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## Gated communities as public entities

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GATED COMMUNITIES AS PUBLIC ENTITIES

By

Dennis W. Stransky

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University of Wyoming  
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## Introduction

*"The significant problems we face cannot be solved at the same level of thinking we were at when we created them." -Albert Einstein*

In 1921, Albert Einstein won a Nobel Prize, "for his services to Theoretical Physics, and especially for his discovery of the law of the photoelectric effect." This discovery introduced the duality of the physical property of light. His work concluded that mathematical measurements of light's behavior could sometimes be made modeling light as a particle and other times as a wave. This caused a great stir in the scientific community since there was no other aspect of the natural world that exhibited dual natures.

Today there is another occurrence that exhibits dual natures - the Common Interest Development (CID)<sup>a</sup>. CIDs, like light, exhibit a duality of character. These characters are those of a public entity and a private corporation. The distinction between these natures is as difficult to distinguish as those of light, if not more so, since light is a more constant entity.

Evan McKenzie, in his book *Privatopia*, describes the jumble of litigation and volumes of court rulings resulting from lawsuits filed in California by homeowners, developers, and others. The result, he says, is "...that CIDs have neither the limitations of a government nor the full potential for civil liability of a business. In their competition with public governments, these mini-governments are the beneficiaries of a double standard."<sup>1</sup>

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<sup>a</sup> *It must be noted here that for the purpose of this writing; the terms and abbreviations for privately held corporations formed around residential communities are meant to be all encompassing and are used in a general sense. Terms such as gated community, private community, homeowner's association, common interest development, incorporated development, and limited liability landscape maintenance corporation are understood to be interchangeable.*

Not only do Gated Communities exist in this dual nature, but there are also an infinite number of variables in their make up. This paper will not attempt to parallel Einstein's work in solving such a paradox but attempts to propose the problems and hopefully entice those so inclined, to attempt solutions.

For the purpose of this writing a distinction is made between "neighborhood associations", "gated communities", "common interest developments", "planned development units", "homeowner's associations", and "private developments". The primary distinction is the official formation of a corporation commonly held by the members, (owners) and the presence of walls and gates separating private, commonly owned property from public property owned by public entities including cities, counties, and states and the federal government.

This distinction is made to separate two groups from those that are the focus of this writing. The first are neighborhood associations formed primarily as political action groups. The focus of these groups is generally to lobby public officials regarding zoning and other land development issues in their neighborhood.

The second are homeowner's associations formed only around covenants, conditions and restrictions to control the behavior of its members and preserve property values. Generally these associations are common only in their proximity to each other. The streets and other property in the vicinity are publicly owned and maintained.

The focus of this writing is residential organizations that are incorporated. These include gated communities and other common interest developments providing jointly owned private properties such as parks, streets, recreation areas and buildings, walls and gates, and other amenities.

## **Abstract**

### GATED COMMUNITIES AS PUBLIC ENTITIES

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Gated Communities as Public Entities identifies these organizations as phenomena of recent land development practices. The topics discussed include the history of private dwelling associations, the makeup of these organizations, and the parallels between them and their larger, public counterparts. Specific areas such as taxes, infrastructure, codes covenants and restrictions, and law enforcement are discussed in detail.

Gated Communities have become a large part of the available housing choices for many homebuyers. Approximately one-third of the homes constructed today are part of private associations created as various forms of private corporations. The laws related to the creation of private corporations vary extensively from state to state. The states of Nevada and California are emphasized but are not necessarily typical. The state legislature in Nevada is now looking over the walls into private communities and they are becoming less and less private.

Social aspects of living behind gates are discussed. There are reasons for secluding ourselves from others, but the most common reason given is security. In other words, fear of our neighbors. Among the social issues related to gated communities are the effects on the children who grow up in them. There is only speculation at this time since the high-density, low-cost, common interest developments that appear to be affecting them are relatively new in concept. McKenzie refers to children in common interest

developments when he says, "...different lessons are being learned and the generations of children are "going to school" on the streets of a new kind of city."

Since this is an early writing on the subject, the results of what has been observed in modern common interest development will only be determined over time.

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### **Dedication**

This work is dedicated to my wife Sharron who has been an advocate of, and an inspiration toward, the pursuit of greater heights.

### **Acknowledgement**

The Public Administration staff of the University of Nevada, Las Vegas has continuously provided enlightening and revealing insights. May they always know that the universe will realize tomorrow what they achieve in the lecture halls today.

## **Methodology**

The information contained in this paper is the result of extensive research, discussions with experts in the field including lawyers, developers, city officials in California and Nevada, homeowner association managers and residents, and personal experience as an engineer for a municipality. References include three books by experts in the field, theoretical writings, periodicals, newspapers, Homeowners associations' Internet web sites, and personal experience. Since the review of literature revealed that scholarly writing to date on the topic of homeowners associations has not been extensive, the topic is more general in scope and should provide a background for other writings on the subject.

Research began with the idea that a survey of members of homeowners' associations and board members would provide a pattern of attitudes and behavior and statistically significant results. In the process of the preliminary work toward this goal and attending local association meetings, it was discovered that there does not appear to be a clear parallel among associations nor consciences among its members as to the purpose and operation of these associations. It was determined that the research would not result in useful conclusions but rather mixed results with no discernible pattern. The general makeup of the associations and the attitudes of its members and leaders are discussed.

The approach was then to study the generalities of these entities and describe them in the contexts of their creation and operation. The parallels of their existence as thousands of private governances within larger governments, their similarities and differences became the focus of study. The results are that, although there appears to be a similarity on the surface, the underlying structure, rules, actions, and behavior of

these entities are dissimilar in as many respects as there are associations.

## Literature Review

Gated Communities and private residential developments are difficult to categorize and therefore research. An extensive search was conducted for scholarly works and texts addressing these entities. The result of this search produced a list of writings addressing their various aspects but generalizing them as some form of private residential developments. Many of the texts read such as Blakely and Snyder and Evan McKenzie contain statements such as “Because scholarly work on gated communities is essentially non-existent,”<sup>2</sup> and “...little research has been done in these types of communities until now.”<sup>3</sup> And “Perhaps one reason more academic writers have not examined the political nature of CID's (Common Interest Developments), is that they are so hard to characterize.”<sup>4</sup> The writer found the same to be true.

Research was begun to define the communities that would be the focus of study. Little information was found that supported distinguishing one private community from another. Since little was found to substantiate the differences between the various forms of private communities, research was conducted to determine whether there was a common ground for discussion and research. The common ground selected and the focus of study is entities that are incorporated under the laws of the state that they exist in.

Blakely and Snyder's in their book *Fortress America, Gated Communities in the United States* were among the first found to make an extensive study of the actual communities that make up Americas “fortresses”. Their research included visiting communities across the country, interviewing their members and reviewing their rules.

This text provided support for a discussion of the similarities and differences between the various types of communities and some attempt to categorize them.

Even McKenzie's PRIVATOPIA, Homeowner Associations and the Rise of Residential Private Government, is the most comprehensive writing found on the subject. McKenzie's research was extensive and many of his citations were reviewed for further information. McKenzie provided additional support in the form of addressing common problems among private communities. This became the tone of subsequent research.

Articles such as Robert H. Nelson's futuristic approach to exclusive community organizations in Pro-choice living arrangements was used to support discussions related to the long-term applications of segregating society. These implications include communities of people all of the same age, profession, sexual orientation, religion or even ethnic origin and how far they will be able to go. He concludes, "It is time to give community associations, digression, within reason, to choose its members." Although the information contained was disconcerting it provided insight into the attitudes of some homeowners. He does however; make a supportive point in that we may be headed in the wrong direction.

John B. Owens' research in the area of gated communities and their legal implications provided direction for research into legal matters between residents and between private communities and the public entities that they exist in. His American Criminal Law Review article, Gated Communities and the Fourth Amendment deals with forth amendment issues and the rights of citizens where private security guards are concerned. No other substantial references in this area were found.

A search for discussions of social issues related to private communities lead to Wendy Plotkin's research of racial issues and her findings in *Deeds of Mistrust: Race, Housing, and Restrictive Covenants in Chicago, 1900-1950*. Since the implications of the discrimination of African Americans in housing discussed here could be applied to other social distinctions, research in each of these other areas was not conducted. For the purpose of this writing, her point is well made.

Andrew Stark's article, *America the Gated?*, provided information related to distinctions between public entities and the gated communities contained within them. He specifically addresses the public and private borders and the implications in American Politics. His discussions about the Hidden Hills suburb in the Los Angeles area and its transformation from a private homeowner's association into a full-fledged city provided a forum for comparing both public and private implications of the same community. The issues range from public control to taxes to IRS concerns.

Although the focus of research is more administrative than social, Richard Louv's article *Childhood's Future: Listening to the American Family*, and his book *America II* provided insight into various aspects of life in America and more specifically, life in gated communities. His insights into the lives of children in common interest developments raise questions that are suggested as topics for further studies.

Research was begun to determine the extent of laws relating specifically to private communities. This search resulted massive amounts of literature, too much to assimilate into this writing. Only selected subjects are included including Dan Johnson's references to the Internet laws in his article *Do-it-yourself governance?* as a form of self-governance. This article although not closely related to the topic, addressed the implications of polycentric law (law arising from a variety of custom and private

processes rather than imposed by a single state authority), and the applications to private communities.

Chris Argyris' writing on the future of organizations was referenced briefly. His pessimistic view of organizations in general applies to the writer's view of common interest development.

The information in this paper stated as fact is referenced to what are believed to be reliable sources. Every attempt was made to give credit where credit is due. Where this was not accomplished, it is not intentional and apologies are offered. Due to the rapid growth of common interest developments, some of the numbers stated may not be current due to the dates of the materials available.

Many of the chapter and incidental quotations were found at:  
<http://startingpage.com/html/quotations.html>. Their references are assumed to be accurate.

Many homeowners' associations have web sites containing copies of their CCRs and other documents. Typical examples are found in Appendices and at:  
<http://www.oakhollowestates.org/aboutohha.htm>; and <http://www.kings-grant.org>

## Chapter One A History Of Common Interest Development

*"Experience should teach us to be most on our guard to protect liberty when the government's purposes are beneficial. The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well meaning but without understanding."-Louis D. Brandeis*

The idea of a city with a common interest population is not new and certainly not unique to the United States. The idea of separating segments of a community dates back to the Greek city-states, the walls around Jerusalem, and the moats around medieval castles. Originally the idea was generally one of protection and defense. The walls and other physical barriers provided actual and perceived security from intrusion by outsiders. The outsiders were simply those on the other side of the wall. They were of another tribe, clan, class or other social distinction. The barriers were seldom perfect in their actual defense but the perception of security was often more important to their being constructed. As we will see, this perception still exists.

Dividing a city was epitomized by the construction of the Berlin Wall in 1958. This politically based separation of the citizens of the same community indicates that there is a tendency by some to use physical barriers to keep in or keep out, like-minded individuals.

In 1898 Ebenezer Howard, a student of Edward Bellamy, became a convert to Bellamy's belief that a perfect society was within "humankind's immediate reach."<sup>5</sup> Bellamy wrote of his novel *Looking Backward*,

*“Looking Backward was written in the belief that the Golden Age lies before us and not behind us, and is not far away. Our children will surely see it, and we, too, who are already men and women, if we deserve it by our faith and by our works.”<sup>6</sup>*

Howard saw the “splendid possibilities of a new civilization based on service to the community and not on self interest...”<sup>7</sup>. Howard’s beliefs and thoughts became the concept of his book “Garden City” that was finally published as *Garden Cities of Tomorrow*.

Howard’s plan for the “Garden City” included physical as well as economic and political ideas. The *garden city* was basically a circular design with the public buildings and a park at the center. The rest of the city was to be constructed in concentric circles around the center with each having a particular function and significance. Outside the center would be shopping followed by houses, schools and then factories, warehouses, and industries and then agriculture. The concept also included the idea that the residents would be renters more than owners.

*The significance of Howard’s plan to this subject is that it included a radical proposal for a constitution that would resemble the charter of a business corporation. The leadership would be an elected group of technicians. This group would possess more power over the renters because it would have the power of a landlord at common law. His concept also included the idea that once established, each garden city would colonize a second and so on.*

Howard’s ideas were first implemented in two cities in England, Welwyn and Letchworth. In the 1920’s his ideas became popular in the United States and are the

heritage of a form of private housing known as common interest developments, (CIDs).<sup>b</sup>

The first gated communities in England were built by the occupying Romans around 300 B.C. Kings Henry I, Richard II, and Charles II resided in the tower of London for protection against rebellious nobles or hostile villagers. London had no police force until the eighteenth century, so it was up to the individuals to provide protection for themselves. The wealthy had more to protect and also the means to provide the protection. The walls and barriers intended for security also became a class distinction.

The Counts of Toulouse, the Capetian kings in Paris, Edward I, King of England and Duke of Aquitaine, created *Bastides* in the provinces of Guyenne and Gascony. These royal bastidors or their agents saw new communities as real estate investments, as ways of strengthening their claims to govern the region in the vicinity of the new towns, and--in a few cases--as military strong-points guarding a frontier.

Although urban reform was thus not the goal of medieval bastide founders, in many respects bastides resembled Howard's ideal towns. Their modest size, surrounding agricultural lands, self-sufficiency, local industry, occupational diversity, and marriage of urban and rural interests all conform to Howard's prescriptions for how city life could be made healthy, comfortable, and attractive.

In early America, the Spanish built fort towns in the Caribbean. The first purely residential gated neighborhoods were not built until the latter half of the nineteenth century. Neighborhoods such as New York's Tuxedo Park and the private streets of St.

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<sup>b</sup> *It must be noted here that for the purpose of this writing the terms and abbreviations for privately held corporations formed around residential communities are meant to be all encompassing and are used in a general sense. Terms such as gated community, private community, homeowner's association, common interest development, incorporated development, and limited liability landscape maintenance corporation are understood to be interchangeable.*

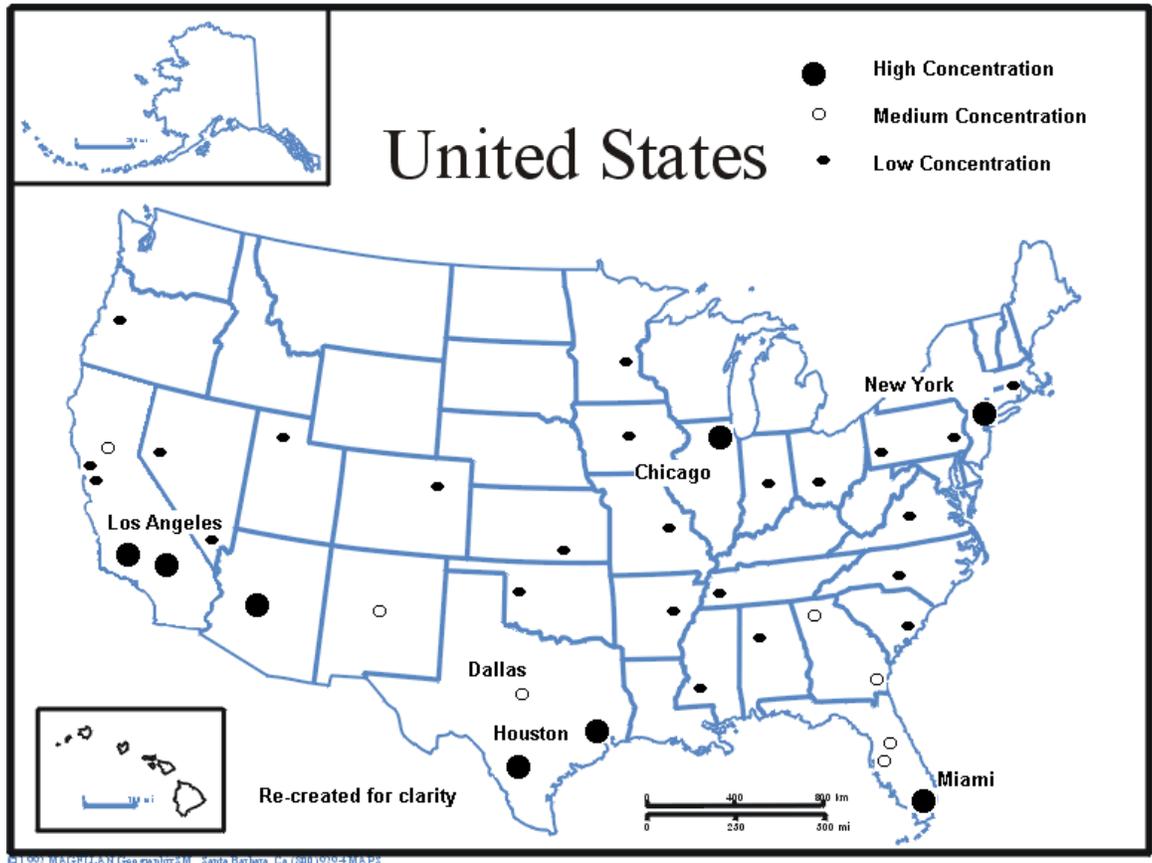
Louis, built by wealthy citizens for protection, were among this group. Later gated communities were built on the East Coast and in Hollywood by aristocracies, for privacy and protection. Blakely and Snyder refer to them as "...uncommon places for uncommon people."<sup>8</sup>

The modern suburb, and more specifically, the common interest development, is very different from the earlier developments in England and the United States. Today it is more primary than secondary as a residential locus. Early in the industrialization of America, land was cheap and open space was plentiful. As early as 1815, a new middle-class was moving out of the central cities. "Brooklyn Heights was a suburb away from Manhattan, as were most of the Bronx, Long Island, and Yonkers. By 1911, three years after the first mass-production of the Ford began, 38 percent of New York's lawyers already lived outside the borough of Manhattan."<sup>9</sup>

As Kenneth Jackson documents, "the flight to the suburbs has been going on for decades, although it has sometimes been masked by aggressive annexation strategies that incorporated suburbs into the city limits".<sup>10</sup> Nowhere is this more evident than in Los Angeles, where the old city names of Hollywood, San Fernando, Pico, Westwood, and Studio City have more civic identity than the city that annexed them.

Modern gated communities became popular in the 1960's and 1970's. Retirement developments like Leisure World were among the first. These *gates* soon spread to resorts and country clubs and then to the middle-class suburbs. In the 1980s there was a trend toward conspicuous consumption, especially in housing. Real estate speculators constructed developments around golf courses for example, that were intended for prestige as well as leisure.

This time period also saw an increase in a preoccupation with violent crime. The developers addressed this fear by providing new communities of single-family homes with walls, gates, guards and other securities. It is interesting to note that these developments are predominantly in the larger; more populated areas and are rare in the Dakotas, Vermont, Wyoming and West Virginia. (See figure 1)



Martha Conway, Institute of Urban and Regional Development, University of California at Berkeley.  
(recreated for clarity)

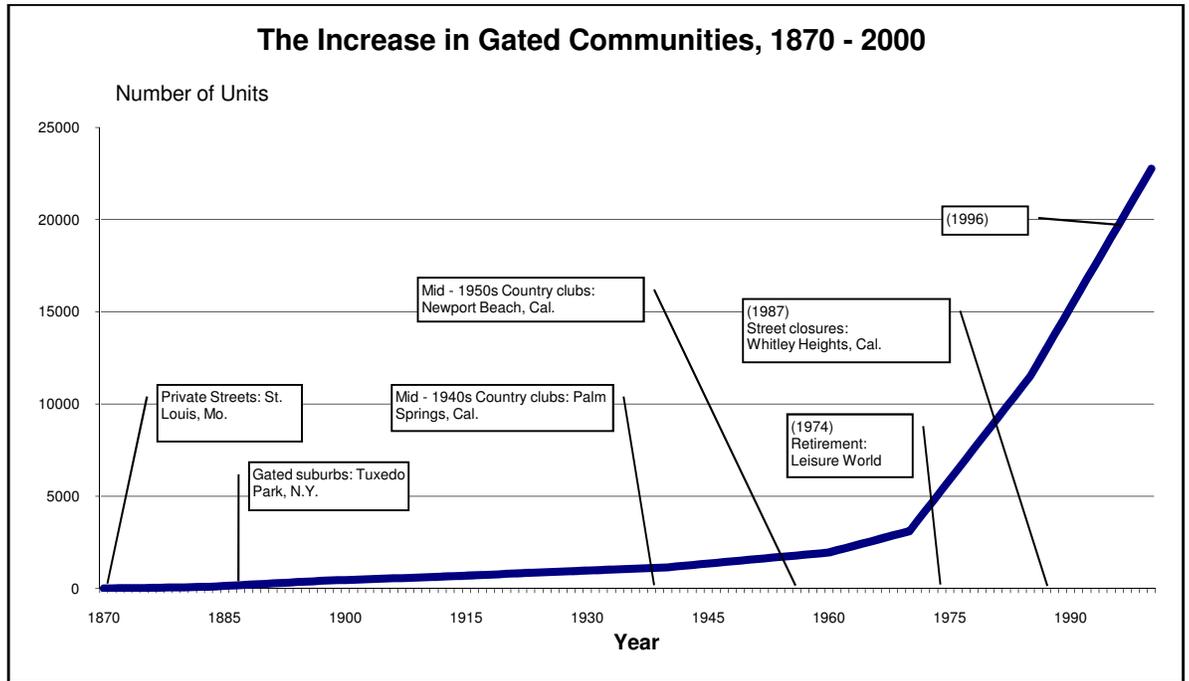
**Figure 1** Gated Community Concentrations

Today there are approximately 30 million Americans, approximately 12 percent of the

population, living in 150,000 gated communities with more than 10 million units. These communities are most popular in Los Angeles, Phoenix, Chicago, Houston, New York and Miami. While early gated communities were once restricted to retirement villages and the compounds of the super rich, today the majority are for the middle to upper-middle class. According to Blakely and Snyder<sup>11</sup>, These communities are of three basic categories: *lifestyle communities*, *prestige communities*, and *security communities*.<sup>c</sup> Blakely and Snyder estimate that "...one-third of the developments built with gates are luxury developments for the upper and upper-middle class, and perhaps another third are retirement oriented. The remainder are mostly for the middle class, although there are a growing number of working class-gated communities." (See figure 2). Gates and security add greatly to the construction and operation of gated communities. In order to provide these amenities to lower income populations, the number of units in the development must be increased. Lower cost developments today consist primarily of Condominiums and high density, (more than 8 units per acre), developments. A leading national real estate developer estimates that eight out of ten new urban projects are gated.<sup>12</sup> In 1998 one-third of the 140 projects in development in Orange County, California were gated, double the proportion just five years earlier.

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<sup>c</sup> McKenzie describes four types as "...condominiums, planned developments, stock cooperatives, and community apartments."



Christine Amado, Institute of Urban and Regional Development, University of California at Berkeley.

(Recreated for clarity)

**Figure 2 The increase in Gated Communities, 1870 - 2000**

## **Chapter Two** An Evolution Of Design (How did we get from there to here?)

*"I believe we have one of the vilest environments in the world today. Nothing in our cities or towns or villages is true to itself."* Frank Lloyd Wright

The original idea and the implications of common interest development were not studied or designed in detail. Unlike other federal government agencies, which seem to go overboard in their investigations and studies, the concept of common interest development was simply endorsed by the Federal Housing Authority (FHA) and local planning agencies. As a result of this lack of investigation, the rapid growth of these developments drew little attention.

There is a significant difference between the founding of cities and towns and the design of today's private communities. In most cases, cities and towns sprung up along trade routes, railroads, and around economic centers such as mining, timber and other natural resources. Some thrived while others did not. Cities and towns are dynamic and have the flexibility to expand and adapt to their environment. The private communities, on the other hand, are static. Few common interest developments will ever have a founder's day parade. They were conceived, designed, and constructed mostly by private interests with the intention of preserving their status forever. There is no room for growth, and change is slow and difficult to implement.

Since private communities are designed and are not evolutionary, they are more subject to the progression of design that affects every invention. This progression can be both positive, as in the case of the personal computer, and negative, as in the case of the auto industry's creation of the Chevrolet Corvair and the Ford Pinto. What began as a means of reliable personal transportation became a safety nightmare.

Designers and visionaries in the late eighteenth century, such as Robert Owens and his French contemporary, Charles Fourier, were among the first to suggest that the place-form could affect human emotions and influence social systems.

*The ideas informing the communal life style—perfectibility, order, brotherhood, merging of mind and body, experimentation, and the community's uniqueness---all represent its intentional quality, with harmony as their principal theme: harmony with nature, harmony among people, and harmony between the spirit and the flesh.<sup>13</sup>*

Later in the nineteenth century, others, such as Fredrick Law Olmsted and Frank Lloyd Wright, created utopian environments around curvilinear streets or cul-de-sacs, building self-contained, separate developments with carefully constructed identities. Frank Lloyd Wright was one of the most influential architects of the suburban form. Blakely and Snyder tell us that: "*Frank Lloyd Wright designed it, Norman Rockwell articulated it, and the movies and television popularized and glamorized it.*"<sup>14</sup>

If the implications of the common interest development are to be understood, it is important to understand its conception and evolution. The architects of the common interest development had specific purposes in mind for its future. Common interest developments did not just happen. The end result, however, in many cases, does not even closely resemble the ideals of the originators.

To understand how things went astray, it is important to understand the design and development process and how the end result can be far from the original concept. Ebenezer Howard, it is believed, would be amazed at the end result of his *Garden City* design.

Any designer, whether an architect, engineer, or artist, will readily admit that seldom does the final product resemble the original intent of the design in every detail. This was never truer than in the design of the common interest community. The first communities that served a purpose other than security were developed around a common interest such as golf, tennis, equestrian interests etc. These communities were designed to provide the wealthy with amenities and conveniences they could not find elsewhere. These amenities were bought, paid for, and maintained by the owners. There was a common interest in these amenities and a sense of community that continued to develop around their use. The owners compared scores; competed with each other in tournaments; shared knowledge and tips; and ate and drank afterwards in their clubhouses and homes. The walls around such developments were intended to protect these amenities from the overuse and abuse of non-owners. The ability to pay was generally the only criteria for joining these groups of owners. Like the occupying Romans in England in 300 B.C., the wealthy had more to protect and also the means to provide the protection. The walls and barriers intended for security also became a class distinction.

With that in mind, one does not have to look far to find the final product of this design in the form of today's high-density, low-priced, gated communities where the only common interest property is a small patch of garden or a play ground. It should be evident that there can be little interest in preserving, nor in developing a sense of community around such insignificant amenities.

The question then is; where did we go wrong? The philosophy of the common interest development is different today by one key factor. The original common interest developments were owner driven. These communities were either privatized after their development or the development was conceived and constructed by a group of

individuals with a preexisting common interest. They had the desire and the money; combined with a preexisting sense of community, to provide themselves with these commonly owned amenities. The important point here is that the community and common interests came first. Frank Lloyd Wright once said of the order of form and function:

*"Form follows function---that has been misunderstood. Form and function should be one, joined in a spiritual union"*

Research has shown that the vast majority of these owner driven developments are viable and functional many years after their construction. The question then is: will the same be true of today's *developer-built* common interest developments? The aspects affecting this outcome will be discussed in greater detail in subsequent chapters.

The common interest developments of today then, differ by one key factor, the market driven developer. The developers of today's common interest developments are not the like-minded owners or the idealistic thinkers like Ebenezer Howard and Frank Lloyd Wright, but the land speculators and the housing developers. These more modern CIDs are conceived, designed, constructed, and then sold to the residents. There is no common bond, sense of common interest, or community prior to or following the construction of the walls and gates. There is no philosophical enlightenment available to explain this phenomenon. The explanation can only be found in the texts and writings of the *bottom-line-thinking* business scholars and economists.

Blakely and Snyder state that:

*"The suburb, sign of middle-class rank and position, has been city-averse from its beginning"*

They go on to say:

*“Suburbs are meant to fulfill a number of aspirations: they should offer close proximity to nature; they should be safe; they should shelter residents from social deviance of every form; they should be clean and friendly; they should keep out or limit anything that varies from their physical form and architecture.”<sup>15</sup>*

As discussed in later chapters, this is not exactly what the end result will be. In the future, the scholars of sociology, archeology, and economics will most likely spend a great deal more time studying the history of high-density, developer driven, common interest development than they spent conceiving and building them. These studies will be geared toward finding out what happened rather than what might have been.

### Chapter Three The Public Laws Of Common Interest Development

*It is important to remember that a [homeowner association] is a business operation, but one without a profit motive.* ---Urban Land Institute/Community Associations Institute, Managing a successful Community Association

In the beginning, common interest development rules were based on common law, also known as polycentric law<sup>d</sup>. Public governments however, were required to rule in cases related to enforcement issues of these *private laws*. There are numerous court decisions in every state that deal with these issues. Many of these cases ended up in state Supreme Courts. One such case involved a ban by the Leisure World Association in California on the delivery of all newspapers except its house publication, the *Leisure World News*<sup>16</sup>. The lines between public law and private law were becoming blurred.

Included in all private CCRs is some provision for enforcement. Without enforcement, rules are useless. This is where many of the problems begin. As any lawyer will attest, the law is not really the law until it has been tested in court. The history of such cases fill volumes. The expense of pursuing and defending such cases can run into the thousands of dollars for even a simple case.

Even in their infancy there were clashes between private and public governances at both the state and federal level. For example, prior to 1948<sup>e</sup> many covenants included restrictions related to race and ethnic background.<sup>f</sup> The statement, “no Blacks or Irish”

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<sup>d</sup> Law arising from a variety of custom and private processes rather than imposed by a single state authority.

<sup>e</sup> U.S. Supreme Court Decision in *Shelley v. Kraemer* (1948)

<sup>f</sup> For more on race restrictions refer to: <http://www.uic.edu/wplotk1/deeds/www/new.html>, containing the Ph.D. dissertation research, "Deeds of Mistrust: Race, Housing, and Restrictive Covenants in Chicago,

(Note continued on next page)

was found but could not be documented. Long and Johnson tell us about 1947 Chicago:

*“The thin strip of land space that is Chicago’s “Black Belt” extends about a mile in width and from 12<sup>th</sup> Street to 67<sup>th</sup> Street on the south, is bound in on three sides by covenants. The east wall of race restrictive agreements begins as far north as 36<sup>th</sup> Street and extends almost continuously to 71<sup>st</sup> Street. Cottage Grove [800 East] is the frontier line of this section of Caucasian-pure neighborhoods.”<sup>17</sup>*

As early as 1938, the federal government supported such thinking as seen in a version of a FHA underwriting manual:

*“982 (1). Adequacy of Civic, Social, and Commercial Centers. These elements of comfortable living usually follow rather than precede development. Those centers serving the city or section in which the development is situated should be readily available to its occupants. Schools should be appropriate to the needs of the new community and they should not be attended in large numbers by inharmonious racial groups. Employment centers, preferably diversified in nature, should be at a convenient distance.”<sup>18</sup>.*”

Plotkin tells us that prior to this, conditions were even worse:

*“Other forms of harassment included actions by neighborhood associations who organized boycotts against realtors who sold or rented to African-Americans.*

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1900-1950" by Wendy Plotkin, Ph.D. Candidate University of Illinois at Chicago, Department of History and  
Appendix A.

*These associations also offered to buy properties from African-Americans in their midst, and aimed antagonistic verbal and written expressions at the African-American community, in meetings, newspapers, threatening letters, and flyers spread throughout the neighborhood. Neighborhood associations were formed and flourished to achieve a variety of purposes from the late 19th century on. Some existing associations in Chicago adopted racial restriction as a goal after an African-American threat was perceived; others were created specifically to address this threat.* <sup>19</sup>

In 1948, the Supreme Court ruled in the case of Shelley v. Kraemer and banned residential discrimination based on race and national origin.

The federal government, in the beginning of the common interest development movement, paid little attention to long-term issues. FHA and HUD officials endorsed them and even participated in their proliferation. Issues that followed were dealt with in the courts on a state-by-state basis. This explains why state laws dealing with private corporations and common interest developments vary widely. It was not until 1977 that the National Conference of Commissioners on Uniform State Laws adopted the Uniform Condominium Act. In 1980, the conference adopted the Uniform Planned Community Act and the next year it adopted a model act for cooperatives. In 1982 the conference consolidated all three acts into the Uniform Common Interest ownership Act.<sup>20</sup>

At the local level, the creation of common interest developments was nothing more than a planning and zoning issue to be decided by local councils and commissions. Individual states were even slower to react than the federal government. California and Florida are the only two states that have established a permanent legislative action committee to deal with private communities.<sup>21</sup> All states have laws related to the creation

of private corporations and provide that each association must have a set of Covenants, Conditions and Restrictions, (CCRs) to go along with their articles of incorporation. Although the incorporations and structures are similar, the similarities end with these CCRs. These CCRs can be dozens of pages thick and contain language that only a skilled lawyer could interpret.

The State of Nevada is no different. Nevada has only recently revised existing legislation specifically related to the behavior of Gated Communities as a response to abuses of CCRs. Senate Bill 314, commonly known as the Common-Interest Ownership Act, codified in Nevada Revised Statutes (NRS) Chapter 116. In 1997 the Nevada Legislature passed Senate Bill 314, which contains significant amendments to the Act. Unfortunately, this 75-page bill is as confusing as some of the issues it was intended to address. There are different effective dates related to the date the association was created, prior to January 1, 1992 and those created later. This bill created the office of Ombudsman in the Division of Real Estate, Department of Business and Industry to take effect on July 1, 1998. This Division is mandated to conduct a survey of homeowner's associations in order to establish and collect a fee to fund the office. Contact with the Ombudsman for Nevada revealed that the Ombudsman was still attempting to collect information on all of the Nevada associations; however the process was not completed due to lack of funding and staff at the time of this writing. It is interesting to note that the funding for this office is to come from the fees collected.

Other provisions in this Bill include:

- A requirement in Section 10 that persons engaged in managing associations be licensed or certified by the Real Estate Division,
- A requirement in Section 11 and 20.5 that certain information relating to

homeowner's associations be provided to prospective buyers.

- Amendments in Section 12 that make certain sections of the Act apply to common interest communities created before January 1, 1992 if their annual dues are \$500 or more.
- The requirements in Section 15 address meetings of the association.
- Section 16 requires that the association establish a reserve for repair and replacement of major components.
- Section 23, effective October 1, 1997, prohibits associations from using powers of eminent domain, or condemnation.<sup>9</sup> Many other provisions such as in Section 4 address the rights of owners to speak at meetings, conduct of executive sessions and minutes of meetings. Provisions in Section 5 regard the adoption and enforcement of rules.
- Section 6 limits the amount of fines that may be imposed.
- Provisions in Sections 13 and 14 require new board members to “read the governing documents,” and require procedural rules to conduct meetings and require by-laws to be written in plain English.
- Provisions in Section 15.5 require a majority vote of members to commence litigation in many situations.
- A restriction in Section 17 limits to associations’ rights to foreclose a lien against a unit.
- Finally, there is a requirement in Section 20 that a financial statement and information regarding judgments and pending litigation be provided to prospective purchasers. This section became effective when the governor signed

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<sup>9</sup> These procedures are generally reserved for public agencies.

the bill on July 17, 1997.<sup>22</sup>

SB 314 also provides for a simplified disclosure statement to be given to prospective buyers that sets forth, in easy to understand language, the most important aspects of such ownership. The statement informs prospective owners that:

1. There will be restrictions on their freedom of choice regarding their home and lifestyle;
2. They will have to pay homeowner's assessments for as long as they own their home;
3. They can lose their home through foreclosure if they fail to pay their assessments;
4. They may become a member of an association that could effect their freedom of choice and lifestyle;
5. They must provide certain information to any prospective buyer of their property.

Another bill proposed in the Nevada Legislature is Senate Bill 192. This bill also proposes changes to NRS 16 and addresses the construction of or additions to buildings and the right of access to individual properties. Under this bill, an association may not expand or construct a building that is not part of any plat or plan of the planned community if it was not previously disclosed to the units' owners, unless the association obtains the written consent of a majority of the unit's owners and residents who reside within 500 feet of the proposed location of the building structure. The importance of this bill is that it requires the consent of units that may be outside the limits of the planned community. These units might very well be in a neighboring private community. This will more than likely result in legal disputes between neighboring communities, both intent on

their objective of preserving their property values. The bill also specifically addresses limiting access to a private dwelling and allows the association to charge a fee to operate or maintain a gate or similar device designed to control access to the planned community.

A third Nevada Bill, SB 451, requires that an association of a common interest development prepare and distribute operation and reserve budgets to its unit owners and requires the executive board to conduct a study of the reserves at least every five years, "...using a person qualified under standards established by the Real Estate Division."

This bill also requires secret ballot elections with the votes counted in public and that only the secret written ballots be used to determine whether a quorum is present for the election of any board member. SB 151 also provides authority of the Real Estate Commission to subpoena records and other information of an association and that these records be made available to the individual unit owners. One of the more important changes proposed in SB451 is the maximum fine for a single violation. The maximum fine is increased to \$100 but the aggregate total for continuing violation is not to exceed \$500.

It is left to the reader's imagination what prompted such extensive legislation in Nevada, but a first guess might be pressure from private community residents in Nevada and the lack of either complete CCRs or understanding of them. The important factor here is that the once wide jurisdictional line between public entities and the private associations within them is being narrowed. The state legislature in Nevada is now looking over the walls into private communities and they are becoming less and less private.

A pamphlet prepared by the Nevada Department of Business and Industry, Real Estate Division, *Rules for Homeowner's Associations*, includes the following statement:

*It is important for prospective borrowers to understand the benefits and possible risks of belonging to a homeowner's association. This type of ownership and lifestyle may not be for everyone.*

## Chapter Four The Private Laws of Common Interest Development, CCRs

*No arts, no letters, no society, and which is worst of all, continual fear and danger of violent death, and the life of man solitary, poor, nasty, brutish, and short.* Chap. xviii.  
Thomas Hobbes

One of the most important distinctions between public and private governments is their law. The laws of common interest developments are their conditions, covenants, and restrictions (CCRs). Although there are many similarities in the articles of incorporation of common interest developments, there are also distinct differences in each one. It is often these differences that are perceived by the homeowners to be the same as the association down the street that cause many of the problems with common interest developments.

The CCRs for most modern Planned Unit Developments are written by the developer and are usually only subject to change by a supermajority<sup>h</sup> of the members, not a simple majority of those who choose to vote.<sup>i</sup> Absentee owners who rent their properties or use them on a seasonal basis complicate this procedure. Since changing the CCRs can be very difficult, what the developer has created is essentially cast-in-stone. In the 1964 *Homes Association Handbook*, written by the ULI and FHA, it is proposed that changes to the CCRs be by a two-thirds vote and a three-year waiting period.<sup>23</sup> “These documents are every bit as enforceable as the laws, charters, and constitutions of public governments, though new owners often fail to recognize that fact. Taken together, they give a developer the power to create a distinct lifestyle in a development, which the

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<sup>h</sup> Two-thirds of the owners, not just those present at a meeting.

<sup>i</sup> This generally means one vote per unit, not a democratic majority.

developer can use as a powerful marketing tool. Moreover, they are the rules of the regime under which, ultimately, the residents will be living.”<sup>24</sup>

The most common reason existing neighborhoods are motivated to form associations, according to Blakely and Snyder is, “...where the fear of crime and outsiders is the foremost motivation for defense fortifications. This category includes inner-city perches, often in deteriorating areas; suburban perches, attempting to protect property and property values; and barricade perches, where street closures create suburban-style street patterns within a city grid.”<sup>25</sup>

A recent example of this is the Scotch 80’s neighborhood in Las Vegas, Nevada. This high-end community recently petitioned the City of Las Vegas to allow the privatization of the internal streets and the installation of barriers at certain access points. This neighborhood houses the Mayor of Las Vegas, comedian Jerry Lewis and other high profile individuals. It should be noted that the conditions of this privatization required the City of Las Vegas to make expensive repairs to the streets and provide a new, separate electrical service for the internal streetlights so that they could be metered separate from the public streetlights.

There are generally two origins of CCRs, those that are formulated by the owners in an established neighborhood and those that are assembled by the developer in the planning stages of a new common interest development (PUDs). The difference is that the owners in an established neighborhood such as the Scotch 80’s in Las Vegas, have buy-in and understand the wants and needs of the other owners. The buyers of homes in new common interest developments often do not know or understand these rules, and this is where many of the problems arise. Most states now have rules requiring real estate agents to provide a document stating that a copy of the CCRs were presented

and explained to the buyer at the time of the sale. These requirements have reduced the enforcement problems to some extent but do not address the issue of interpretation.

All of the forms of common interest development ownership include ownership of private residential property or common areas. Ownership in the development is voluntary but membership in the association is mandatory. The association is established with a set of rules to regulate the common areas of the development and is financed by its members. In a majority of these developments, this regulation also includes many aspects of the private owner's property.<sup>26</sup>

When the final papers are signed for the average home purchase, there are generally a real estate agent and an escrow agent present. In the future it will be more common for the buyer to have an attorney present. Few homeowners see their purchase as more than acquiring the land and all buildings. What buyers in a common interest development don't often realize is that they are acquiring much more than that. They don't realize that at the time of purchase they are closer to buying into a corporation than they are to just buying a house. Not only are they buying into the corporation, they may be buying and become responsible, and liable, for more land than they realize. In some private developments, the property limits for each home extend to the center of the adjacent street.<sup>j</sup> The association may be responsible for the maintenance of this "common area", but is owned outright by the homeowner. In stock cooperatives (common on the east coast), the owner purchases a share of stock in the development. The old adage "buyer beware" is most appropriate.

Research of incorporated common interest developments in Nevada and California

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<sup>j</sup> In conventional developments the property limits are at the back of the sidewalk.

reveals that they span the legal gamut of articles of incorporation and the rules in their CCRs. This leads us to believe that they are not all alike. There is a legal application known as “if it looks like a duck and quacks like a duck then it’s duck”. This is not the case when considering homeowner’s associations and gated communities. Although they may all look alike on the surface, there are basic differences. There are Gated Communities in Nevada that are incorporated as corporations, non-profit corporations, private organizations, cooperative associations, homeowner associations, and even limited liability landscape maintenance corporations<sup>k</sup>. The scope of the activities of the associations ranges from maintenance of small landscaped areas and buildings to providing trash removal and picking paint colors to the core functions of municipal government including armed protection and land-use controls. The services provided to homeowners include maintenance of streets and roads, landscaping, golf courses and clubhouses, equestrian facilities and in a few more recent cases, emulating public utility districts by providing water and sewer facilities. A review of the CCRs of these corporations reveals an even broader difference between them. The question then is why the difference and what difference does it make to the residents?

Mckenzie reminds us;

*“Like other corporations, homeowner’s associations have full legal rights, limited responsibility for the individuals who operate them, a potential infinite lifespan, and a dedication to a narrow private purpose---in this case, protection of property values.”<sup>27</sup>*

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<sup>k</sup> Limited Liability Corporations have a limited life span, generally 30 years. For more information see “Ed Martin - About.com Guide to: Small Business Information Feb 19, 2000.

This protection of property values is the foundation of the CCRs for most common interest developments. It is based on the idea that the behavior of one resident in a neighborhood can affect the value of their neighbor's property. An example would be a neighbor who has an old vehicle sitting on blocks in his front yard. If this occurs in many front yards, the neighborhood appears to be rundown and deteriorating. The selling price a homeowner might get for a house in this neighborhood would likely be lower than that of an equivalent home only a few blocks away.

If the homeowners jointly decide that having vehicles parked on their front yards is not a good idea, they could form an association and all sign a contract, called a covenant, agreeing not to allow vehicles to be parked or stored in areas other than in driveways and carports. It would seem that this should solve the problem, and that the property values in the neighborhood would remain high.

It is not that simple. Once the process is begun, there is no end to the number or type of rules that can be imposed. Perhaps another neighbor has painted his home hot pink. The others feel this is not appropriate and decide to add a rule that the association must vote on or provide an approved list of house colors. Now we add to the mix the fact that one owner has decorated his yard with cheap pink flamingos and another with western antiques such as wagon wheels and plows. Rules against these activities can also be written into the covenant. Soon the document has grown to include antennas, shrubbery, roofing materials, and even curtain colors. Developers of common interest developments have taken just this approach. They have sought out what kinds of complaints homeowners have against their neighbors and created gated communities around rules to mitigate these complaints.

CCRs can impose and enforce rules that no *public* entity could. These rules escape

the boundaries of the constitution, articles of incorporation of statehood, and city and county ordinances. What makes these rules even more distinct is that they are enforceable. An example of one of the most restrictive CCRs found is provided in Appendix C, Restrictions of King's Grant on the Ashley. These CCRs even restrict the type of mailbox post that may be used. Enforcement may also be turned over to a contractor. The letter in Appendix B tells of the outcome of such a contract.

A recent episode of TV's X-Files featured a neighborhood association that threatens to kill a resident for having a burned-out light bulb in the yard. The plot was over the top, as usual, but it reflects a growing real-life fear about the power of residential neighborhood associations. Today 15 percent<sup>1</sup> of Americans belong to condominium, cooperative or homeowner associations and one-third of all new housing is being built under such private governance. This situation applies to two-thirds of new housing in southern California, always a bellwether.<sup>28</sup>

It can be assumed that there have been violent confrontations related to covenant disputes. It is well documented that there were deaths where race related covenants were enforced as mentioned above. It is believed however, that there have been few recent deaths related to covenant enforcement. Generally, covenant disputes do not get physical. The more common resolution today is as follows.

One of the classic examples of a private development that resembles a public entity, except for the CCRs, is Rancho Bernardo in southern California. Rancho Bernardo is about 25 miles north of downtown San Diego. It houses approximately 41,200 people in

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<sup>1</sup> McKenzie says 10 to 12%; Blakely and Snyder say 8 to 10%. This difference is not significant because some of these numbers include condominiums and other forms of private communities and some do not and also because of the dates of the writings. The significance is that this percentage is high and increasing.

about 17,900 dwellings. Builder Harry L. Summers started the project in 1961 on 6,107 acres of undeveloped land. This small city includes streets, houses, recreation facilities, commercial areas, and light industry. Rancho Bernardo is legally a part of San Diego, but to a large extent is self-sufficient. There are large shopping areas containing banks, grocery stores, post office, a library, theaters, auto service centers and even hotels and restaurants. There are office buildings which house lawyers, doctors and other professionals. There are also localized, convenience shopping areas. Two industrial areas house corporations such as UNISYS, National Cash Register, Hewlett Packard, Sony, Gould Electronics, and others.

The development is divided into neighborhoods with differing architectural styles, prices, and lifestyles. One is a retirement community; one for people over forty-five, and one includes apartments and large family units. The plan included complex and detailed architectural restrictions for each neighborhood---rigidly enforced by more than a dozen neighborhood organizations run by elected directors. Even the minutest changes in the restrictions require the approval of the association. Richard Louv, who studied Rancho Bernardo for his book *America II*, describes the restrictions as follows:

*Even vegetable gardens are frowned upon—though some people do grow tiny ones out of their neighbors' view. Fences, hedges, or walls require approval, and may not be more than three feet tall. Signs, other than for-sale signs, are prohibited. Trees must be kept trimmed and may not grow above the level of the roof, which must be covered with red tiles. Residents are not allowed to park recreational vehicles or boats in their driveway; a special communal parking area is set-aside for them. One village, designed for seniors, prohibits grandchildren from using the recreation center, and home visitation by grandchildren is strictly limited. The owners of patio homes (semidetached houses that share common*

*grounds, except for patio areas) must gain their neighbors' approval before altering the patio, planting a rose bush, or raising a canopy.<sup>29</sup>*

Restrictions in some neighborhood are so detailed as to regulate the color of curtains.<sup>30</sup> A matter that had to be resolved by the California courts illustrates the rigidity with which these restrictions are interpreted and enforced.<sup>31</sup> One phase of the development had a restriction providing that “no truck, camper, trailer, boat of any kind or other form of recreational vehicle shall be parked” in the project. One of the residents bought a new pickup truck with a camper shell to use for personal transportation. The association, through its management company, took him to court to enjoin him from parking the truck under his own carport and to recover \$2,060 in fines for this “violation.” After losing in the trial court, the management company appealed, only to see the appellate court sided with the resident and held the company’s action unreasonable.

Yet this sort of action does not seem unreasonable to many Rancho Bernardo residents. They place a high value on the restrictions, feeling that the infringement on one’s own freedom is a small price to pay for protection from the potential misdeeds of one’s neighbors. Louv quotes one resident as saying “Sure, they have some rules, like the one that regulates campers. But the community associations are here to protect our interests, not let the community deteriorate. That’s not regulation; it’s common sense. I don’t know why anyone would look at it differently than I do, do you?”<sup>32</sup>

McKenzie states in a note to a reference to this issue:

*“I spent several evenings attending meetings of the Bernardo Home Owners Corporation, a body that does not enforce architectural restrictions but supports the other associations in a variety of ways. The group spent a good deal of time*

*discussing how to help a neighborhood association appeal a case it lost against a homeowner. The association had cited a Trails homeowner for violating the rule against television antennas by installing a satellite dish, which he hid, concealed from view inside a structure. The point members of the BHOC argued, was that a satellite dish is an antenna. The fact that in this case it neither looked like an antenna (in fact, it was not visible to anyone) nor sat atop the roof was deemed irrelevant by the board.*

Another case in Henderson, Nevada had a much different result. A homeowner was informed by the man at her door that he had just purchased her house at a foreclosure sale and that she had 30-days to vacate<sup>m</sup>. The homeowner had refused to pay continuing fines imposed by Terra West.

*Burns says: "They kept fining me and fining me...they fined me \$1500 for a truck that wasn't even mine and was on a public street...they'd fine me for having shutters that needed painting." There were even fines she didn't know about that News 3 found in documents we obtained. For example, Burns says, "Boat in guest parking? I don't own a boat. And I have never seen this. They fined me for a boat in guest parking? I don't have a boat!"<sup>63</sup>*

The CCRs for the association had a rule against parking on the street or in the driveway. The association filed a lien against the property and eventually the property went into foreclosure. The resident claims that she had no idea of these proceedings

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<sup>m</sup> (Judi) Burns says, "A man came and knocked on my door and told me he'd just bought this house at a foreclosure sale yesterday. And I said, excuse me?" The man bought Burns' \$160,000 home for just over ten thousand dollars in foreclosure proceedings initiated by Pebble Creek property manager, Terra West.

until the new owner showed up on her doorstep. In the same article “State senator Mike Schneider says we’re sitting on a time bomb with associations who essentially thumb their nose at the law.”<sup>34</sup>

*“It’s my understanding that they were harassing her and fining her and in protest she didn’t pay her dues, which is very, very foolish.” Testa (Phil Testa founded Justice for Home and Condo Owners), also says if you miss 3 months payment on association dues, they can immediately foreclose. Testa says, “The association dues pay for this attorney and management company so you have actually hired a gun that’s pointed at you.” That gun can fire out a foreclosure with no due process... No day in court...”<sup>35</sup>*

What was once a unique idea has become a trend. Dan Johnson compares gated community’s laws to those of the Internet. He states;

*“More and more people have embraced the concept of gated communities to prevent crime and urban decay. Just like the internet, these communities promote a form of self-governance as (a) way to enhance their public infrastructure.”<sup>36</sup>*

Johnson’s article also includes the following:

*“The growth of private communities has made polycentric law an everyday reality for millions of people,” says Bell, a former director of telecommunications and technology studies at the Cato Institute, a Washington, D.C. think tank. Polycentric Law is “law arising from a Variety of customs and private processes rather than imposed by a single state authority.”<sup>37</sup>*



## Chapter Five To Protect and to Serve

Private police in the common interest development.

*"That government is best which governs the least, because its people discipline themselves." -Thomas Jefferson*

Security guards have taken on a new stature as the police forces of common interest developments. Since most private developments are accessed by private streets and protected by closed gates, public police officers do not patrol them. In many areas, the police only respond to 911 calls or calls from the private guards. What this means to the residents is that they may not see a public police officer in their neighborhood for years. The private guards handle the majority of the security related problems. Although the primary function of private security guards is to "observe and report", these private guards have the same arrest powers as any other *private* citizen. According to the California Penal Code these are:

A private person may arrest another:

1. For a public offence committed or attempted in his presence.
2. When the person arrested has committed a felony, although not in his presence.
3. When a felony has been in fact committed, and he has reasonable cause for believing the person arrested to have committed it.<sup>38</sup>

This gives the private security guard, acting as a private citizen, broad latitude in carrying out his duties.

The law treats private security forces as private citizens when it comes to their

powers to arrest, interrogate suspects, and perform other police activities. The California Legislature contends, “Armed security guards should not be required to meet the same rigor of standards required of peace officers.”<sup>39</sup> Technically, security guards should only “observe and report” suspicious activity. Yet all citizens may perform “citizens’ arrest” on those that they suspect of criminal activity.

With the proliferation of common interest developments and the need for these developments to provide their own security, the number of private security guards performing more and more “police” duties is expected to increase. With this increased activity, it is likely that the number of court cases testing their authority will also increase.

Ironically, one of the major reasons homeowners give for wanting to live in a gated community is security, as if they have some magically added security behind the walls. Berkley and Snyder report;

*“A developer we interviewed in 1994 said that gated communities had only become common in the previous several years as a result of increased violence and decreased municipal services.”<sup>40</sup>*

They go on to say that:

*“Developers do not, however, prominently advertise security or safety, or promise it in their promotional brochures. ...developers fear liability if they make such claims. ...As one developer of gated communities in Florida told us, “Selling houses is showbiz. You go after the emotions. We don’t go out and show a gate in the ad. But we try to imply and do it subtly. In our ad, we don’t even show houses. We show a yacht. We show an emotion.”<sup>41</sup>*

There are many differences between the law enforcement officers of public entities and the rented police of private common interest developments. One of the most serious of these differences are implications related to the Fourth Amendment. John B. Owens, in the abstract of his article, *Gated Communities and the Fourth Amendment*, states:

*“Gated communities and the private security services they often employ raise serious questions regarding the scope of the Fourth Amendment and whether security guards will be subject to the same search and seizure standards as police officers. The Supreme Court has repeatedly stated that purely private search activities do not implicate the Fourth Amendment. The only prospect for finding security guards to be subject to the Fourth Amendment would be finding that they are performing services that are traditionally exclusively reserved to the state.”<sup>42</sup>*

The need for a stronger feeling of security has been one of the major driving forces behind the rapid growth of common interest development. One study found that in Leisure World, in California, 92 percent of the homebuyers rated security as “very important.” The development is surrounded by “six-foot block walls topped with two-foot-high bands of barbed wire,” and more than three hundred private security officers patrol the grounds.<sup>43</sup>

Armed guards are only one of the security amenities offered by these communities. Others provide gates with pass codes, electronic gate openers, video cameras and other such security appurtenances. With the rapid growth of gated communities and increasing numbers of them offering armed security, the question must be asked: Which set of rules are these officers required to follow? Are they the rules of law enforcement that officers of public entities must follow or are these rented police acting as private

citizens? The answer is surprising. In almost every case, the Supreme Court has ruled that they are acting as private citizens.

At first glance the issue seems insignificant. One would think that the rules for police behavior, search and seizure, the use of force, and civilian's rights are the same everywhere. In gated communities this is not the case. As is stated by Owens above, the Supreme Court sees them differently as do individual state statutes.

Guarding these gated communities are the *private police* like those employed by Westec Security, "whose warning signs are becoming as common as weeds on Southland [Los Angeles] lawns".<sup>44</sup> Since 1980, the number of private security guards has risen 64% to 1.6 million,<sup>45</sup> and it will reach 1.9 million by 2000.<sup>46</sup> Currently private security guards outnumber public police officers three to one.<sup>47</sup> Our nation spends roughly 73% more on private security than it does on public police.<sup>48</sup> It is likely that only the Las Vegas casinos employ more private security guards than common interest developments.

Although the law treats these guards as private citizens, their responsibilities often exceed those of the average private citizen. These guards resemble public police officers. They wear uniforms with badges, carry guns and nightsticks, and drive police-like cars complete with flashing lights and sirens.

"Because scholarly work on gated communities is essentially non-existent,"<sup>49</sup> No one knows whether the Fourth Amendment applies to these private police forces that protect Fortress America. However, in *Burdeau v. McDowell*,<sup>50</sup> the Supreme Court held that "[Fourth Amendment] ... was intended as a restraint upon the activities of sovereign authority, and was not intended to be a limitation upon other than government

agencies.”<sup>51</sup> In the seventy-nine years since *Burdeau*, The Supreme Court has continually held that purely private searches do not implicate any Fourth Amendment interests. These rulings cited examples of the “town-snoop” looking into private mail or even safes and desk drawers.<sup>52</sup> These rulings go on to say that a private search can trigger the Fourth Amendment only if, “in light of all the circumstances of the case, [the private actor] must be regarded as having acted as an ‘instrument or agent of the state’.”<sup>53</sup>

Owens’ article goes on to cite numerous cases where, even though lower courts ruled that private citizens and security guards violated Fourth Amendment rights, the Supreme Court overruled these decisions. The opinions state that while there may have been wrongdoing on the part of the *private citizens*, since they were not acting as agents of the state, there was no violation of the Fourth Amendment. Both the majority and the dissenting opinions in most of these cases state that the intent of the framers in the Fourth Amendment is to protect the public from search and seizure by officers of the state and not private citizens.

The legal records related to private versus public police behaviors are vast. No attempt will be made here to cover the subject completely. The intent here is only to make the reader aware that there is a difference and that the rules for private security guards, in some instances, are more liberal than those of public police officers. It is possible that the primary reason homebuyers select gated communities may also become the most undesirable.

## Chapter Six Private Works

*"If the vitality of the concept of the organization (public or private) is to survive, the new designs will have to raise the level of quality of life within the system and genuinely value high-quality living as much as efficiency."* On Organizations of the Future, Administrative and Policy Studies Series: Volume I, No. 03-006. A Sage Professional Paper by Chris Argyris, 1973.

Every public entity has a Public Works Department. This is the department that deals with the engineering, construction, inspection, and maintenance of the streets and other facilities. These facilities include water treatment and distribution, wastewater collection and treatment, flood control facilities, parks, and almost every other aspect of the entity's infrastructure. Generally these departments are staffed with professional engineers and administrators, skilled workers and other well-trained staff. The duties and responsibilities range from patching potholes to ensuring the safety of the drinking water in the community.

One important aspect of this department is that it ensures, through careful inspection, that the facilities are constructed and maintained according to firm guidelines so that long-term problems are held to a minimum.

As stated earlier, approximately one third of the communities being constructed today are private. The private part of these communities includes the streets, streetlights, sewer system, parks and landscaping, and buildings such as clubhouses and gyms.<sup>n</sup> Some of the designs of these facilities are different from what is required for

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<sup>n</sup> Generally the private works department of these communities does not include water distribution. However, due to high connection fees, some developments in southern Nevada have recently master-metered the water service. This means that there is one water meter at the entrance. The cost of the water used by residents is included as a part of their dues. The association then, becomes equivalent to a water utility

a public facility. For example, the width of private community roads is often more narrow than that required for a public street since private associations can enforce strict no parking rules. These private roads are designed and constructed narrow because they take up less space and therefore allow room for more housing lots.

As opposed to Public Works Departments, the maintenance efforts of private organizations are herein referred to as *Private Works*. There are generally two ways private communities deal with their private works. Private Works issues in private communities are seldom made by experts in any field. Either workers are employed directly by the association, or a real estate management company is hired to deal with these *Private Works* issues. These management companies contract with communities to deal with all or part of the day-to-day operation of the association.<sup>o</sup>

One of the more disconcerting aspects of Private Works is that those charged with the task of maintaining them are not involved in the design, construction or inspection of the infrastructure. Generally, the developer is in charge of the construction, inspection and maintenance until 51% of the homes are sold. It must be noted here that cities and counties in which private communities are developed differ in their approach to the inspection and standard of construction inside the gates. Although some require inspection by public works staff, many do not. What this means is that the fox is left watching the hen house. What exactly gets constructed is essentially an unknown. It should also be noted that those public entities that do provide inspection charge a fee for the service and assume a greater liability, those that don't, claim that they assume no liability. Since this topic is relatively new, the debate over which is better is ongoing.

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<sup>o</sup> For further information regarding these companies the reader is referred to the Community Association Institute (CAI)

Generally, after the development is completed, local laws, or at least many public officials, do not allow inspectors or other employees to make repairs, suggestions or otherwise expend public efforts within the private developments.

As an example, consider the roadways within the community.<sup>P</sup> These are generally the most extensive and expensive common facilities. The design typically consists of 4-inches to 12-inches of base material and 4-inches of asphalt cement (AC) paving. Private roads can be something much less, as little as 2-inches of AC over little to no base. From the surface, even an experienced observer cannot tell the difference. The difference is in the expected useful life of the pavement. The typical public roadway is constructed to last 15 to 20 years with good maintenance. Anything less will require earlier replacement. The cost of this replacement is high and will be born by the association.

If the association is not collecting sufficient fees to pay for this work, an additional assessment must be made of the property owners. This additional assessment generally requires a majority vote of the residents as described in their CCRs. If this vote requires a super-majority, (generally two-thirds of all the owners, not just those voting), there could be delays due to non-resident owners etc. If the work is not performed, the problem only gets worse and the replacement costs increase.

As stated earlier, many newer common interest developments are high-density and lower cost. The buyers in these developments are often first time or lower income buyers with limited financial resources. In many cases they will have to cut back on other

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<sup>P</sup> The situation presented here is purely speculative. The life span of roadway pavement is longer than the majority of the newer high-density private developments have been in existence. Therefore there is little evidence available other than personal knowledge to support these ideas.

needed purchases to afford the additional assessment. Those who cannot afford to pay are in danger of losing their home through foreclosure.

In the extreme case, if the number of owners who cannot pay is substantial, there is likelihood that the entire association could be headed for financial disaster. Each owner who does not pay his fair share places an additional burden on the other owners. If the work has already been contracted before it is realized that many of the owners will not be contributing, the association could be facing default.

The laws in each state differ in the area of incorporation. The type of corporation formed and the individual state laws present a legal nightmare. Generally a corporation in default cannot obtain additional credit and must formulate a strategy for recovery. Seldom is the corporation allowed to dissolve except in the case of the Limited Liability Corporations. Considering the large number of members of a common interest development, this is even less likely. Since the residents own the association, there could be substantial personal implications.<sup>9</sup>

There is one option available to a financially troubled private community: go public. The owners could petition the public entity having jurisdiction over their area to accept the private infrastructure as public and to assume the maintenance and liabilities just as any other public facilities.

This is often not a viable option since, as stated earlier; the streets in a private development are generally narrower than the public standard. They would not be acceptable for dedication because the public entity could not reasonably enforce the no-

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<sup>9</sup> No attempt is made here to provide legal expertise or advise.

parking rules. If autos were parked on both sides of the street, there would not be room for street sweepers, not to mention ambulances or fire trucks. There would also be a substantial expense attached to this dedication. If the streets were in a state of deterioration, it would not simply be a matter of assuming the maintenance of these facilities; it would be a matter of removing and replacing them.

Another obstacle to turning these facilities over to a public entity is that many codes do not yet have provisions for these actions. For example, The City of Las Vegas, Nevada development codes only provide for assuming maintenance of perimeter landscaping, perimeter walls and streetlights.<sup>54</sup>

## Chapter Seven Public Private Political Parallels

*"God made California but man sub-divided it."* W. H. Hutchinson in California, 1967

McKenzie asks the question, *"Would Locke Have Lived in a Condominium?"*<sup>55</sup>

Locke's approach to democracy was liberal. Locke maintained;

*"lay in a social contract between the people and their government, and the people were within their rights to remove or alter a government which betrayed their trust. Revolution, then, became the ultimate recourse (and a legitimate one)."*

“(Locke) believed, with Hobbes, that man had once existed in a state of nature, but that, as a creature created in God's image, man was possessed of reason, and therefore capable of rational behavior, which permitted him to cooperate with other men to form societies and to discern the laws of nature, the most important of which guaranteed him life, liberty, and property.<sup>56</sup> “Though all men were born equal, Locke maintained, some, by dint of greater industry, could legitimately accumulate more property than others: the primary responsibilities of legitimate governments, therefore, were to protect life and liberty and to safeguard property. Locke was no democrat: he believed that laborers had neither the time, the education, nor the inclination to make rational political judgments, and should not, therefore, be permitted to have a voice in government, and he denied a role in politics or government to individuals who were not possessed of property.”<sup>57</sup>

Locke would be surprised to see the large numbers of “laborers” that are accumulating property in common interest developments are without the “time, the education, or the inclination to make rational political judgments.” They are forming their

own private governments.

The idea that only property owners should vote is not new. Voting in a homeowners association is based on the concept of “one unit, one vote.” Owners of more than one unit have more than one vote. In new private developments, the developer retains three votes per unit until 51 percent of the units are sold. Renters on the other hand, are categorically eliminated from the voting process and no matter how many adults own one unit; there is only one vote per unit. “The members have consented to equating “rights” with “property rights.” This, it seems, is a Lockean conception.”<sup>58</sup>

Not long ago, former Labor Secretary Robert Reich called the spread of private communities a “secession of the successful” from full participation in American life. But in a nation built on the strength and individuality of local communities, when was it decided (and by whom) that it is bad for people of the same background and interests to live together? Reich’s thinking exemplifies the sour grapes attitude of the governing elite; worried it will have less control over people’s lives.<sup>59</sup> This revolution by escape, has predicated the escape to private governance known as the common interest development.

The distance between the private governance of Gated Communities and public government is separated by a chasm of legal issues. As mentioned in the Introduction, there is a duality of nature of Gated Communities; they have the appearance of both public and private organizations. The law, however, draws a clear distinction. For example, Federal law addresses the issue of; *one man* one vote. Most common interest developments only allow *one-property*, one vote. Opponents of common interest developments declare this as undemocratic. This arrangement disenfranchises renters and households with two or more residents. For the most part, the courts have upheld

the private corporation's rights to enforce voting rules of this sort.

McKenzie tells us that; "References to private associations as governments within a government begin at least as early as the seventeenth century, when Thomas Hobbs wrote of private "systems" within the body politic—the commonwealth—that are akin to the muscles of the body. Some of these systems, including those set up for business purposes, could bring about the disintegration of the commonwealth if there are too many of them or if they acquired too much power.

*"Another infirmity of a Common-wealth, is...the great number of Corporations; which are as it were lesser Common-wealths in the bowels of a greater, like wormes in the entrayles of a naturall man."*<sup>60</sup>

Arthur Bentley, a more modern writer, said in 1908, "a corporation is a government through and through."<sup>61</sup> In 1944, Charles E. Merriam argued that the study of government could not be complete without addressing the obviously political subsystems that exist outside the formal institutions of government yet exert a government-like authority over their members.<sup>62</sup>

Private government is as much an oxymoron as a temporary tax increase. How can an organization be both public and private? The answer is, it can't. The difficulty in making the distinction is that many private organizations look just like public organizations. This is where the difficulty of studying private organizations lies. One function of many private organizations that mirrors a traditionally public function is law enforcement. Many common interest developments employ private security companies to provide "law enforcement" on private property. In many instances, their duties straddle the public-private line because they also provide some protection to the public.

Other examples of individuals and organizations that perform quasi-public functions are corporations exercising *governmental* powers over their employees. McKenzie tells us, "...this has led to a number of political scientists, as well as some business and legal scholars, to argue in favor of calling corporations private governments, and some say, of holding them accountable to constitutional standards."<sup>63</sup> Chief Justice John Marshall described corporations as "...an artificial being, invisible, intangible and existing only in contemplation of law."<sup>64</sup> Corporations of every sense are a group of private citizens organized for the pursuit of a common purpose. This pooling of common resources takes on the legal definition of an artificial person. In many views however, this artificial person is a social entity, "...as real and material as any other group and a valued manifestation of a society based on pluralism."<sup>65</sup>

McKenzie refers to Eells and Walton saying;

*"Eells and Walton recognize, though, that large business corporations function as private governments in the lives of their employees, that they are undemocratic and oligarchic, and that they are often closely entangled with public government (through such connections as government contracts) to the point of being its agent."*<sup>66</sup>

Legal scholar Adolph Berle, in 1954 stated, "the danger is the ancient one of irresponsible power, functioning outside the discipline of law implicit under organized government."<sup>67</sup> In 1959 political scientist Earl Latham analyzed corporations as

Systems of private government, arguing that:

*One of America's most important political problems is a long-needed and now urgent redefinition of the relation between giant corporations and the*

*commonwealth, for the growth of the corporation has produced a tension of power in which giant enterprises have at points come to rival the sovereignty of the state itself. The great corporations are political systems in which their market, social, and political influence goes far beyond their functional efficiency in the economy. Indeed, in the very culture of the American people, the influence of the larger principalities overflows the banks of their corporate jurisdiction or economic reason. In the name of free enterprise, corporate collectivism has made deep inroads upon the celebrated individualism of the economy, and corporate welfarism has gone an equal distance toward tranquilizing the historic initiative of the individual in a smother of narcotic "togetherness."<sup>68</sup>*

More recently, John McDermott has argued that "the modern corporation is *the* central institution of contemporary society" and that the corporation has redefined the class structure and the meaning of property. "Liberal society," he argues, "is rapidly being supplanted by corporate society," with social classes now being based on position in the corporate hierarchy, and a new property system of "quasi-collective property" is emerging to replace the private property system.<sup>69</sup>

As in any shortsighted political organization, the long-term ramifications of its actions are not considered. In the case of the modern common interest development, the long-term effects on the development of the children who grow up in them are not known. A recent Jack's World cartoon (source unknown) shows two children looking out a window over a Christmas decorated, guarded entrance gate. The caption reads "Actually, it'll be a miracle if Santa even makes it past the gate." McKenzie tells us that students of politics have long recognized that people learn a great deal about the meaning of citizenship from day-to-day life in their communities.<sup>70</sup> Day-to-day life for a child in a common interest development, dealing with strict CCR enforcement, not being able to

visit grandparents, not being allowed to install air conditioners, satellite TV dishes and so on, will have some effect. Many of them will be affected by squabbles between their parents, their neighbors, and board members. There will be limited exposure to other cultures and people of diverse backgrounds. One can only imagine the impact on the child of a family forced to leave their home for non-payment of dues or fees.

Robert Dahl has written “ what Pericles said of Athens, that the city is in general a school of the Grecians, may be said of every city of moderate size: It is a marvelous school.”<sup>71</sup> Children today are growing up in a different kind of city. They will surely have different political attitudes and ideals. One can only imagine what their ideals of such things as voting, respect for law enforcement, and other ideals of life will be.

## Chapter Eight Private Governments' Finances

*"The government solution to a problem is usually as bad as the problem."  
-Milton Friedman*

"Like other corporations, homeowner associations have full legal rights, limited responsibilities for the individuals who operate them, a potentially infinite lifespan, and a dedication to a narrow private purpose-- in this case, protection of property values."<sup>72</sup> This protection of property values, as a goal of the corporation, costs money. There are two aspects of this protection, actions by the owners and actions of the corporation. The individual owners are required to maintain their individual units at their expense. The corporation is required to maintain the common properties, also at the expense of the owners. Generally the upkeep of the individual properties is not a major financial impact to the owner. This maintenance includes painting, landscaping, cleaning, and in general, not doing things that detract from the appearance of the neighborhood like parking junk cars on the property.

The maintenance of the common property can be very costly. In a condominium association, this includes all of the building repairs such as re-roofing, painting, landscaping, etc. In a homeowners association it includes maintenance and repair of common buildings such as clubhouses and recreation facilities such as pools, and common grounds such as streets, walkways, streetlights, utilities, parks and landscaping. All of these expenses are paid through the collection of monthly assessments. When the developer creates the association, a reserve is set aside for these expenses. This reserve is to be used at the discretion of the association. This reserve may or may not be sufficient for all of the expenses encountered. In that case, an additional assessment is made and must also be paid by the members. It must be

noted that in addition to these fees, the owners are also responsible for all public property taxes and fees.

A developer (name withheld) in the Las Vegas, Nevada area told of a new homeowner's association (name withheld) that voted to use these funds to add on to the clubhouse in the first year of its existence. The cost of this expansion almost depleted the reserve provided by the developer. The association later contacted the developer wanting to know how they were to pay for the landscape maintenance. What they learned was that they would have to raise the association fees to provide the needed revenue. This additional fee created a hardship on some of the new homebuyers who had already maximized their financial obligations to purchase their homes.

Reserves tend to be lower than they should be. Just as in any political organization, raising taxes or increasing common interest development fees is never a popular platform. One study in California showed that reserves averaged 40 percent of the annual budget, with only 28 percent of the developments reaching the 75 percent of the budget that is recommended by industry experts.<sup>73</sup>

If reserves are not adequately provided or are expended irresponsibly, the situation can become critical if unexpected expenses arise. "Recent surveys suggest that as many as one-third of all CIDs have major defects in original construction."<sup>74</sup> When this happens there are few options. The board can raise the fees or require a special assessment. This will often require a supermajority vote by the members. Another option is to sue the builder. Lawsuits can cost hundreds of thousands of dollars and can drag out for many years. If the association is already short of funds, this may not be an option unless a lawyer is found who will take the case based on a percentage of the judgment plus legal fees. In many cases, the attorney who advises the board on whether to file suit

will handle the litigation, "...raising the question of whether legal advise in these matters is always as disinterested as it should be."<sup>75</sup> In the case where legal fees are paid to the attorneys in the event of a judgment in favor of the association, the attorneys get paid even if the judgment is only one dollar. In the event of a percentage share of the judgment, the lawyers' share is often forty percent or more. This may not leave the association members with enough to make the repairs. In many of these cases, the judgment requires that the repairs be made. This judgment is recorded against each property and will show up in a title search should the owner try to sell the home. Unless the repairs are made, the owner could be "upside down"<sup>r</sup> in the property. The repairs are required by the judgment but the money received is insufficient to make the repairs. In turn, the property is valued at less than market value.

The owners in an association should also be aware that many developers form a new, limited liability corporation for the development of each subdivision. What this means to the owners is, in the case of a judgment against the developer corporation, the corporation can liquidate its assets to pay the judgment and file bankruptcy. Many of these corporations may have already liquidated following the completion of the development and essentially be non-existent. These corporations are formed under the same rules as the homeowners associations and are allowed to use these rules to their advantage too.

Not all Gated Communities are under funded, as is the case of the Whitney Ranch Owners Association in Henderson Nevada. An article in the Henderson News, March 9, 2000, by Richard W. Crandall tells of the excess fees collected by the association as a

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<sup>r</sup> "Upside down" is a real estate term meaning the owner owes more on the property than it is worth.

reserve. The association deposited money each month into a reserve account. This surplus was allowed to grow to over \$43,000 by 1996. Between 1997 and 1999 the excess amount collected exceeds \$130,000 plus interest. Since this was not a budgeted item, Nevada law and the CCRs of the Whitney Ranch Owners Association, requires that it be returned to the homeowners. The association should have either returned the money to the members, or credited their accounts and applied it to future dues. The significance of this mismanagement is that while the association was hoarding this reserve from the homeowners it was putting liens on homeowners for late payment of assessments. A lien cost the owner an additional \$700 on top of the past dues. If not paid in 60 days, the association can foreclose on the house and evict the residents. The house would then be sold at auction. The association should remove all liens put on homes during the period the excess existed and pay back any lien fees that were not deserved. The case has not been resolved at the time of this writing.

The question might be asked whether the board can be sued for mismanagement of the funds. McKenzie tells us that In most states, board members are protected against resident lawsuits by the business judgment rule, a legal provision governing the liability of the directors of profit and nonprofit corporations which holds that board members are not liable to the shareholders for their errors as long as they act prudently and in good faith. A typical version reads as follows:

*“A director shall perform the duties of a director...in good faith, in a manner such director believes to be in the best interests of the corporation and its shareholders and with such care, including reasonable inquiry, as an ordinary prudent person in a like position would use under similar circumstances.”<sup>76</sup>*

It is generally construed that the board member's enforcement of the rules is an

indication of their performance “in good faith”. This means that board members who allow the rules to be broken on a regular basis can be accused of mismanagement and this could affect their liability in a lawsuit related to other matters. Enforcing the rules to the maximum is therefore, often in the best interest of the board members as well.

## Chapter Nine The End?

*“Some of the most important causes for organizational deterioration and entropy are related to the fact that organizations have been designed and managed on a restrictive view of man.” Chris Argyris*

Science fiction writers often write about the end of life on earth, as we know it. They write about social classes living under extremely adverse conditions with violent conflicts between other surviving classes. These writers have a vision of the series of events that will combine to change the character of society. These events are almost always the acts of some villainous individual or group with self-serving intentions. The actions by these villains, with otherwise honorable intentions, bring about a chain reaction of events that results in the destruction of the environment, the social structure of mankind, and the collapse of governing institutions.

It is believed, that to date, the subject of cramped dwellings behind high security walls, dividing cities by class and race, driven by self-serving individuals, resulting in the destruction of life, as we know it, has not yet been the subject of one of these works. All of the essential elements are there however, including the archetypical villain, the gullible citizenry, and the premise of impending doom. All that is missing is the writer's image of the results. This writing however, is not science fiction. It is only intended to present facts, the intuition of scholars, and insights of the author to encourage further scrutiny of the significance of gated communities.

The information provided discusses Gated Communities as a relatively new phenomenon in modern society. Although gated communities existed in the past, they have evolved into a form of residential disfigurement. Early private communities and many newer communities typify the intent of planners and designers such as Ebenezer

Howard and Frank Lloyd Wright. These are based on ideals of community and common interests such as golf, tennis and equestrian activities. Sound financial foundations and a true sense of community support them.

The modern adaptation of this concept has resulted in high-density residential developments surrounded by walls but with little more to suggest a sense of community. Due to the high density and low cost of the homes in these developments, there is no long-term financial security. The high cost of maintenance and the low income of the residents of these developments indicates that their future is uncertain.

Suggestions have been made here that many of these communities will face financial and legal difficulties in the future. Since these types of communities are relatively new, the resolution of these difficulties is left only to the reader's imagination. It is however, highly likely that many will not survive in tact. Since most are not constructed to the higher standards of public entities, converting them to normal public neighborhoods is not a viable option. Should public entities elect to allow this conversion, there will be significant financial and sociological issues that are yet to be resolved.

One resolution to this dilemma is to require that all private developments be constructed to public standards. At the time 51 percent of the units are sold and the association is turned over to the residents by the developer, the residents could vote whether to incorporate as a private corporation or remain as a public neighborhood. The final maps and other documents would then be recorded accordingly. This facilitates the idea that the association should be created by the residents rather than by the developer.

Polycentric law is generating new legal questions related to private communities. These communities are drafting volumes of new “private” laws in the form of covenants, conditions and restrictions (CCRs). The existing legal volumes dealing with both the internal and external issues related to gated communities do not yet address many the evolving issues. Many states such as Nevada and California are drafting and passing new laws aimed at resolving some of these issues. It is believed that this process will not only continue but will accelerate.

Approximately one third of the homes constructed today are in private communities of one type or another. Every citizen, not just those who choose to purchase property under the jurisdiction of these private corporations, will feel the implications of this rapid growth of private communities.

Suggested topics for further research are:

The psychological development of children raised in gated communities

- A comparison of the laws of incorporation of individual states related to private communities
- The economic impacts of private communities on their encompassing public entities
- Demographic research to determine the reasons for the high concentration of private communities in various geographic areas such as southern California, Florida and Texas
- The demographics of the owners in private communities related to the economic characteristics of the development such as median property value, geographic location, amenities provided, and the restrictiveness of the covenants, conditions, and restrictions.



## Appendix-A Standard Form, Chicago Restrictive Covenant, 1927

*This electronic document was created by Wendy Plotkin, a Ph.D. Candidate at the University of Illinois at Chicago, Department of History, on 22 September 1996.*

If you'd like to suggest documents for this collection of primary documents on the topic of racial restrictive covenants, please contact Wendy Plotkin at U20566@uicvm.uic.edu.

### Appendix A

Standard Form, Restrictive Covenant, Drafted for Chicago Real Estate Board by Nathan William MacChesney of the Chicago Plan Commission, 1927.

AND, WHEREAS, the parties hereto feel that the restrictions and covenants hereinafter imposed and created are for the best interests of all the parties hereto and of the property hereinbefore described.

IN CONSIDERATION of the premises and of the mutual covenants hereinafter made, and of the sum of Five Dollars (\$5.00) in hand paid to each of the parties hereto by each of the other parties hereto, the receipt of which is hereby acknowledged, each party as owner of the parcel of land above described immediately under his name, does hereby covenant and agree with each and every other of the parties hereto, that his said parcel of land is now and until January 1, 1949 and thereafter until this agreement shall be abrogated as hereinafter provided, shall be subject to the restrictions and provisions hereinafter set forth, and that he will make no sale, contract of sale, conveyance, lease or agreement and give no license or permission in violation of such restrictions or provisions, which are as follows:

1. The restriction that no part of said premises shall in any manner be used or occupied directly or indirectly by any negro or negroes, provided that this restriction shall not prevent the occupation, during the period of their employment, of janitors' or chauffeurs' quarters in the basement or in a barn or garage in the rear, or of servants' quarters by negro janitors, chauffeurs or house servants, respectively, actually employed as such for service in and about the premises by the rightful owner or occupant of said premises.

2. The restriction that no part of said premises shall be sold, given, conveyed or leased to any negro or negroes, and no permission or license to use or occupy any part thereof shall be given to any negro except house servants or janitors or chauffeurs employed thereon as aforesaid. The covenants, restrictions, and agreements herein contained shall be considered as appurtenant to and running with the land, and shall be binding upon and for the benefit of each party hereto and may be enforced by any of the parties hereto by any permissible legal or equitable proceedings, including proceedings to enjoin violation and for specific performance; provided, however, that in any action brought to set aside any deed made in violation of any of the provisions of this agreement, it shall be a good defense thereto that prior to the institution of such suit, the title to the premises then in question had become vested in, and was then owned by, a corporation or a white person, for value; and provided, further, that the lien of no mortgage or trust deed in the nature of a mortgage shall be impaired or invalidated by reason of the breach of any of the provisions of this agreement, whether any such breach shall have occurred prior or subsequent to the recording of any such mortgage or trust deed; and provided, further, that nothing contained in the foregoing provisions shall in any manner impair the right of any person or persons interested to enforce at all times and against all persons the restrictions in this agreement contained prohibiting the use or occupation of all or any part of said premises by a negro or negroes.

This agreement and the restrictions herein contained shall be of no force or effect unless this agreement or a substantially similar agreement, shall be signed by the owners above enumerated of seventy-five per centum of the frontage above described, or their heirs or assigns, and recorded in the office of the Recorder of Deeds of Cook County, Illinois, on or before March 31, 1929. Provided, however, that if the owner of any of said parcels or any part thereof shall be under disability, as, for example, that of minority, or for any other reason shall not have the power to execute this agreement, as, for example, when the title is held, without such power, by testamentary trustees or other fiduciaries, the frontage so owned shall be treated as though the owners thereof had power to sign, and had signed this agreement, for the purpose of determining whether this agreement becomes effective or not under the provisions of this paragraph.

It is understood that for convenience a number of counterpart or concurrent instruments have been prepared, of even date herewith, the text of each of which is substantially the same as that of this instrument, and that the execution of any one of such instruments shall have the same effect as the execution of this instrument by the same person would have, and it is understood that parties to this

agreement shall include not only those persons who shall sign this instrument but also all persons who shall sign any of said counterpart or concurrent instruments, and that this instrument and all of said counterpart or concurrent instruments shall constitute one agreement. It being contemplated that changes in ownership may occur between the date which this instrument bears and the date when it shall become effective, or that there may possibly be some misrecital of ownership herein contained, it is further understood that the execution hereof by the person who shall be the owner of any of said parcels of land at the time of such execution shall have the same effect as though such person had been the owner thereof on the date hereof and was so described herein, whether the recital of ownership herein contained be made to conform to the facts at the time of execution or not. And if, in order to conform to the facts as to ownership at the time of execution, the recital of ownership in any of said instruments shall be made different from that contained in the others, that difference shall not prevent all of such instruments from being construed to be substantially similar to each other.

No restriction imposed hereby shall be abrogated or waived by any failure [sic] to enforce the provisions hereof no matter how many violation or breaches may occur.

This agreement and the restrictions herein expressed may be abrogated at any time on or after January 1, 1949, by the written agreement of the owners of sixty per centum of the frontage owned by the parties who shall sign this agreement, as herein set forth, such abrogation to be effective from and after the date of delivery and recording of such written agreement. Provided, however, that if the owner of any of said parcels or any part thereof shall be under disability, as, for example, that of minority, or for any other reason shall not have the power to execute such abrogation agreement, as, for example, when the title is held, without such power, by testamentary trustees or other fiduciaries, the frontage so owned shall be treated as though the owners thereof had power to sign, and had signed, such abrogation agreement, for the purpose of determining whether such abrogation agreement becomes effective or not under the provisions of this paragraph.

The invalidity of any restriction hereby imposed, or of any provision hereof, or of any part of any such restriction or provision shall not impair or affect in any manner the validity, enforceability or effect of the rest of this agreement.

Pronouns herein employed in the masculine gender shall be construed to include the feminine and neuter genders, and the word "party" or "persons" to include natural and artificial parties or persons.

The term "negro: as used herein shall include every person having one-eighth part or more of negro blood, or having any appreciable admixture of negro blood, and every person who is what is commonly known as a colored person.

In any case where there is a recorded lease of any parcel of the property described herein for a term ending more than five years after any given date the owner of the reversion and the owner of the leasehold estate together shall be deemed to be the owners of such parcel on such given date within the meaning of this contract, and whenever the signature of the owner of such parcel shall be required on such given date under the provisions hereof, the signatures of both shall be required, provided that whatever interest any signer of this instrument owns in any of said property shall be bound by the provisions hereof. Lessees under unrecorded leases on any given date and under leases for terms ending less than five years after such given date shall not be regarded as owners within the meaning of this contract.

The undersigned spouses of owners of land herein described join herein for the purpose of signifying their assent hereto and of subjecting their rights of dower, if any, to the restrictions and provisions imposed hereby.

Time is of the essence of this contract and all the terms, conditions and provisions hereof.

The covenants, restrictions and agreements herein contained shall be binding on, and for the benefit of, and may be enforced by and against, each party hereto, his successors and assigns, and the heirs, executors, administrators and successors of them respectively.

IN WITNESS WHEREOF, the parties hereto have hereunto set their hands and seals the day and year first aforesaid.

SOURCE: Thomas Lee Philpott, THE SLUM AND THE GHETTO: NEIGHBORHOOD

DETERIORATION AND MIDDLE CLASS REFORM, 1880-1930.

New York: Oxford University Press, 1978. Appendix A, 407-410.

## Appendix-B A Note From A Homeowner's Association President

Dear Friends and Neighbors,

The primary responsibility of the completely volunteer OHA Board is to manage the CCR&R's. These are the restrictive covenants attached to every piece of property within the development. These rules and regulations were assembled and tied to each lot by the original developer as an enticement for potential buyers to buy lots or homes in our development. Because the vast majority of buyers want to live in a neighborhood full of neatly painted homes resting on nicely landscaped lots, the CCR&R's, which never expire, act as a sort of insurance policy that your neighbors will take good care of their property. When you list your property for sale, your neighbor's peeling paint, rusting sheet metal, knee-high weeds, and generally sloppy appearance will have a dramatic effect on the price you are offered for your home. If you neglect your property the OHA will enforce the CCR&R's to ensure compliance.

We have had difficulty in past years with the continued follow-up needed to insure that all deficient properties were repainted and that constant problem yards were mowed and trimmed. For this reason, we hired CDC Management [(800) \*\*\*-\*\*\*\*] to oversee the overall management of the Olympus neighborhood. Some of you may have received a letter from \*\*\*\*\* of CDC Management requesting that you repaint your house or mow your lawn. Each of these letters is reviewed individually by the OHA Board. In no case have we, thus far, disagreed with her letters or suggestions. We have also found no reason to defer a repaint or yard cleanup. The bottom line is that if you want to live in Olympus, you have to take care of your property. If you need a copy of the CCR&R's, please call Kelli Smith. That's about enough about the CCR&R's. And a Bravo and many thanks to all those who've recently painted or taken on a big yard beautification / landscaping project. You're making our community a better place to live!

Part of what you buy when you come to Olympus is a **sense of community**. The OHA organizes many activities throughout the year including the Easter Egg Hunt, Spring Cleanup and Planting Party, the Annual Garage Sale, Summer Potluck (coming soon), Day-After-Halloween Canned Food Drive, and Kids Christmas Party and Cookie Exchange. Many of these activities are centered around our kids and are meant to be fun for the whole family. Different volunteer board members and community volunteers organize these activities. The key word here is Volunteer. Many of us have been volunteers on the Olympus Homeowners Board for several years. We really have a lot of fun and it is a great way to get to know your neighbors. For those of you who are new in the neighborhood, it is a good way to develop a network of friends and a good way for your kids to "settle-in" and **make new friends**. Our next meeting is at 7:00 PM., **Monday, July 26th** at my home located at 8019 129th Pl. SE. We invite any and all to join us. But specifically, we need a secretary who can take a few notes and bring them to the next meeting. This is probably the most important position on the Board! But feel free to join us even if you don't have desire to secretary. We'll find a place for you!

Best regards,  
\*\*\* \*\*\*\*\* , OHA president

## Appendix C Restrictions of King's Grant on the Ashley

### Declaration of Restrictions

INTRODUCTION: The original sets of restrictions governing development of this subdivision were filed with the Office of the Clerk of Court for Dorchester County during 1970 through 1979.

An additional set modifying the relationship between lot owners and the Country Club was filed in 1975. Since 1983 over 51% of the lot owners have given written approval to a series of changes in the original restrictions. These changes were filed in 1984, 1985, 1986, 1996 and 1999.

In the restrictions, King's Grant is subdivided into three sections:

- Section One - lots bounding Seven Oaks Lane and to the North
- Patio Houses - lots on Kings and Queens Courts and Lancer Drive
- Section Two - lots bounding Country Club Lane and to the South.

The Restrictions govern all property within King's Grant except:

- The Country Club property
- The townhouse developments between Country Club and Seven Oaks Lanes
- The real estate office at the corner of Seven Oaks and Dorchester Road.

The restrictions for the three sections vary only with respect to portions of Setbacks, Area Requirements, and Easements; therefore, we will present the restrictions for Section Two, indicating the slight differences in parentheses. We will omit only the descriptions of property and the opening and closing legal format statements.

The Declaration of Restrictions, which is a legal part of your deed, should have been furnished to you by your realtor and or closing attorney; however, we have found most of these professionals delinquent in this respect. Accordingly, we have included this extract for your convenience and guidance. The basic purpose of these provisions is to protect the property values within King's Grant. Please read and comply with these laws.

### SECTION I

#### Restrictions

1. Description of Property. (omitted)
2. Residential Use of Property. All lots shall be used for residential purposes only and no structure shall be erected, placed, altered or permitted to remain on any lot other than one single-family dwelling not more than two and one-half stories in height and any accessory structures customarily incidental to the residential use of such lots. No trade, business, distribution point of any kind, nor the practice of any profession shall be permitted on any lot. No building or structure of any kind may be used for any trade, business or profession.
3. Setbacks and Building Lines. No building shall be located on any lot nearer to the front lot line than thirty (30) feet, or nearer to a side street line than twenty (20) feet. On corner lots, the front lot line shall be the shorter of the two property lines along the intersecting streets. Setback provisions herein prescribed may be altered by the subdivider whenever, in its sole discretion, the topography or the configuration of any lot in said subdivision will so require. (Patio Houses: No minimum setback.)
4. The following additional provisions concerning setbacks shall apply:
  - (a) No building shall be located nearer than fifty (50) feet to the bank line of the King's Grant canal, reservoir or property line of the King's Grant Golf Course. (Section One-or fifty (50) feet to the bank lines of the Ashley River or Eagle Creek.)
  - (b) Flexibility. The minimum setbacks are not intended to engender uniformity of setbacks. They are meant to avoid overcrowding. It is the King's Grant Homeowners' Association's intent that setbacks shall be staggered where appropriate so as to preserve important trees and assure vistas of water and open areas. King's Grant Homeowners' Association reserves the right to select the precise site and location of each house or other structure on each lot and to arrange the same in such manner and for such reasons as King's Grant Homeowners' Association shall deem sufficient; provided, however, King's Grant Homeowners' Association shall make such determination after considering Owner's recommendation as shown on Owner's site plan; and provided, further, in the event Board fails to notify Owner of King's Grant Homeowners' Association's site plan recommendation, Owner's site plan recommendation shall be binding on King's Grant Homeowners' Association.
  - (c) Swimming Pools. Swimming pools shall not be nearer than six (6) feet to any lot line and must be located to the rear of the main dwelling and shall not project with their coping more than two (2) feet above the established lot grade.
  - (d) Walls and Fences. Boundary walls may be erected and hedges grown, but no higher than three (3) feet in that area of the subject lot from the street right-of-way to the nearest point of the main residence closest to such right-of-way. No

fence of any type shall be permitted between the street right-of-way and the nearest point of the main residence closest to such right-of-way except for fences on corner lots adjacent to Dorchester Road: Fences, boundary walls and hedges shall not exceed six (6) feet in height from the finished grade of the fence sought to be constructed. No elevation changes shall be permitted which materially affect surface grade of surrounding lots. Any property owner whose rear property line or such lot line parallels or borders on Dorchester Road and who desires to erect a new or replacement fence must erect a privacy fence of unpainted wood construction, six (6) feet in height.

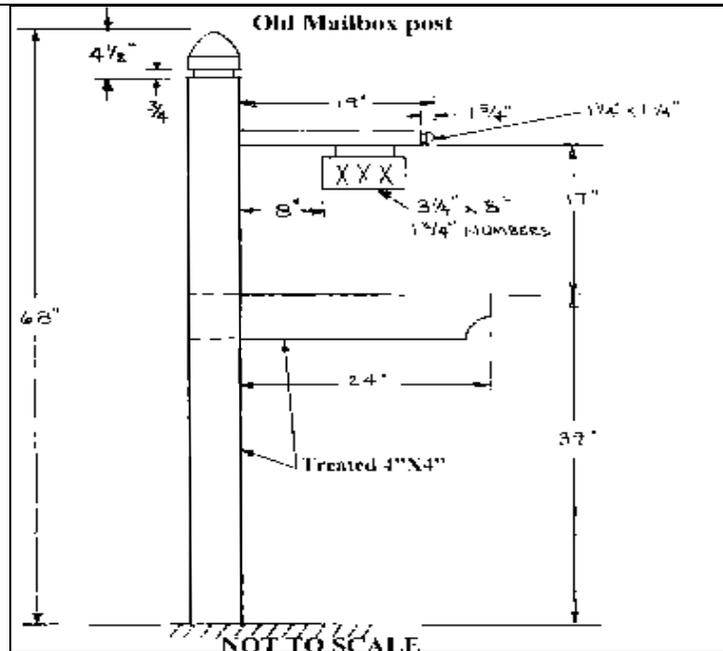
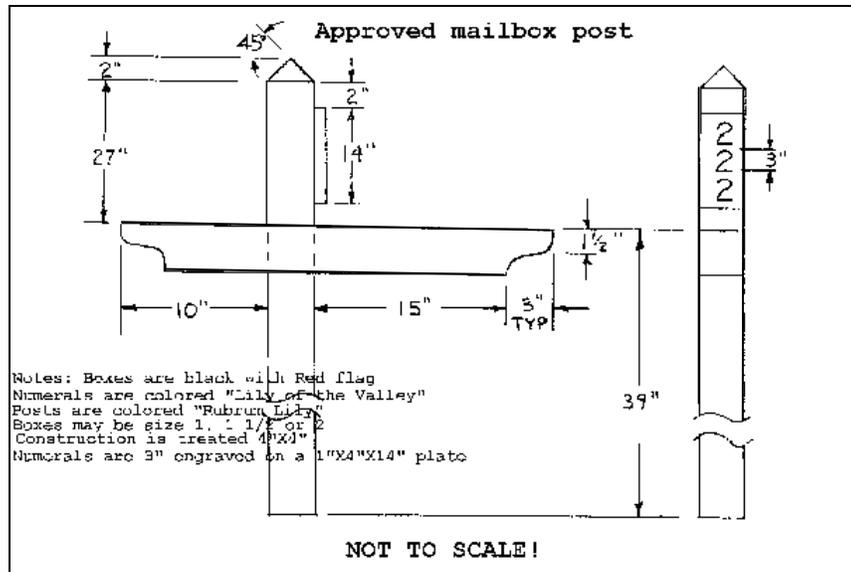
(e) Minor Deviations. Any deviation from the building line requirements set forth herein, not in excess of 10% thereof, shall not be construed to be a violation of said building line requirements. Setback provisions herein prescribed may be altered by the Developer whenever in its sole discretion the topography or configuration of any lot in said subdivision will so require.

(f) Subdivision of Lots. No lots (as shown on said Plat) shall be subdivided or combined to form one single building lot without the express written permission of the King's Grant Homeowners' Association. In such event, the building line requirements provided herein shall apply to such lots as re-subdivided or combined.

(g) Corner Lots. The "front line" of any corner lot shall be the shorter of the two property lines along the two streets.

(h) Porches, Eaves and Detached Garages. For the purpose of determining compliance and non-compliance with the foregoing building line requirements, porches, terraces, stoops, eaves, wing-walls, and steps extending beyond the outside wall of a structure shall not be considered as a part of the structure. The location of such structures shall be approved by the King's Grant Homeowners' Association, but no side yard shall be required for any detached garage or accessory acceptable to King's Grant Homeowners' Association, or the Architectural Committee as provided by Paragraph 5, Section 1, of these covenants.

5. Approval of Plans. No construction, reconstruction, remodeling, alteration or addition to any structure, building, fence, wall, driveway or improvement of any nature which is visible from the outside of the structure, shall be constructed without obtaining the prior written approval of the Board of Governors of the King's Grant Homeowners' Association or its Architectural Review Committee, as to location, plans and specifications. As a prerequisite to consideration for approval and prior to beginning the contemplated work, two complete sets of building plans and specifications must be submitted. The Board of Governors or its Architectural Review Committee shall be the sole arbiter of such plans and may withhold approval for any reason, including purely aesthetic considerations. Upon giving authority, construction shall be started and prosecuted to completion promptly and in strict conformity with such plans. The approving authority shall be entitled to stop any construction in violation of these restrictions or not complying with the approved plans and specifications.
6. Architectural Review. The authority for the review and approval of plans as set out in 4 above is hereby vested with the Board of Governors of the King's Grant Homeowners' Association, Inc. or such Architectural Review Committee as shall be appointed by the Board. Such committee shall be composed of not less than three nor more than seven members, all of whom shall be owners of property subject to these restrictions.
7. Dwelling Building Cost and Area Requirements. The living areas of the main structure, exclusive of open porches, porte-cocheres, garages, carports and breezeways, shall be not less than 2,000 square feet for lots bordering on any canal, reservoir or the property line of the King's Grant Golf Course. (Section One -- Ashley River or Eagle Creek.) On all other lots, the minimum living area, exclusive of open porches, porte-cocheres, garages, carports and breezeways, shall be not less than 1,400 square feet (Patio Houses -- 1,200 square feet.)
8. Obstructions to View at Intersections and Delivery Receptacles.
  - (a) The lower branches of trees or other vegetation in sight line approaches to any street or street intersections shall not be permitted to obstruct the view of the same.
  - (b) No receptacle of any construction of height for the receipt of mail, newspapers, or similar delivered materials, shall be erected or permitted to remain between the front street line and the applicable minimum building setback line; provided, however, that this restriction shall be unenforceable insofar as it may conflict with the regulations, now or hereafter adopted, of any government agency.
  - (c) All mailbox posts will meet the standard mailbox post design as approved by the 1999 Homeowners Board of Governors. All mailbox posts will meet this standard by December 31st, 1999 and this standard will be considered the only acceptable mailbox design for use in King's Grant. All mailboxes shall be firmly attached to the post and shall be well maintained. A brass hook will be attached on the arm of the mailbox post below the door and used to hold the Kapers newsletter when delivered.
9. The 1999 Board of Governors approved the following design (titled "Approved Mailbox Post") as the standard mailbox post. The Board also approved the following design (titled "Old Mailbox Post") as acceptable as long as it is in good condition, as decided by the Restrictions Committee. If the "Old Mailbox Post" is in a state of needed to be replaced, it must be replaced by the approved design. Minor deviations will be allowed if approved by the Restrictions Committee provided the deviations do not detract from the overall design or the deviations are required for security or placement reasons.



10. Use of Outbuildings and Similar Structures. No structure of a temporary nature, such as prefabricated metal storage buildings, shall be erected or placed on any lot. Wooden or masonry storage buildings or precut wooden buildings are acceptable. All such buildings shall be approved by the Architectural Review Committee prior to being placed on any lot. Metal roofs on such buildings are prohibited. Metal, lawn or storage buildings existing on any lot as of date of this instrument shall be allowed to remain in place as long as they are completely screened by a wood, masonry or flora fence.
11. Livestock. No animals, livestock or poultry of any kind shall be raised, bred or maintained on any lot, except 7household pets (in reasonable numbers) of the owners or occupants of the dwelling house thereon.
12. Sign Boards. No sign boards of any description shall be displayed on any lot with the exception of conventional real estate "For Sale" and "For Rent", "Garage Sale" or security system signs. No billboards, political or advertising signs shall be permitted.
13. Aesthetics, Nature growth, Screening, Underground Utility Service.
  - (a) Trees shall not be intentionally destroyed or removed without the written approval of the Board of Governors of the King's Grant Homeowners' Association. Exceptions to this restriction are diseased, dead or lightning-struck trees or those trees that constitute a threat or hazard to a residence or community or such trees as are necessary to facilitate approved construction. The intent of this Restriction is to encourage the protection and replacement of trees consistent with the economic and healthful enjoyment of private property and common areas within the subdivision. The intent is not punitive or to cause hardship to any individual who uses every care and diligence to protect trees within the subdivision.

Violation of this Restriction by failure to comply with requirements may be subject to a monetary assessment of \$100.00 per infractor or such violator may be required to replace a like tree within the property or common area as required by the King's Grant Homeowners' Association. Requests for tree removal are to be submitted to the Restrictions Committee for approval. Downed or fallen trees should be removed promptly and stumps ground down.

(b) Garbage cans, equipment, coolers, wood piles or storage piles shall be screened to conceal them from the view of neighboring lots, roads, streets, the waterfront or open areas. Grills and/or other similar barbecue devices shall be stored so as not to be visible from the front lot line of the subject residence.

(c) All residential utility service and lines to residences shall be underground. All fuel tanks must be buried or walled from view as aforesaid. Plans for all screens, walls and enclosures must be approved by the Developer prior to construction.

(d) No automobile, truck, motorcycle or other vehicle will be allowed to park on the lawn or yard area of any property in King's Grant. The only area where parking is allowed is the driveway or paved areas designated as appropriate by the Board of Governors

14. Antenna. No radio or television transmitting or receiving towers, dishes or antenna of any kind shall be erected within the restricted property which are visible from any street. Any proposed tower, dish or antenna visible from neighboring lots must be approved in writing by the Board and shall be screened appropriately (in accordance with 11-C).
15. Boats, Boathouses, Docks, Piers, and Pilings. No boathouses, docks, piers or wharves shall be constructed at any residential building without King's Grant Homeowners' Association's prior written approval. Quays paralleling the river bank may be constructed upon obtaining the King's Grant Homeowners' Association's prior written approval as to location, design and construction, which approval shall be discretionary. Such approval by the King's Grant Homeowners' Association for the construction or placement of structures in or upon navigable waters shall not obviate the necessity of lot owners from obtaining the approval by the U.S. Army Corps of Engineers or other appropriate South Carolina State Agencies.
16. Trailers, Trucks, School Buses, Boat Trailers. No house trailer or mobile home, or habitable motor vehicle of any kind, school buses, trucks (other than "pickups" and 1/2 ton panel trucks), or other commercial vehicles, shall be kept, stored, or parked overnight; either on any street or on any lot except within enclosed garages or within storage areas that may be established by the King's Grant Homeowners' Association. Out of area guests traveling in a self-propelled recreational vehicle or pulling a travel trailer will be allowed to park these vehicles in the driveway or side yard without shielding from the street for the duration of their visit, up to two weeks, only. Camper trailers or travel trailers, utility trailers and boats on or off trailers, may be stored on a lot, but must be parked to the rear or back yard of the dwelling house. Camper trailers, travel trailers, utility trailers and boats on or off trailers may be stored in the side yards of a lot provided that such vehicles are shielded from the street by a flora, wooden or masonry wall (not constructed of concrete or cinder block) fence, no further forward than the main front elevation of the residence. Such vehicles may be parked in the front drive for a period of twenty-four (24) hours for loading and unloading only.
17. Unightly materials. No trash, rubbish, debris, junk, stored materials, wrecked or inoperable vehicles or similar unightly items shall be allowed to remain on any street or lot outside an enclosed structure. However, the foregoing shall not be construed to prohibit temporary deposits of trash, rubbish and debris for pickup by governmental or similar garbage and trash removal service units. In the event any owner of any developed lot fails or refuses to keep such property free from any unightly items or any weeds, underbrush or other unightly growth, then the King's Grant Homeowners' Association, or its successor, may enter upon such property five days after posting a notice thereon requesting the owner to observe this paragraph, and upon entry, remove all such unightly items or growth at owner's cost. No such entry shall be deemed a trespass. The King's Grant Homeowners' Association notice shall be sufficient if it states, in substance:  

Please remove this unightly item or growth:  
(describe here)  
within five days or King's Grant Homeowners' Association shall do so at your expense.  
You are violating the restrictions.
18. Filling Waterways, Changing Elevations, Bridges. No lot shall be increased in size by filling in the water it abuts. No lot owner shall excavate or extract earth for any business purpose. No elevation changes shall be permitted which materially affect surface grade of surrounding lots. King's Grant Homeowners' Association reserves the right to build footbridges or vehicular bridges across any canals, creeks or lagoons so long as a minimum of six (6) feet of clearance is available at mean high tide, provided this paragraph shall not obligate King's Grant Homeowners' Association to construct any such bridge.
19. Wells. No individual water supply system shall be permitted except for irrigation, swimming pools or other non-domestic use.
20. Easements. An easement on each lot is hereby reserved by the King's Grant Homeowners' Association along, over, under, and upon a strip of land ten (10) feet in width parallel and contiguous to the rear or back lot line of each lot. (Patio Houses - five (5) feet) and along, over, under, or upon a strip of land three (3) feet in width parallel and contiguous to each side lot line, in addition to such other easements as may appear on the aforementioned recorded subdivision plats. The purpose of these easements shall be to provide, install, maintain, construct and operate drainage facilities now or in the future to, from or for each of the individual subdivision lots. Within these easements, no permanent structure, or other materials of a permanent nature shall be placed or permitted to remain which may damage or interfere with the installation or maintenance of, or which may change the direction or flow of drainage channels in the easements. The easement area of

each lot and all improvements in it shall be maintained continuously by the owner of the lot, except for those improvements for which a public authority or utility company is responsible. For the purpose of this covenant, the King's Grant Homeowners' Association reserves the right to notify or extinguish the herein reserved easements along any lot lines when, in its sole discretion, adequate reserved easements are otherwise available for the installation of drainage facilities.

21. Green Areas. The green areas are the common property of all homeowners and have both aesthetic and functional value. The areas are meant for play and enjoyment by everyone.
  - (a) Burning: If necessary, leaves and pine straw only may be burned under constant supervision and with the proper permits. The area is to be raked level afterward. No garbage, trash or wood is to be incinerated.
  - (b) Access: Usage of green areas for incoming and outgoing materials for construction or landscaping will be permitted only if request is made in writing and approved by the Chairperson of the Green Area Committee. The ground must be left free from rots and debris. No general drive through or parking is permitted.
  - (c) Debris: There will be no depositing of refuse, Christmas trees, building materials, cut wood, etc. No personal property or vehicles are to be left in the green area.
  - (d) Use: Digging, construction of playhouses and pet houses/runs, destruction of trees and shrubs and motorized vehicles are prohibited.
  - (e) Water Discharge: Backwash from swimming pools is prohibited as it softens the ground and inhibits proper maintenance.
  - (f) Gardens: Vegetable and flower gardens are to be confined to the owner's property. The Committee may designate areas that are to be planted and maintained by the maintenance crews.
  - (g) Wood Piles: Storage of wood is to be kept on the owner's property. Wood piles create an obstacle to mowing and could kill trees by insect transferal.
  - (h) Trees: Any item of live growth in the common areas may be felled only by King's Grant Homeowners' Association. If a tree must be felled from private property into the green area, the homeowner must remove it promptly.

## SECTION II

### Annual Regime Fee

1. Annual Assessment for Regime Fee. Each owner of a lot within King's Grant on the Ashley subject to these Restrictions is deemed to covenant and agree to pay to the King's Grant Homeowners' Association, Inc. an annual assessment for the continuation of an operating fund in the amounts hereinafter set forth. The sums so received shall be used to provide funds for the maintenance, landscaping and beautification of the common areas currently owned by King's Grant Homeowners' Association, Inc. but shall not include public right-of-ways or easements when satisfactorily maintained by any government authority or the Country Club facilities. Further, such sums may be used for providing services and the enforcing of these restrictions on their behalf by the King's Grant Homeowners' Association. The administration of the operating fund shall be vested with the Board of Governors of the King's Grant Homeowners' Association, Inc. according to its by-laws.
2. Amount and Due Date of Annual Assessment for Regime Fee. Each owner of a lot subject to these restrictions shall pay to the King's Grant Homeowners' Association, Inc. the designated annual regime fee amount. The Annual assessment was increased to Ninety and no/100 (\$90.00) beginning January 1, 1990. Such payment is due on the first of January each year and shall be delinquent sixty (60) days after such. It shall be the right and responsibility of the Board of Governors of the King's Grant Homeowners' Association, Inc. to prosecute any action against any lot owner for any delinquent payments. A late charge of \$5.per month shall be charged for each month late or any portion thereof.
3. Adjustments in Annual Assessment for Maintenance Fund. The amount of the assessment may be adjusted by the King's Grant Homeowners' Association where, in its discretion, such adjustment is necessary to accomplish the purposes of the Maintenance Fund as set out above. Any adjustments shall correspond to any increase or decrease in the cost of living as shown by the Consumer Price Index as published by the Bureau of Labor Statistics of the United States Department of Labor. The base year for determining such increase or decrease shall be the year 1971. If the publication of the Consumer Price Index is discontinued, the property owners and Board of Governors may agree to accept comparable statistical information in the cost of living for the tri-county area published by any state or federal agency or by a financial periodical of recognized authority selected by the Board of Governors.
4. Assessment -- Personal Obligation of Owners. The assessment shall be the personal obligation of the owner of a lot subject to these restrictions at such time as the assessment falls due and shall not pass to successors in title unless expressly assumed. Each lot owner is responsible for the payment of such assessment whether or not a residence has been constructed on his lot. This assessment is due and payable by all lot owners other than those specifically exempted.

## SECTION III

### King's Grant Country Club

As of September 30, 1975, the King's Grant Country Club, including golf course, fairways, club house, swimming pool, tennis courts and all other recreational facilities became privately owned.

However, each owner of a lot in King's Grant on the Ashley, upon payment of the monthly dues prescribed by the owner shall

have the right and privilege to designate one Family Unit to use and enjoy the facilities of the King's Grant Country Club. Based on previous documents filed with the Clerk of the Court of Dorchester County, no Family Unit shall be required to pay an initiation fee as a right to become a member of King's Grant Country Club.

## SECTION IV

### General Provisions

1. Unintentional Violation of Restrictions. In the event of unintentional violation of any of the foregoing restrictions with respect to any lot, the King's Grant Homeowners' Association or its successors reserves the right (by and with the written mutual consent of the owner or owners for the time being of such lot) to change, amend, or release any of the foregoing restrictions as the same may apply to that particular lot.
2. Enforcement. If any person, firm or corporation shall violate or attempt to violate any of said restrictions, it shall be lawful for any person, firm or corporation owning any of said lots (or having any interest therein) or the Board of Governors of the King's Grant Homeowners' Association to prosecute any proceeding at law or in equity against the person, firm or corporation violating or attempting to violate the same, and either to prevent him, it or them from doing so or to recover damages or other dues for such violation. In the event the Board shall prevail in any such legal proceeding allowed hereunder, the Board shall be entitled to a monetary award against such violator of reasonable attorney's fees, costs and expenses incurred incident to such proceeding.
3. Severability. Whenever possible, each provision of this Declaration shall be interpreted in such manner as to be effective and valid, but if any provisions of this Declaration or the application thereof to any persons or to any property shall be prohibited or held invalid, such prohibition or invalidity shall not affect any other without the invalid provision or application, and to this end the provisions of this Declaration are declared to be severable.
4. Headings and Binding Effect. Headings are inserted only for convenience and are in no way to be construed as defining, limiting, extending or otherwise modifying or adding to the particular paragraphs to which they refer. The covenants, agreements and rights set forth herein shall be binding upon and inure to the benefit of the respective heirs, executors, successors and assigns of the King's Grant Homeowners' Association and all persons claiming by, through or under King's Grant Homeowners' Association.
5. Duration. The foregoing restrictions shall be construed as covenants running with the land and shall be binding and effective until January 1, 2006, at which time they shall automatically be extended for successive periods of ten (10) years each unless it is agreed by the vote of a majority in interest of the then owners of the described property to change, amend or revoke the restrictions in whole or in part. Every purchaser or subsequent grantee of any interest in any property now or hereafter made subject to this King's Grant Homeowners' Association, by acceptance of a deed or other conveyer thereof, agrees that the covenants and restrictions of this Declaration may be extended as provided in this Article.
6. Amendment. The covenants and restrictions of this Declaration may be amended at any time and from time to time by an agreement signed by at least fifty-one (51) percent of the property owners whose lots are within King's Grant on the Ashley. Any such amendment shall not become effective until the instrument evidencing such change has been filed for record in the Office of the Clerk of Court for Dorchester County, South Carolina. Every purchaser or subsequent grantee of an interest acceptance of a deed or other conveyance, agrees that the covenants and restriction of this Declaration may be amended as provided herein.

### References

Restrictions are filed with the Office of the Clerk of Court for Dorchester County as follows:

Section One - 24 September 1970, recorded in Book 179, page 113  
Patio Houses - 22 June 1973, recorded in Book 214, page 46  
                  23 October 1973, recorded in Book 219, page 410  
Section Two - 19 December 1972, recorded in Book 206, page 42  
                  31 October 1973, recorded in Book 220, page 157  
Country Club - 30 September 1975, recorded in Book 256, page 343  
All Sections - 03 August 1984, recorded in Book 519, page 148  
                  29 October 1984, recorded in Book 524, page 484  
                  05 February 1985, recorded in Book 531, page 122  
                  31 December 1986, recorded in Book 576, page 784  
                  28 February 1996, recorded in Book 1564, page 208

## References:

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<sup>1</sup> Evan McKenzie, *Privatopia, Home Owners Associations and the Rise of Residential Private Governments*, (New Haven and London: Yale University Press 1994) p 155.

<sup>2</sup> Blakely-Snyder Report, *supra* note 1, at 3

<sup>3</sup> Edward J. Blakely; Mary Gail Snyder, *growth of gated communities*, *American Demographics*, May 1997 v19 n5 p22(3)

<sup>4</sup> Evan McKenzie, *Privatopia, Home Owners Associations and the Rise of Residential Private Governments*, (New Haven and London: Yale University Press 1994)

<sup>5</sup> *Ibid.*

<sup>6</sup> Edward Bellamy, *Looking Backward: 2000-1887* (Ticknor and Company, 1887; reprint, New York: Random House, 1917).

<sup>7</sup> Ebenezer Howard, *Garden Cities of Tomorrow* (Cambridge, Mass.: MIT Press, 1965).

<sup>8</sup> Edward J. Blakely and Gail Snyder, *Fortress America, Gated Communities in the United States*, (Washington D.C.: Brookings Institution Press, 1997), p. 4.

<sup>9</sup> Blakely and Snyder, p. 14

<sup>10</sup> Jackson, *Crabgrass Frontier*

<sup>11</sup> Edward J. Blakely and Gail Snyder, *Fortress America, Gated Communities in the United States*, (Washington D.C.: Brookings Institution Press, 1997)

<sup>12</sup> Interview by Blakely and Snyder with Martha Borsanyi, Robert Charles Lesser and Company, November 27, 1993.

<sup>13</sup> Rosabeth Moss Kanter, *Commitment And Community: Communes and Utopias in Sociological Perspective* (Harvard University Press, 1972), p.54.

<sup>14</sup> Blakely and Snyder, p. 12

<sup>15</sup> Blakely and Snyder, p. 15

<sup>16</sup> 182 Cal. App. 3d 816 [1982].

<sup>17</sup> Herman Long and Charles Johnson, *People vs. Property: Race Restrictive Covenants in Housing*, (Nashville: Fisk University Press, 1947).

<sup>18</sup> Source: Federal Housing Administration, *Underwriting Manual: Underwriting and Valuation Procedure Under Title II of the National Housing Act With Revisions to February, 1938* (Washington, D.C.), Part II, Section 9, Rating of Location as cited by Plotkin.

<sup>19</sup> "Deeds of Mistrust: Race, Housing, and Restrictive Covenants in Chicago, 1900-1950" by Wendy Plotkin, Ph.D. Candidate University of Illinois at Chicago, Department of History. Retrieved June 10, 2000, from the World Wide Web. <http://www.uic.edu/~wplotk1/deeds/>

<sup>20</sup> For a discussion of the history of these acts see Uniform Common Interest ownership Act (Chicago: National Conference of Commissioners on Uniform State Laws, 1982), 6-8.

<sup>21</sup> McKenzie p 154.

<sup>22</sup> SB 314, Act of July 17, 1997, ch.631, 1995 Nev. Stat.3110.

<sup>23</sup> See Federal Housing Administration/Urban Land Institute, *The Homes Association Handbook*, Technical Bulletin no. 50 (Washington, D.C.: Urban Land Institute, 1964), appendix F, atr. N, sec.1.

<sup>24</sup> McKenzie, p127-128.

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25 American Demographics, May 1997 v19 n5 p2293), Places to hide. (growth of gated communities) Edward J. Blakely; Mary Gail Snyder.

26 Stephen E. Barton and Carol J. Silverman, Common Interest Homeowners' Association Management Study (Sacramento: California Department of Real Estate, 1987), 2.

27 McKenzie, p. 122

28 Ibid, 222

29 Richard Louv, America II (New York: Penguin, 1983), 92. "Louv's perceptive treatment of such "capitalistic communes" as Rancho Bernardo and their role in what he calls the "shelter revolution" is one of the most accessible and influential to date." (McKenzie p. 202)

30 Ibid., 94.

31 Bernardo Villas Management Corp. v. Black, 190 Cal. App. 3d 153; 235 Cal. Rptr. 509 (1987)

32 Louv, America II, 94-95.

<sup>33</sup>33 Consumer Alert: News 3 puts Homeowners Associations back on the Hot Seat A broadcast news article posted on MSNBC www.kvbc.com by Channel 3 News; Las Vegas, Nevada, reported by Darcy Spears, April 17, 2000. selected text as follows:

"The problem, according to Justice for Home and Condo Owners is that they don't get all this information until escrow closing, when they're already locked into buying the house. Phil Testa founded Justice for Home and Condo Owners, a non-profit group helping Burns fight to get her home back. Testa says, "The greatest investment you'll ever make in your life could be slid out from under you. These people would steal your pillow while you're sleeping...It's my understanding that they were harassing her and fining her and in protest she didn't pay her dues, which is very, very foolish." Testa also says if you miss 3 months payment on association dues, they can immediately foreclose. Testa says, "The association dues pay for this attorney and management company so you have actually hired a gun that's pointed at you." That gun can fire out a foreclosure with no due process... No day in court. Testa says, "You don't have any judicial process. It's just advertised in the paper and it goes to sale." Ellen Rosenbaum runs benchmark, pebble creek's new property management company who came into the picture toward the end of Burns' foreclosure proceedings. Rosenbaum explains associations were formed with the idea of protecting property value, keeping up a neighborhood's appearance, but she acknowledges their power has spread. Burns says, "Absolute power corrupts absolutely...and in some cases, is out of control. Rosenbaum says, "It starts because you have people who are elected to the board of directors who don't understand a sense of community, they're extremely rigid on the enforcement of the documents. As we both know there are two ways you can deal with that kind of thing, in a positive "may we help you" mode or a "shame on you we're going to fine you" mode. And I think unfortunately in the last few years it's gone in the negative instead of the positive." State senator (Nevada) Mike Schneider says we're sitting on a time bomb with associations who essentially thumb their nose at the law.

34 Ibid.

35 Ibid.

36 The Futurist, May 1999 v33 i5 p12(1); Do-it-yourself governance: (Internet and gated communities) Dan Johnson.

37 Ibid.

38 Cal. Penal Code [sections] 837 (West 1995)

39 Cal. Penal Code [sections] 7582 Statutory Note (e) (West 1995)

40 Blakely and Snyder, p. 18

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- 41 Ibid. p 18
- 42 John B. Owens, Westec story: gated Communities and the Fourth Amendment, *American Criminal Law Review*, Spring 1997 v34 n3 p1127-1160
- <sup>43</sup> Louv, *America II*, 119. Cited by McKenzie p 141
- 44 Ronald L. Soble, Private Firms on Patrol. Security is Big Business, *L.A. Times*, May 21, 1985, at [section] 1, 1.
- 45 Peter Fimrite, Private Security Business Booms, *S.F. Chronicle*, Dec. 8, 1994, at A1 (citing a study of the National Institute of Justice).
- 46 Gage Harter, Cop and Microchip Coexist in a Booming Industry: Security, *Bus. Wkly.*, Aug. 1, 1994, at 8 (citing Hallcrest Report, a 1990 analysis of security trends.)
- 47 Charles Oliver, Private Sector Crime Control: More Firms, States Think Government Efforts Wanting, *Inv. Bus. Daily*, May 12, 1994, at 1.
- 48 Blakely-Snyder Report, *supra* note 1, at 17. the cost of the entire criminal justice system, including prisons, etc., is around \$100 billion. Oliver, *supra* note 13, at 1
- 49 Ibid. at 3.
- 50 256 U.S. 465 (1921)
- 51 Ibid. at 475
- 52 Jacobson, 466 U.S. at 111 (discussing a Federal Express employee who opened a package containing contraband).
- 53 Coolidge, 430 U.S. at 487
- <sup>54</sup> City of Las Vegas Title 19.
- <sup>55</sup> McKenzie, Section heading, p 140
- <sup>56</sup> Ibid.
- <sup>57</sup> Ibid.
- <sup>58</sup> McKenzie p 140.
- 59 Pro-choice living arrangements. (exclusive community organizations) (Brief Article) Robert H. Nelson, *Forbes* June 14, 1999 p222
- 60 Thomas Hobbs, *Leviathan* (New York: J. M. Dent and Sons, 1976), 117-118.
- 61 Arthur F. Bentley, *The Process of Government: A Study of Social Pressures* (Bloomington, Ind.: Principia Press, 1908), 268
- 62 McKenzie, p. 123
- 63 McKenzie, p 124.
- 64 *Dartmouth College v. Woodward*, 4 Wheaton 518 (1819)
- 65 McKenzie, p 124.
- 66 Ibid, p 125
- 67 Adolph Berle, Jr., *The 20th Century Capitalist Revolution* (New York: Harcourt, Brace, 1954), 105-6.
- 68 Earl Latham, "The Body Politic of the Corporation," in Edward S. Mason, ed., *The Corporation in Modern Society* (Cambridge, Mass.: Harvard University Press, 1959), 218
- 69 McKenzie p 125, Author interview with Byron Hanke, January 9, 1993.

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<sup>70</sup> McKenzie p 149.

<sup>71</sup> Robert Dahl, "The City in the Future of Democracy," *American Political Science Review* 61 (December 1967): 953, cited by McKenzie p 149.

<sup>72</sup> McKenzie p 122.

<sup>73</sup> Steven E. Barton and Carol J. Silverman, *Common Interest Homeowners' Association Management Study* (Sacramento: California Department of Real Estate, 1987), 2, cited by McKenzie p 130. *Physical deterioration of CID housing may become a serious issue in areas where a great deal of new construction was undertaken in the late 1970s through the 1990 recession. Many associations do not maintain adequate reserves for replacement of such building components as roofs, walls, and windows, which have a shorter useful life than many residents may realize. A defect in one component often causes damage to other components, hastening overall deterioration. This problem can be especially serious in condominiums and townhouses, where many residents live under one-roof and share walls. For example, a leaking roof membrane that admits water into the interior of the structure can damage the plywood roof itself and cause dry rot of the drywall and even the beams and joists. Consequently, the ultimate cost of not maintaining a roof or replacing its outer surface on schedule can be monumental and exceed the residents' resources.*

<sup>74</sup> *Ibid.*, 9.

<sup>75</sup> McKenzie p 132.

<sup>76</sup> See California Corporations Code, sec. 309.