

## DEVELOPERS: THE REAL CITY PLANNERS

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One of us (Gordon) writes about Common Interest Developments (CIDs, planned developments with governance structures that enforce private zoning codes) and the other (Keston) builds them. As we would expect in a market economy, it is the entrepreneurs who have discovered and brought to market in CIDs something innovative and auspicious while the scholars have begun to elaborate CID significance only recently<sup>1, 2</sup>. Some have referred to CIDs as a “quiet revolution”<sup>3</sup>, little noticed and only recently celebrated by a few writers but, of course, also subject to a growing array of criticisms. In Robert D. Putnam’s much celebrated *Bowling Alone* (2000), he casts CIDs in a negative light, lumping all of them with the much maligned “gated communities”. That may fit his agenda but gated communities are in fact only a small part, perhaps five percent, of the CID phenomenon<sup>4</sup>.

The appeal of CIDs makes great sense. At a time when all sorts of “stakeholders” are accorded standing in various land use decisions, private zoning administered via CID governance by the property owners themselves represents the market’s remedy in the service of more secure property rights. Just as conventional zoning has appeal as a way to preserve neighborhood character and assure property values, private zoning is one better because third parties are presumably kept at arms length.

It is also clear, although not yet recognized in most economics textbooks, that “public goods” have a spatial ambit and are, therefore, really “territorial goods”<sup>5</sup>. As such, it is sensible that many local “public” goods be paid for not with taxes but with the increases in land values created by those same common grounds and facilities. These are, of course, best managed by the property owners, usually the CID’s Board, acting in accordance with rules and regulations that were promulgated by market savvy developers whose success depends on understanding what it is that people want.

It is clear that the developer of a housing tract or condominium complex has incentives to think carefully about the rules which will govern the development after it has been completed. A home in a community with a sound constitution is more valuable and thus more saleable than a home in a community with a governance structure that features less clear property rights. These developers sell more than homes, they also sell “constitutional rules.” Contractual governments, CC&Rs and other homeowner-generated rules, developed in response to competitive pressures, may even have something to teach us about optimal constitutional rules.

Small wonder that across the U.S., there are now approximately 205,000 CIDs<sup>6</sup> housing more than 42 million residents. This represents nearly 15 percent of the nation’s housing stock, up from 3 percent in 1975 and 1.1 percent in 1970. Not surprisingly, a newer-housing stock state like California with 12 percent of the U.S. population and 10 percent of its housing stock (1990) has 20 percent of the CIDs. It appears that the odds of a California housing unit being governed as a CID are double the U.S. rate. The rise and the success of common interest developments (CIDs) is auspicious. The growth of CIDs since the early 1960s has been exponential. Many millions of Americans have already voted with their pocketbooks and their feet and many more millions will soon follow.

Almost half a century years after the appearance of Jane Jacobs’ masterful *The Death and Life of Great American Cities*, urban scholars of all sorts are staking claims to her legacy, one that emphasizes the importance of spontaneous innovations which are more likely to be bottom-up than top-down. We are no exception. Events have finally caught up with the Jacobs vision and no one today takes conventional 1950s urban planning seriously. We agree with Jacobs that there is substantial scope for markets to register and mediate the plans and visions of the people who make their lives in these settings. The ambit for markets and voluntary arrangements is much larger than many realize. Not only do maximizing individuals feed each other, as Adam Smith noted many years ago, but they also cooperate and sustain each other in numerous ways that extend beyond the realm of traditional “private” goods and services.

Pre- as well as post-Jacobs city planning has tried to be scientific. Planning literature and practice makes much of the transportation-land use interface and relies on elaborate models to forecast interdependent highway network traffic flows and small-area land uses for large metropolitan areas. The very difficult modeling issues involved have enlisted the efforts of large numbers of highly skilled people and have given rise to a large volume of sophisticated writing. Yet, at the end of fifty years of this effort, it appears that, i) most of the fruits of transportation science have, for one reason or another, not migrated to applied land use-transportation modeling; ii) even if the best thinking could be applied, it is probably a fool's errand because it is impossible to make long-term detailed forecasts. Under the best of circumstances, is a reliable forecast of such detail and magnitude, over hundreds or thousands of parcels and network links, ever possible? If it were, would a "snapshot" of this sort be useful given the power and magnitude of relentless change? Would it ever be useful if the uses of private land were planned at this level of detail?

Randall Holcombe<sup>7</sup> has recently argued that planners should leave land markets alone but, instead, attend to infrastructure planning and specialize in that to the best of their abilities. The appeal of Holcombe's position is clear. Land markets become freed, top-down planners are restricted and published infrastructure plans reveal the rules of the game, allowing developers to fulfill their plans, e.g the aspirations of their customers. These could be minimalist regional infrastructure plans because considerable infrastructure planning already occurs *within* the many CIDs recently put in place. Freed land markets would bring about much more of the latter phenomenon. There would be minimal conventional "city planning" (if one wants to preserve that title) but it would be limited to regional trunkline infrastructure planning, such as major highways and sewer treatment plants. These would establish the rules of the game, supporting private land markets -- as well as the provision of private services within CIDs.

The constitutions of contractual and "official" governments have much in common. Both include procedures for ensuring democratic rule and for financing basic services. Despite these similarities, there are also many differences. While majority rule is a defining characteristic of modern American governments, Boudreaux and Holcombe<sup>8</sup> report that contractual governments often subscribe to a voting standard of unanimity, or of super-majorities. While critics have emphasized that homeowner and condominium associations may legally enforce rules that a local government would be constitutionally prohibited from enforcing, it is also true that a binding deed restriction is no more a violation of constitutional rights than any other voluntary contract. It is safe to predict, however, that as more and more people come under the sway of contractual or shadow governments their powers and limitations will become an increasing source of controversy.

Nelson has suggested that there would be less NIMBY if homeowners had greater faith in the local zoning board and that private zoning would resolve that difficulty. In that view, NIMBYism is simply the result of property owners digging in their heels against *any* neighborhood change because they do not trust the zoning authorities. This beats the most widely proposed antidote for NIMBY, regional government<sup>9</sup> which has many serious problems: it overlooks heterogeneous tastes as well as scale diseconomies. Besides, the record of regional governments in the U.S. offers little basis for optimism<sup>10</sup>. "Marketable zoning", on the other hand, allows some socially desirable development to occur while avoiding what economists call agency problems, thereby reducing the attraction of the NIMBY tactic.

Nelson<sup>11</sup> has elaborated the superiority of private zoning, proposing ways to extend the phenomenon to established neighborhoods. Most people still reside in older neighborhoods and are unlikely to avail themselves of the benefits of governance by neighborhood association because of the high transactions costs of such a transition, involving many property owners and possible hold-outs. Nelson has suggested plausible concrete steps whereby self-governance can replace municipal governance.

[R]esidents of a neighborhood would come forward and propose the creation of a private neighborhood within certain boundaries. They would have set out the proposed terms of neighborhood governance, the proposed covenants to control land use in the area and other details of the proposed governance arrangement. This setup would replace whatever municipal zoning or other land use controls already in effect. After allowing suitable time for presenting and discussing this information in the neighborhood, an election would be held. If a certain

percentage (say 80 percent) voted in favor, a private neighborhood would be established – and every property owner in the neighborhood would be required as a matter of law to join. Although this system would in all likelihood be preferable to city-wide zoning controls, it may be important to provide some form of compensation or buy-out option for those who do not wish to be part of the new arrangement. The newly formed private neighborhood would be similar to current condominium and homeowner associations in the suburbs ... (p. 4)

Nelson's proposed Residential Improvement Districts (RIDs) would enable inner city residents to exclude criminals and secure property rights and personal safety. The benefits of privatization should be available to poor and non-poor alike.

Both of us teach in the University of Southern California's Master of Real Estate Development program. We emphasize the well known, but still seldom articulated, view that developers, reacting to the marketplace, and not to rigid and politicized rules, conceive the best plans for the community. Joseph Schumpeter once showed that entrepreneurs, the discoverers of myriad opportunities for enhanced efficiency and consumer satisfaction, are the real heroes of economic growth and development. The CID phenomenon corroborates the idea that, not surprisingly, developers are more consequential than ever to how the cities of the future will succeed. In this view, the best and most sophisticated education for tomorrow's developers is more important than ever. It is our responsibility to meet this challenge.

## Endnotes

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- <sup>1</sup> MacCallum, Spencer (1997) "The Quickening of Social Evolution" *The Independent Review*, 2:2, 287-302.
- <sup>2</sup> Foldvary, Fred (1995) *Public Goods and Private Communities: The Market Provision of Social Services*. London: Edward Elgar.
- <sup>3</sup> Nelson, Robert H. (1999) "Privatizing the Neighborhood: A Proposal to Replace Zoning with Private Collective Property Rights to Existing Neighborhoods" *George Mason Law Review* 7:4, 827-880.
- <sup>4</sup> Egan, Timothy (1995) "Many Seek Security in Private Communities." *New York Times* (Sep. 3, A1, A22).
- <sup>5</sup> Foldvary, Fred (1995) *Public Goods and Private Communities: The Market Provision of Social Services*. London: Edward Elgar.
- <sup>6</sup> Treese, Clifford J. (1999) *Community Associations Factbook*. Alexandria, VA: Community Associations Institute.
- <sup>7</sup> Holcombe, Randall G. (2000) "Growth Management in Action: The Case of Florida" in Randall Holcombe and Sam Staley (eds.) *Market Strategies for Land Use Planning for the 21<sup>st</sup> Century* Westport, Conn.: Greenwood Press (forthcoming).
- <sup>8</sup> Boudreaux, Donald J. and Randall G. Holcombe (2000) "Contractual Governments in Theory and Practice" in David Beito and Peter Gordon (eds.) *The Voluntary City* (forthcoming).
- <sup>9</sup> Downs, Anthony (1994) *New Visions for Metropolitan America*. Washington, DC: The Brookings Institution; and Cambridge, Mass: The Lincoln Institute of land Policy.
- <sup>10</sup> Siegel, Fred (1999) "Is Regional Government the Answer?" *The Public Interest*. No. 137, 85-98.
- <sup>11</sup> Nelson, Robert H. (1999) "Privatizing the Neighborhood: A Proposal to Replace Zoning with Private Collective Property Rights to Existing Neighborhoods" *George Mason Law Review* 7:4, 827-880.