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March 11, 2008

Independent law review article highly critical of homeowners associations

Trust and Community: The Common Interest Community as Metaphor and Paradox, Paula A. Franzese and Steven Siegel, Vol 72, Missouri L. Rev., 1111 (2007).

Excerpts from I. Introduction.

Over the past several decades, common interest communities (an umbrella designation that includes planned single-family home developments, gated and walled communities, condominiums and housing cooperatives all under the aegis of a homeowners association) have become the standard template for new residential development in the United States. Yet, the CIC paradigm is palpably deficient in many ways, premised, since its inception, on a “command and control” rule regime that attempts to regulate all manner of land use and behavior.

We argue instead that the standard CIC rule-template is far from the inevitable by-product of unfettered market forces. Its continued dominance is, rather, a product of distorted market forces – just as the underlying CIC movement persists as a consequence of skewed markets. The source of that market distortion is three-fold. First, mounting evidence suggests that the CIC phenomenon is, increasingly, the direct product of conscious and deliberate government policy aimed at load-shedding municipal functions and services onto newly created CICs.

A well-functioning marketplace usually requires some rough equality of bargaining power between the market players, or, in the alternative, a strong governmental role in protecting the consumer. Further, healthy markets typically depend on market players having meaningful access to all of the information needed to make informed decisions.

But developer and homeowner interests are *not* congruent. . . . [T]he “dead hand” of the developer all too often bequeaths to the CIC a rule regime that does not necessarily comport with the needs of the residents themselves or, more broadly stated, the needs of the housing market. Buyers are left to contend with a draconian package of restrictions that, unfortunately, is remarkably resistant to change. . . . The rule-bound boilerplate that governs the traditional CIC is best replaced by a legal template that places far less emphasis on regimentation and punishment and far greater reliance on the power of social trust and community.

In this regard, mandatory leadership training programs as well as fiscal integrity training for all CIC board members are appropriate and warranted. Such programs are the norm in both governmental and private sectors, and have been shown to be effective in inculcating leadership skills and ethical responsibility.

Still, a broad program of statutory reform and training initiatives, although necessary, is not sufficient. The elusive but essential social virtues of trust and community must be consciously cultivated, tended to and reinforced by CIC leadership and, most importantly, by CIC residents themselves. Neighborliness works. When all is said and done, the power of social trust and cooperation must be given the chance to do its job.

Excerpts from VII. Conclusion.

That particular paradox has been the source of considerable confusion and misunderstanding. For too long, conventional wisdom has been that CICs are nothing more or less than the product of market forces, and that the elaborate CIC servitude regime is nothing more or less than a market response to consumer demand. This received wisdom ignores the realities of several distinctly non-market phenomena, including the pervasive privatization policies of local governments and the self-interested motives of CIC developers, that are at variance with the best interests of CIC homeowners. It also fails to respond meaningfully to gaps in resident consent to the CIC servitude regime in the first place. Those market distortions have played a critical role in sustaining less than desirable rule-bound CIC templates. One consequence is that the status quo CIC paradigm cannot be justified as the inevitable product of market forces or consumer choice. In fact, we have argued the contrary to be true.

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In particular, we propose a new legal foundation for CICs composed of the following elements: (1) a new set of governance choices based on a sunseting of the developer-imposed servitude regime after the developer relinquishes control of the CIC; (2) a series of clear statutory rights for residents; (3) a fair, equitable and affordable alternative dispute resolution regime; (4) an ombudsman with a mandate to resolve homeowner issues before such issues metastasize into full-blown wars; and (5) the imposition of systems of transparent management and accountability.

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Ultimately, CICs must be afforded the opportunity to shed their command-and-control rule regimes in favor of templates aimed at reinforcing norms of basic neighborliness. This way, similarly situated residents, all of whom share the goals of minimizing their own transaction costs while preserving and protecting their property values, are given the chance to live the essential wisdom of “self-interest rightly understood.”

Steven Siegel

1. Co-author of **AARP amicus brief to NJ Supreme Court** in the 2007 Twin Rivers HOA free speech appeal.
2. **The Constitution and Private Government: Toward the Recognition of Constitutional Rights in Private Residential Communities Fifty Years after *Marsh v. Alabama***, Wm & Mary Bill of Rights J., Spring 1998.