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Commentaries on Private Associations as Local Governments

Table of Contents

Part V, Creating HOA Constitutions	I
Introduction	1
Commentary on Ch. 15, Neighborhood Legislatures	1
Commentary on Chs. 16&17, Neighborhood Executive/Judiciary	2
The Executive	2
The Judiciary	2
Part VI, Neighborhood Associations in American Life	3
Introduction	3
Commentary on Ch. 18, Freedom of Neighborhood Association	3
Commentary on Ch. 19, A Democracy of Property Owners	4
Property values and voluntary consent	4
HOAs and local governments are businesses	4
Commentary on Ch. 20, Neighborhood Secession	6
GKS Profile	a

Commentary on: *Private Neighborhoods and the Transformation of Local Government*, Robert H. Nelson, (Urban Institute Press 2005)¹ [Not affiliated with the Urban Land Institute, ULI. See <http://www.urban.org/>].

OBSERVATION ON THE NEW SOCIAL ORDER:

The New Social Order created by these private governments without accountability to state government can be summarized by this flyer, which reflects a gross obsession with property values, and a harsh indifference to the suffering of people in society as a whole when children must be cared for by grandparents in an adult only association, or financial hardships or a family death occurs affecting their member-owner “citizens”:

WE THE BOARD OF DIRECTORS OF MAJESTIC OAKS HOMEOWNERS ASSOCIATION ... THAT SEVERAL CHURCHES MAY REQUEST INDIVIDUALS OR FAMILIES OPEN THEIR HOMES TO HURRICANE KATRINA'S VICTIMS. THIS IS TO ADVISE YOU THAT OUR COVENANTS AND BY-LAWS PROHIBIT ADDITIONAL FAMILIES IN FAMILY HOMES. NO DWELLING SHALL BE USED FOR ANY PURPOSE EXCEPT FOR RESIDENTIAL PURPOSES.

¹ This nonprofit organization is quoted on pp. 342-3, and references given on p. 357.

Commentaries on Private Associations as Local Governments

Those interested in rewriting CC&RS, or the HOA constitution, might be interested in reading Part V, Creating HOA Constitutions, of Bob Nelson's new book, *Private Neighborhoods*. Its 3 chapters are called: The Neighborhood Legislature, The Neighborhood Executive Office and The Neighborhood Judicial Branch. And also Part VI, Neighborhood Associations in American Life, is of interest with respect to governing constitutions.

To begin with, I find it difficult to equate the concept of a neighborhood with that of a sprawling subdivision governed by a contractual nonprofit corporation with mandatory membership and compulsory dues.

The format of the chapters consists of the presentation of related problems and criticisms from across the country, followed by the authors views and his solutions, which may or not be in answer to the problems posed at the beginning of the chapter.

Part V, Creating HOA Constitutions

Introduction

In his Introduction to this Part V he says, among other things,

"The purpose of a constitution is to set the ground rules for governance. . . . Yes the rise of the private neighborhood has resulted in far and away the largest number of new constitutions in recent years. [Is he referring to HOA principalities?] . . . [T]he real estate lawyers and their developer clients . . . With no previous experience available to understand what the pros and cons would be to live in a community controlled by covenants, [governing documents] were born . . ."

Commentary on Ch. 15, Neighborhood Legislatures

Nelson begins this intriguing chapter, acknowledging that a problem of democracy exists in HOAs.

"Even though these associations are democratic in theory . . . there is often in practice control by an arbitrary few. Part of the difficulty [] is because the attorneys writing them [HOA constitutions] have given too little thought to the abuse of power." p. 323.

Having made an argument for problems to be resolved, Nelson offers the following alternatives to electing a board:

1. proportional representation {presumes some party system); ideal social units of about 100 - 150 people to elect representative from their election district, sort of a federalism model;

2. because of the financial investment by homeowners, qualified outside board members may be desirable, and, of course, paying them;
3. not firm on whether or not terms limits are good;
4. relying on think-tank studies of voting systems, and making a reference to Pareto (Remember Vilfredo Pareto ? The guy concerned with the efficient and productive government of resources); he says that a simple majority may make some "mistakes", whatever that means, and recommends a vote between "above a majority" but less than unanimous (what's new?);
5. voting by incentive -- a monetary reward for the first so-many voters;
6. a separation of powers, with perhaps a higher and lower House, one made of the board and one made of homeowners.
7. Interestingly, in this chapter, the author treats the HOA within the existing legal scheme, as a principality, without making any reference to accountability under the laws of the land, or the effective enforcement of violations of the governing documents by boards and officers, or to a need for a Bill of Rights. His solutions are restricted to the status quo, and will not bring HOAs into the American system of government.

Commentary on Chs. 16 and 17, Neighborhood Executive Office and Neighborhood Judicial Branch

The Executive

"During the last 30 years, a number of large community associations have lapsed into mismanagement . . . Poor management is . . . a principal source of internal friction in many neighborhood associations."

"Some current tensions within in neighborhood associations . . . reflect many unit owners' sense that ownership and operational decisions are being made by individuals who have no professional real estate expertise or experience"

The author believes in the corporate form of government for HOAs, with paid president (\$75,000 - \$125,000 salary) and paid management firms to run the day-to-day operations. He discusses mayor vs. city manager and administration (business) vs. political concerns.

"Indeed, the job of neighborhood management may be more 'political', while the job of business management may be more 'economic.'"

"A powerful executive and a weak legislature have served many American business corporations well. ... Perhaps private neighborhood associations should move closer to the business model in their manner of governance".

The judicial

Here, Nelson falls far short of providing any meaningful relief for homeowners considering the powers given to the board, and the lack of homeowner rights and the protection of their rights.

"It is also more often a waste of time and money for unit owners who bring the suits because boards of directors generally prevail. . . . There is good reason for this: **the courts understand that 'a presumption of validity is essential to the orderly operation and fiscal soundness of the common interest developments'"**

"Marriage and neighborhood associations share some similar characteristics."

As for solutions, Nelson speaks of a 'jury' system of homeowners or the use of outside arbitrators to decide violation issues. He then speaks only to enforcement against homeowner violations, ignoring any discussion of board and officer violations and the enforcement of the governing documents and laws of the land.

For example, he lists enforcement against homeowners could be:

1. publicizing their names, taking their personal property in lieu of foreclosure, which he rightly refers to as a 'draconian' measure, but eviction as a last resort is OK,
2. curtailing their privileges -- no discussion of 'criminal' acts and disenfranchisement,
3. branding, yes branding, homeowners with a hugh sign on their front lawn,

At no time is there any discussion of the lack of due process, or the adhesion contract, or constructive notice as proper due process.

Part VI, Neighborhood Associations in American Life.

Introduction

Author Nelson opens with a broad discussion of the protected classifications against housing discrimination – race, religions, gender, etc. He then asks, "Should groups wishing to maintain a strong community character have an ability to exclude nonconforming individuals?" One such group that currently comes to mind is renters. In Arizona, HOA attorneys are scurrying to have CC&Rs amended to not allow homeowners to rent their units for fear of declining property values. In fact, there is an Arizona appeals case on this very issue: *Vales v. Kings Condo Association*, 1 CA-CV 04-0816, (2004).

Astoundingly, Nelson asks, "**If the business model is rejected for neighborhood associations, what other body of legal thought and precedent might be substituted?**" Further, he admits that "[N]eighborhood associations can be seen as a partial secession from municipalities."

Commentary on Ch. 18, Freedom of Neighborhood Association

Except for one comment on state actors, I will skip this chapter that deals with broad social issues of freedom of association, diversity of association, individual freedoms, creation of classes of citizens and Constitutional protections for now.

Nelson comments on the writings of James L. Winokur² (p. 388),

“He contends that federal constitutional protections of freedom of speech, assembly, press, worship and other individual rights should override the current powers of neighborhood associations. In essence, **Winokur proposes that the neighborhood association should be considered equivalent to a local public government and thus constitutionally considered a state actor.**”

Commentary on Ch. 19, A Democracy of Property Owners

Maintaining property values and homebuyer voluntary consent

Once again the business objective of HOAs is mentioned, and not anything said about buying a home. “The overall ‘goals of the board should be to preserve, maintain and enhance the association’s property The association must be operated as a business.’” (quoting Jan Hickenbottom). In spite of referring to statements by critics that, “It’s ‘private’ status should not be allowed to shelter it from the normal American democratic requirements”, Nelson astonishingly and unfortunately adds a false statement concerning voluntary consent by the home buyer.

“Individuals entering neighborhood associations have voluntarily accepted the existing neighborhood form of governance; they have in fact signed on the dotted line to this effect. If private home-buyers want a democracy of individuals, then developers will respond to these market demands and neighborhood associations will have different voting rules.”

The homebuyer does not sign a contractual Declaration form or document. The deed simply refers to the CC&Rs and, under the current law of servitudes, it becomes the uninformed homebuyer’s responsibility to get those CC&Rs and read them. If he disapproves, then he can back out of the purchase. But the buyer signs no contract at closing! Furthermore, those CC&Rs are silent on many aspects of HOA living and the implications and consequences of those covenants. And in spite of the proliferation of arguments that living in an HOA is like buying into a business, there is no “red herring”³ warning given the homebuyer. And the homebuyer signs no waiver of his constitutional rights or any acknowledgement that he is surrendering these rights.

Democracy and class establishment; local governments as businesses

The argument for privatization continues with a call for the Supreme Court to end the vague distinctions, according to the author, between HOAs and local governments “to allow the governing structures of private neighborhoods to flourish in all their private diversity.” Nelson

² See Note 18, p. 401, “The Mixed Blessings of Promissory Servitudes: Toward Optimizing Economic Utility, Individual Liberty and Personal Identity”, Wisconsin Law Review, Jan/Feb 1989.

³ A preliminary prospectus for the sale of stock, filed with the SEC containing large red lettering. The purpose of this registration statement is to provide disclosure of information upon which investors may appraise the merits of the stock. Unlike subdivision PUD disclosures or the statutory requirements of many states, it requires a discussion of the performance and operations of the business, and not just a recitation of legal documents that may or may not be followed.

argues that the Supreme Court's holding in Avery⁴ applying a one person/one vote rule to municipal elections was wrong, and definitely not applicable to these private governments.

Citing Tocqueville's *Democracy in America*⁵ (1835), Nelson continues his argument against democratic majoritarianism, not in terms of the tyranny of the majority or tyranny of the legislature, also covered by Tocqueville, but "that 'universal suffrage really does hand the government of society over to the poor'". He continues to rally against government interference with, "to a government with unrestrained authority to tax, spend and regulate", but sees the same exercise of these function by the unregulated private government as somehow acceptable as an the legitimate right and the voice of the people to freely associate (see chapter 18, above)

Continuing his isolationist stand with respect to HOA governance, the author writes,

"Winning **economist** [emphasis added] James Buchanan [not to be confused with Pat Buchanan] concluded that basic constitutional revision is the only solution to the problems of majoritarian democracy. . . . If private neighborhoods want to avoid excessive redistribution as well . . . [they] might want to examine these and other potential barriers. . . . because new unit owners will want assurances that their resources will not be confiscated to benefit unduly others in the neighborhood (who may have a majority vote)."

Nelson again introduces "the most good for the most people" argument (see chapter 15, above), now with respect to voting and majority rule,

"In the traditional utilitarian understanding [Jeremy Bentham and Vilfredo Pareto], for example, the government's purpose is to maximize the people's total welfare ('the total utility'). Voting choices are not determined by voters' parochial interests but represent an effort to find the best available political leadership in the interests of the highest total social welfare. . . . A political community should have a vision and its members willing to make significant sacrifices in the service of its ideals. . . . The neighborhood association, therefore, is only the newest addition to the already diverse ranks of American political systems."

"[N]o modern John Locke, Thomas Jefferson, James Madison, J. P. Morgan [financial banker who helped make U.S. Steel and other corporations], or other political visionaries has yet emerged to provide an appropriate political philosophy of neighborhoods."

I rest my case with respect to planned communities and their HOA form of private government are socialistic and represent a major departure from the principles of American democracy as set forth by the Founding Fathers and in the US Constitution. I reject his position, like I reject CAI's position, that no other system of government exists to govern HOAs. What's wrong with the existing laws relating to local governments? Why is there this insistence on a

⁴ *Avery v. Midland County*, 390 U.S. 474 (1968).

⁵ Alexis de Tocqueville, a native of France, toured the United States in the early 1830s and wrote his observations on American society and the new republic in his two-volume book, *Democracy in America*.

private principality is necessary for planned communities, if not for the state and America in general?

Nelson ends the chapter with, “Neighborhood associations should have a wide range of flexibility in assigning voting rights”, and “I submit that local governments can be better understood if we examine them with the same economic lens with which business corporations are studied.”

Commentary of ch. 20, Neighborhood Secession

In this chapter, the author addresses the question of seceding, as he calls it, from the local government and creating your own local private government as any community is able to do under their state’s incorporation statutes. Without providing the citation, Nelson makes the assertion that “The evidence in Montgomery County [where the author lives] suggests that, where a small municipality and a private neighborhood are alternative governmental forms, many people now prefer the private regime.” Yet he admits that the special interest and HOA proponent platitude of moving, “likely involves considerable costs . . . [and] When confronted with the high costs of moving, most homeowners are likely to raise the volume of their complaints.”

Nelson again resorts to a constitutional revolution to solve this problem with local government dissatisfaction and the adversity to moving out, but fails to equate civil government with private neighborhood government – a government is a government -- giving private neighborhood government, the HOA, the allure of utopian perfection. Using James Buchanan as his voice,

“This might be accomplished by a constitutional revolution [devolving government authority]. . . . [B]y providing an option of secession, a useful means of pressuring the larger government when the option is not actually exercised. . . . If no major problems or obstacles are found, a new legal option of local ‘free secession’ might be provided by law.”

Noting the work of Sheryll D. Cashin⁶, the author addresses private secession by the creation of private neighborhoods – the HOA, pointing out that **using blighted areas as justification**, the local government can create private neighborhoods (planned communities) easier than incorporating a community. Nelson looks to the future, commenting on the quasi-secession of today’s planned communities that still rely on many local government services,

“[I]n the future, more complete forms of private secession may become possible. For example, if neighborhood associations become more numerous, the political pressures for substantial rebates from property taxes – for relief from the current system of ‘double taxation’ – are bound to grow.”

Is this treason? “[A]s traditional norms are increasingly challenged, the use of government coercion to enforce a set of uniform set of social norms has become less acceptable. What, then,

⁶ Sheryll D. Cashin, “*Privatized Communities and the ‘Secession of the Successful’: Democracy and Fairness Beyond the Gate*”, Fordham Urban Law Journal 28 (June 2001).

can justify the use of coercion to compel one political jurisdiction to remain ‘married’ to another jurisdiction?” Or is Nelson referring to planned community private governments and the complaints echoing in the media across the land? And to make his argument solid and acceptable to all, including government officials, he states, citing Georgette C. Poindexter⁷,

“As a form of private secession from an existing local government, it is consistent with the spread of pro-choice attitudes in marriage, abortion, and many areas of American life.”

And he further resorts to arguments of peoples having a strong commitment to their own values, by using examples of Muslim communities and the attitudes of Arab women. And finally, Nelson argues that there should be no objection to the just exercise of voluntary consent to “exit” the local government and create the HOA principality. However he ducks the constitutional and ethical question of consent of the majority, and the taking of property rights from those who do not consent.

The author ends this highly controversial chapter with, **“‘Secession’ really means ‘group freedom’ to exit in matters of local governance and land use.”** As I’ve written earlier on this topic, the future holds,

The United HOAs of America

And holds, similarly, for each and every state in the Union.

⁷ Georgette C. Poindexter, “*Collective Individualism: Deconstructing the Legal City*”, Univ. Penn. L. Rev. 145 (Jan. 1997).

George K. Staropoli

Mr. Staropoli is an Arizona resident who has been active as a homeowners rights advocate since 2000, appearing several times on a live talk radio HOA advocacy show, *On The Commons*, heard internationally over the internet. He also appeared before a Nevada Legislative committee, the Arizona HOA Study Committee, and testified before several Legislative committees; and has been active in submitting homeowner rights issues to the legislators, the media and the public. His opinions and views have appeared in the national media, *Kiplinger's Personal Finance magazine*, *CNN/Money Online* and in the *New York Times*, and on local TV news and in local Arizona newspapers, including *The Arizona Capitol Times*. He is editor of ***Buyer's Guide to Living in a Community Association***, which has been distributed nationally to policy makers, the media and to libraries.



And he is author of ***The Case Against State Protection of Homeowner Associations***, reaching a growing audience of concerned people. The author, a veteran homeowner rights activist, makes his case against state government protection of homeowner associations. He documents, using his appearances before the Arizona Legislature, state legislative hostility toward upholding the civil liberties of homeowners with their broad, misguided interpretation of "private contract" prohibitions, and the use of statutes that favor the HOA; he provides numerous supporting materials from US Supreme Court, federal appellate and state court decisions; he provides research and publications by political scientists going back to 1992; and he even provides, in support of the advocates, the publications of the national trade organization that lobbies state legislatures against returning homeowner associations to the American system of government.

In 2000 he founded and is president of the nonprofit **Citizens for Constitutional Local Government, Inc**, Scottsdale, AZ, a nonprofit organization seeking to inform the legislators and public about common interest property issues and to expose the prevalent myths and propaganda about carefree living in an HOA.

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