefit might be large but the cost to the individual might exceed the individual benefit. As a result, as urban historian David Beito comments, "covenants generally suffered from the lack of an effective enforcement mechanism."[16]

In order to deal with this problem, developers devised the idea of forming a mandatory private association. . In 1914 a leading early American community builder, James Nichols, established the first such association at the Mission Hills development near Kansas City, Missouri. Besides enforcing the covenants, a mandatory association could also provide certain other common services. The Radburn new town in New Jersey, designed in the 1920s by progressive reformers seeking to demonstrate the advantages of comprehensive social and physical planning, included an association whose responsibilities, among others, was to enforce an extensive set of covenants.

The spreading use of covenants and homeowner associations was almost coincident with the rapid adoption of municipal zoning, following its American introduction in New York City in 1916. Both new property right institutions met much the same needs. However, they were initially put in place in neighborhoods in much different ways. A basic

distinction was that zoning was normally established by government fiat and in an after-the-fact manner in many existing neighborhoods. A homeowners association was established by the actions of a developer before the first residents arrived in a new area, and each resident had to agree in advance to accept the neighborhood covenants and other groundrules as a condition of purchase.

One less savory consideration leading some new neighborhoods to rely on private devices was that racially exclusive covenants were legal until 1948. Racial zoning had been declared unconstitutional much earlier in 1917. A policy of racial segregation, maintained by restrictions included in private covenants, was a common feature for large private housing projects in both the north and south in the period between World War I and World War II.

Following World War II, individual home ownership shot upward in the United States. The Urban Land Institute (which had been formed in 1936) and other builder organizations promoted the mechanism of the mandatory homeowner association as a practical way of taking care of green spaces, playgrounds, swimming pools, tennis courts and other common property areas increasingly being included in large developments. During the post-war building boom, the Federal Housing Administration (FHA) actively encouraged builders to make comprehensive use of deed restrictions and demanded that they be tightly enforced -- in part to ensure that FHA would not be called upon to bail out failing developments. FHA provided technical assistance to developers in both designing the physical layout of large projects and establishing a suitable set of neighborhood covenants to protect the neighborhood character. Following the creation of a mortgage guarantee program in the Veterans Administration in 1944, this agency followed similar policies.

Nevertheless, as noted above, it is estimated that fewer than full fledged 500 neighborhood associations existed in the United States in 1962.

It was in the 1960s that the key foundations for the explosive growth of neighborhood associations over the next several decades would be laid. Like most developments in land law, it was not a matter of practice following urban planning theory or any other intellectual constructs. Rather, the key roles were played by practitioners in the real estate industry and career officials in the housing agencies of the federal government. They were simply responding to perceived home builder needs that could be met by improving the legal instruments for ownership of residential property. In 1963, for example, FHA issued technical assistance for homeowners associations in a key document on Planned-Unit Development with a Homes Association. Working collaboratively with FHA, the Urban Land Institute in 1964 published the The Homes Association Handbook, destined in this and subsequent editions to become a bible of neighborhood association creation and operation.[17]

Condominium Ownership

The major legal innovation of the 1960s was the development in the United States of the condominium form of ownership. Although homeowners associations dated back to the nineteenth century, the first condominiums in the United States were in Puerto Rico where a rudimentary condominium law had been enacted in 1951. Puerto Rican developers were influenced by the example of other builders throughout Latin America. Condominium ownership had spread rapidly there, following its introduction in Brazil in 1928. Tracing matters back further, France had a "horizontal property" law as early as 1804. The earliest known antecedents of condominium ownership are found in the Middle Ages in Germany

where "story property" -- the separate ownership of different stories within the same structure – is known to have existed as long ago as the 1100s.[18]

In 1960, however, the condominium concept was still virtually unknown in the continental United States. At the request of Puerto Rican representatives, hearings were held in by the House Subcommittee on Housing of the Committee on Banking and Currency, and by a Senate Committee. Following these hearings, Congress provided in Section 234 of the National Housing Act of 1961 for the Federal Housing Administration (FHA) to make its mortgage insurance available to condominium units. FHA promptly took steps to promote the new ownership instrument, including the publication of a model state condominium statute.[19] By 1967, in most cases based on the FHA model, almost every state had adopted some kind of legislation setting a legal framework for condominium ownership. All these efforts served to generate wide attention within the building industry to the advantages of condominium ownership as a tool of large project development.

By the 1960s and 1970s there were new pressures for greater housing densities, including the still rising demands for home ownership of baby boom families, slowing of highway construction, tighter suburban limits on land use availability, and greater demands in general to limit growth for environmental reasons. Such factors contributed to a new tightness in metropolitan land supplies and rapid escalations in some metropolitan areas of the price of land. Collective ownership allowed for the realization of land economies of scale through higher densities -- including collective provision of parks, green spaces and other common areas -- without having to sacrifice the advantages of ownership of the individually occupied housing units. As Marc Weiss and John Watts observe, neighborhood associations "continued to enforce deed restrictions but their essential purposes increasingly

reflected other priorities: the provision of attractive services and the economical maintenance of common property."[20] As Robert Natelson has explained:

> Through its preservation and community enhancement activities the association offers its members the ... replacement of high contract costs with lower agency costs.... Without an association, the members would have to investivate each of the large number of amenities and services available in modern society, learn enough about each amenity and service to be able to understand its pricing, appraise different services provided by the same supplier (as when a single maintenance person both mows lawns and repairs plumbing), and assess the respective contributions of each participant in a single project. By purchasing a unit in a subdivision governed by a Property Owners Association, the owner receives the entire panoply of services in exchange for one periodic monthly assessment.[21]

In 1970 there were about 10,000 neighborhood associations – still only about 1 percent of U.S. housing units but a sharp increase in absolute number from ten years earlier. At that point, 12 percent of all neighborhood associations were in the condominium form of collective ownership. By 1990, this figure would rise to 42 percent as condominiums increasingly became a familiar feature of the American urban and suburban scene.

Growing Pains

Already by the late 1960s, to be sure, criticisms began to appear that condominiums and other neighborhood associations were exhibiting growing pains. The transition from developer to resident control was often proving troublesome. Many developers, having little familiarity with this new form of ownership, paid insufficient attention to the details of association management. Associations often exhibited difficulties in holding required meetings, keeping adequate records, and enforcing effectively the covenants and other rules. In 1973, a survey of 1,760 condominium residents found that most were satisfied with their overall condominium experience but 61 percent were dissatisfied with aspects of the specific workings of the association management.

In that same year, leaders in the real estate industry joined together to form the Community Association Institute (CAI). Its purpose was to promote the role of collective ownership of residential property and to provide education in methods of establishing and managing neighborhood associations. The CAI over the years has provided models for various aspects of association governance such as procedures for the shifting of control from the developer to the residents as a project nears completion. CAI provides today a wide range of training programs in the management of neighborhood associations.

Another important step was the approval in the mid 1970s by the Federal National Mortgage Association (FNMA) and the Federal Home Loan Mortgage Corporation (FHLMC) of inclusion of condominium and planned unit development loans in the bundling of mortgages in the secondary market. With these and other steps, purchasers of housing units in neighborhood associations now received the same forms of government support that had long been directed to individual home owners.

In the late 1970s the National Conference of Commissioners on Uniform State Laws organized the development of a new set of model laws for collective ownership of private property. With the support also of the American Bar Association, the Commissioners published a model law for condominiums in 1980 and for planned communities in 1981. These model laws offered further guidance to improve the day-to-day functioning of neighborhood associations. For example, full prior disclosure to the purchaser of the details of association land use restrictions and of the size of mandatory assessments was required. Enforcement procedures to ensure compliance of residents with association rules, and prompt payment of assessments, were tightened and improved. The model law

recommended that a 67 percent vote be required to amend the basic working rules for the neighborhood association.

In California, the Davis-Stirling Act in the 1980s set a number of requirements for the management of neighborhood associations.[22] It requires that board meetings be open to residents of the association; budgets must be prepared annually with appropriate financial disclosures; procedures are laid out for use of fines as a means of enforcing payment of assessments; and associations are required to make minutes of meetings available to residents. The California legislation generally seeks to ensure that a fair and reasonable set of procedural standards are met in the management of neighborhood associations.

The housing role of neighborhood associations was advanced by the fiscal crisis of many local governments in the 1970s and 1980s. New financial pressures meant that these governments were less willing to accept added responsibilities for building and maintaining streets, collecting garbage and providing other municipal services. For example, the passage in 1978 of Proposition 13 in California, limiting the ability of local governments to raise property taxes, provided a boost to the use of neighborhood associations in that state. In other states as well, providing services privately through a neighborhood association, and thus relieving part of the fiscal burden of development on a municipality, has often been a condition of approval for large new developments.[23]

In 1988 the Advisory Commission on Intergovernmental Relations (ACIR) stated that "traditionally the intergovernmental system has been thought to include the national government, state governments, and local governments of all kinds." Such thinking now had to be modified, however, to recognize that "the concept of intergovernmental relations should be adapted to contemporary developments so as to take account of territorial

community associations that display many, if not all, of the characteristics of traditional local government." Given the very rapid growth of such associations, by which "private organizations substitute for local government service provision," it would be necessary to devote greater research in the future to this important new instrument of local governance and innovation in the forms of American private property ownership.[24]

Thus, since the mid 1960s, private neighborhoods have become a routine part of land development over much of the United States.[25] By the 1990s, students of neighborhood associations would find that their widespread use was "transforming the urban and suburban landscape, not just physically but also politically."[26] It was the most important form of privatization taking place in the United States in the context of powerful worldwide trends to abolish the legacies of socialist schemes for scientific management and to turn instead to the private sector to meet many basic social needs.

Neighborhood Associations Today

In 1998 the total number of housing units in neighborhood associations reached 16.4 million. California and Florida have the largest numbers of neighborhood associations. The number of condominiums increased by 101 percent in California and 85 percent in Florida from 1980 to 1990. Other states where they are common include New York, New Jersey, Illinois, and Texas. In the suburbs of Washington, D.C., about about a third of the residents in affluent Montgomery County now live in a neighborhood association.[27] According to a survey conducted by the Community Associations Institute, more than 60 percent of all neighborhood associations nationwide are located in suburban areas

The largest single category of housing in neighborhood associations is townhouses. Single family homes in 1990 represented 18 percent of the units. The majority of homes in

neighborhood associations belong to associations that extend beyond individual buildings to include territorial responsibilities of some sort. The typical operating budget of a neighborhood association is $100,000 to $200,000 per year, although 5 percent of those associations belonging to the Community Association Institute (about 10,000) had budgets greater than $1.5 million per year. In order to cover the costs of neighborhood services and other activities, the neighborhood association levies an assessment on each member. The typical fee -- which is mandatory for anyone living in the neighborhood -- is about $100 to $200 per month. A member of the neighborhood association who fails to pay the assessment is subject to fines, a lien on their property, or other enforcement actions.

The management of neighborhoods has engaged the active efforts of hundreds of thousands of people; an estimated 750,000 people nationwide and 100,000 in California alone serve on the boards of directors of private neighborhood associations. The average board member is 48 years old, has served on the board for 2.9 years, and spends 9 hours per month on board activities. The leading reason given by board members for their willingness to serve is to "protect property value." The second leading reason is a sense of neighborhood "civic duty." Forty-two percent of boards delegate the basic management task for the neighborhood association to an outside management company.

Housing units in homeowners' associations have the highest average value, $118,000 per unit, followed by condominiums at $100,300 per unit. An estimated 64 percent of all homes in neighborhood associations of any type are part of a homeowners' association. The total value of residential property in neighborhood associations in the United States is $1.8 trillion.

From Zoning to Private Rights

Four overarching themes characterize this social revolution in American property rights that is rapidly bringing about the privatization of the American neighborhood. First, the privatization of collective controls over the uses of residential property began much earlier in the twentieth century under zoning. Whatever the official rationales, the actual practice of zoning -- following its first American adoption in New York City in 1916 -- anticipated the later formal development and spread of collective private ownership of residential property. Zoning provided a new power to exclude unwanted land uses; in this respect, it amounted to a new de facto collective property right to the neighborhood exterior environment.

History shows that new property rights seldom emerge from whole cloth. The normal course of events is a period of gradual evolution, perhaps followed by a formalization in the law decades (or even centuries) later. The rise of collective private ownership of American residential property took such a course, beginning early in the twentieth century with the establishment of neighborhood zoning controls and only later adopting an explicitly private framework of collective property rights in the law.[28]

Second, the new collective forms of ownership of residential private property are a matter of fundamental importance to American society not only in terms of the history of property rights but also of public finance, city planning, public service provision and other traditional functions of local government. Neighborhood associations are forms of private governance, if usually encompassing a geographic area smaller than the typical municipality. Yet, as described above, neighborhood associations operate under constitutional groundrules that differ in many ways from municipal governments.

Neighborhood associations have a much greater flexibility in institutional design – they are free to engage in much wider local constitutional experiments -- owing to their private status. In principle, they can be more discriminatory about whom they admit, regulate virtually any aspect of neighborhood land use, impose various forms of "private taxes," build gates around their boundaries, sell off the whole neighborhood collectively, close off streets to public use, and take other actions that would often be difficult or impossible for a municipal government. Based on the revealed preferences of millions of Americans in actual housing decisions, many of these Americans in fact desire the constitutional framework for local private government that neighborhood associations are able to provide.

Third, neighborhood associations not only offer a new constitutional flexibility to devise innovative mechanisms of local governance but they create the opportunity as well to promote a strong sense of community that is often missing today in American life. In a mobile society where relations among its members are often impersonal, there is a need for new social institutions that facilitate the coming together of Americans in small communities. While almost any form of collective decision making will be accompanied by significant strains and frictions, many neighborhood associations have succeeded in bringing residents together with a new form of common identity among themselves. Neighborhood associations are a new and important form of "private democracy" at work in American life.

Based on this positive overall assessment, the collective private ownership of residential property perhaps might well be extended to existing inner city, suburban and other neighborhoods where the housing units are at present individually and separately owned. The opportunity to live under the governance structure of a neighborhood association is now effectively limited to neighborhoods that were initially developed as a

single project, and the properties were sold with the structure of the neighborhood association already in place. Where properties historically have been separately owned, it would involve prohibitively large transactions costs to assemble an after-the-fact collective agreement among all the individual owners. Thus, if existing neighborhoods are to be able in the future to achieve new private forms of collective governance, new legislation will be needed to facilitate the process. Such legislation, as proposed below, should establish procedures to allow residents of an existing neighborhood to vote to form a new neighborhood association of their own.

A large literature describes the failings of municipal zoning in denying access to land for moderate income housing in suburban developing areas, promoting haphazard and "leapfrog" patterns of land development, stifling creative mixtures of land uses, frustrating conversion of land to new higher-value forms of development, and other problems. Yet, the core workings of municipal zoning thus far have been resistant to almost all reform efforts. It may be that most past zoning reformers have been working under the wrong premises and have therefore proposed the wrong remedies. They have generally accepted the basic goals and existence of the zoning system, and then sought to improve zoning within this legal and theoretical framework.

Instead, a more radical cure for zoning may be needed. It may be time to move beyond zoning altogether. Although the transition would inevitably be difficult at times, and would have to be accomplished gradually, in the long run municipal zoning in the United States perhaps is best abolished. The existing functions of zoning perhaps instead should be served through private neighborhood associations. The longstanding de facto "privatization of zoning" in its municipal forms could in this manner be explicitly

recognized and formalized. Existing "private" zoning of many years duration would be replaced by the explicitly private legal instrument of the neighborhood association.

A Proposal: A Six-Step Process

In order to make the advantages of neighborhood associations also available to existing neighborhoods, I propose that a new law be enacted in each state to provide a well defined procedure for the establishment of a new neighborhood association.[29] For this purpose, I propose the following six-step process, recognizing that many variations are possible.

1. A group of individual property owners in an existing neighborhood could petition the state to form a neighborhood association. The petition should describe the boundaries of the proposed private neighborhood and the instruments of collective governance intended for it. The petition should state the services expected to be performed by the neighborhood association and an estimate of the monthly assessment required. The petitioning owners should possess cumulatively more than 60 percent of the total value of neighborhood property.

2. The state would then have to certify that the proposed neighborhood met certain standards of reasonableness, including having a contiguous area; boundaries of a regular shape; an appropriate relationship to major streets, streams, valleys and other geographic features; and other considerations. The state would also certify that the proposed private governance instruments of the neighborhood association met state standards.

3. If the application met state requirements, a neighborhood committee would be authorized to negotiate a service transfer agreement with the municipal government in which the neighborhood was located. The agreement would specify the future possible

transfer of ownership of muncipal streets, parks, swimming pools, tennis courts, and other existing public lands and facilities located within the proposed private neighborhood (possibly including some compensation to the city). It would specify the future assumption of garbage collection, snow removal, policing, fire protection, to the degree that the private neighborhood would assume responsibility for such services. The transfer agreement would also specify future tax arrangements, including any property or other tax credits that the members of the new neighborhood association might receive in compensation for assuming existing municipal burdens. Other matters of potential importance to the municipality and the neighborhood would also be addressed. The state government would serve as an overseer and mediator in this negotiation process, and would have ultimate authority to resolve disputes.

4. Once state certification of the neighborhood proposal, and a municipal transfer agreement, had been achieved, a neighborhood election would be called for a future date. The election would occur at least one year after the submission of a complete description of the neighborhood proposal, including the founding documents for the neighborhood association, the municipal transfer agreement, estimates of assessment burdens, a comprehensive appraisal of the values of individual neighborhood properties, and other relevant information. During the one year waiting period, the state would supervise a process to inform property owners and residents of the neighborhood of the details of the proposal and to facilitate public discussion and debate.

5. In the actual election, approval of the creation of a new neighborhood association would require both of the following: (1) an affirmative vote of property owners cumulatively representing 90 percent or more of the total value of the proposed

neighborhood; and (2) an affirmative vote by 75 percent or more of the individual unit owners in the neighborhood. If these conditions were met, all property owners in the neighborhood would be required to join the neighborhood association and would be subject to the full terms and conditions laid out in the neighborhood association founding documents (the "declaration").

6. Following the establishment of a neighborhood association, the municipal government would transfer the legal responsibility for regulating land use in the neighborhood to the members of the neighborhood association, acting through their instruments of collective decision making. Zoning authority within the boundaries of the neighborhood association would thus be eliminated.

Conclusion

The long run trend in the ownership of private property in the United States is away from individual and towards collective forms of ownership. A first large step in this direction was the spread of the corporate form of business ownership in the second half of the nineteenth century. A new ease of transportation, economies of scale in mass production, improved management techniques of business coordination, the rise of nationwide markets, and other economic developments led American business to operate at a whole new scale, and the corporate form of ownership proved to have large financial and other advantages. Although there were few business corporations before the Civil War, by 1900 almost two-thirds of U.S. manufacturing output was produced by firms operating under corporate ownership, a figure that would reach 95 percent in the 1960s.

During the last 40 years of the twentieth century, the ownership of residential property followed along a similar path. Higher densities of development, the desire for

more precise control over neighborhood character, lower-cost private provision of neighborhood services, greater interest in common recreational and other community facilities, and other economic and social forces made collective private ownership of housing the choice of growing numbers of Americans.

In the past 30 years the spread of neighborhood associations has established a widespread system of private regulation of land use and private provision of common services for much of the new housing being built in the United States today. Private governments are increasingly replacing public governments at the local level. If current trends continue for long, the majority of all Americans at some point in the twenty-first century could well be living in a regime of collective private ownership of residential property. Although the word "revolution" is overworked, the beginnings of a true social revolution are apparent today in these developments. The social significant of the new collective ownership of residential property for the twenty-first century will likely be comparable to the social impact that the rise of the corporate form of collective ownership of business property had for the twentieth century.

Endnotes

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[3] Evan McKenzie, Privatopia: Homeowner Associations and the Rise of Residential Private Government (New Haven: Yale University Press, 1994), p. 120.

[4] Robert G. Natelson, "Comments on the Historiography and Condominium: The of Roman Origin," *Oklahoma City Law Review* (Spring 1987), p. 42.

[5]. Steven E. Barton and Carol J. Silverman, "Preface," in Steven E. Barton and Carol J. Silverman, eds., *Common Interest Communities: Private Governments and the Public Interest* (Berkeley, CA: Institute of Governmental Studies Press, University of California at Berkeley, 1994), p. xi.

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[10] Robert H. Nelson, *Zoning and Property Rights: An Analysis of the American System of Land Use Regulation* (Cambridge, MA: MIT Press, 1977).

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[12] See William A. William Fischel, *The Economics of Zoning Laws* (Baltimore, MD: Johns Hopkins University Press, 1985); also William A. Fischel, *Regulatory Takings Law, Economics and Politics* (Cambridge, MA: Harvard University Press, 1995). .

[13] Adolf Berle and Gardiner Means, *The Modern Corporation and Private Property* (1932).

[14]. Advisory Commission on Intergovernmental Relations, *Residential Community Associations* , p. 18.

[15]. This history draws heavily on McKenzie, *Privatopia* , Ch. 2.

[16]. David T. Beito, "The Formation of Urban Infrastructure Through Nongovernmental Planning: The Private Places of St. Louis, 1869-1920," *Journal of Urban History* (May 1990), p. 283.

[17] It might be noted that Byron Hanke, the head of land planning at FHA, was also the principal author of the ULI Handbook.

[18]. See Natelson, "Comments on the Historiography and Condominium," pp. 28-31.

[19]. Id., at 31.

[20]. Marc A. Weiss and John W. Watts, "Community Builders and Community Associations: The Role of Real Estate Developers in Private Residential Governance," in Advisory Commission on Intergovernmental Relations, *Residential Community Associations* .

[21]. Natelson, "Comments on the Historiography and Condominium."

[22]. Curtis Sproul, "The Many Faces of Community Associations Under California Law," in Advisory Commission on Intergovernmental Relations, *Residential Community Associations*, pp. 65-67.

[23]. Dowden, "Community Associations and Local Governments."

[24]. Advisory Commission on Intergovernmental Relations, *Residential Community Associations*, pp. ii, iii.

[25]. McKenzie, *Privatopia*; Robert J. Dilger, *Neighborhood Politics: Residential Community Associations in American Governance* (New York: New York University Press, (1992); Barton and Silverman, eds., *Common Interest Communities*; and Gerald Korngold, *Private Land Use Controls: Balancing Private Initiative and the Public Interest in the Homeowner Association* (Cambridge, MA: Lincoln Institute of Land Policy, 1995).

[26]. Barton and Silverman, *Common Interest Communities*, p. 39.

[27] McKenzie, *Privatopia* , p. 120.

[28] This is a main theme of my previous book, Zoning and Property Rights .

[29] See also George W. Liebmann, "The Devolution of Power to Community and Block Associations," *Urban Lawyer*, no. 25 (1993); and Robert C. Ellickson, "New Institutions for Old Neighborhoods," *Duke Law Journal* , No. g 47 (1998)