

Privatopia: Homeowner Associations and the Rise of Residential Private Government

Evan McKenzie

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Privatopia provides a critical description and history of homeowner associations, including some of the important court cases regarding the enforcement of covenants. Whereas classical liberals would view private homeowner associations as a reflection of the principle of free association, the author, a political scientist and attorney, contends that such private organizations violate the ideals of choice and democracy. Evan McKenzie has "no quarrel" with the concept of "private land use arrangements," but believes the courts have granted homeowner associations too much power over their residents, and that the pursuit of profit by real-estate developers has transformed the originally utopian vision of social reform through the establishment of new communities into a mechanism for uniformity and excessive restrictions on property rights.

The development of residential associations (RAs), in which over 30 million Americans now live, was spurred by Ebenezer Howard's book, *Garden Cities of Tomorrow* (1902). RAs are a hybrid of Howard's utopian vision and "American privatism," hence McKenzie's term "privatopia."

The garden city was to be a new community made up of clusters around a central city, combining town and country. Howard envisioned voluntary associations financed by leaseholds, a concept that dates back to Thomas Spence in 1775. The ground rents would be paid to trustees, who would then turn over the balance of funds to the town council to pay for the community's public works. The architecture of the city would have a harmonious unity. The garden city was to be a model for the reform of society as a whole. In the United States, Howard's model influenced both land trusts, such as the village of Arden, Delaware, and residential associations.

The author contends that, despite the argument that members freely enter into contracts with RAs, they inhibit choice, since an increasing proportion of housing consists of RAs. But he ignores the fact that, first of all, choice is restricted in non-RA housing as well by government, including zoning, building codes, and laws governing personal behavior. The option of escaping all restrictions does not exist. Second, the RA rules that restrict can also protect; the prohibition of excessive noise, for instance, also protects neighbors' peaceful enjoyment of their property. Third, RAs offer the opportunity not just to add restrictions but to remove restrictions that apply to "public" but not private realms. For example, in a nudist club, the government's laws requiring clothing don't apply, and members join it to be free of those restrictions. In many cases, governments have not allowed RAs full control over their own property—for example, in the condominium in which I lived in Alexandria, Virginia, the city limited the number of people allowed in the pool area when there was no lifeguard, and the Virginia Condominium Act limits penalties

for rule violations to \$10 (Foldvary 1994). The issue, however, is not whether restrictions exist, but whether a person has freely agreed to a certain set of rules by contracting with other owners or with an organization.

Some of the practices that McKenzie illustrates are indeed problems, but their treatment in the book is itself problematical. He stresses that RAs are designed primarily to protect property values, but he does not seem to appreciate the principle that such values reflect market demand based on personal valuations of the services, rules, and amenities of a community.

As McKenzie states, RAs in the United States do indeed have a great deal of restrictive uniformity, contrary to the diversity suggested by the Tiebout model used by economists who study local public goods. In that model, based on an article by Charles Tiebout (1956) and subsequent literature, people choose an amount and type of local public goods by moving to communities that best meet their desires. But McKenzie does not delve deeply enough into the origin of RA uniformity. Tiebout is not even mentioned in the book.

As with other outcomes, one cannot, a priori, ascribe the problems of RAs to private enterprise, since the outcomes are a result of both market processes and government intervention. As McKenzie notes, developers built those communities "with government as a silent partner." One key reason for the uniformity is that the master deed and bylaws of RAs must be submitted to local planning authorities for approval, and also need approval by the Federal Housing Administration to qualify for its program to insure residential mortgages. The Government National Mortgage Association (GNMA or "Ginnie Mae") has also financed large-scale developments. McKenzie documents how the FHA promoted segregated housing patterns. Covenants that conform to "boilerplate deed restrictions" are most likely to get quick approval. But there are also communities such as Arden (a land trust rather than an RA) without architectural covenants, showing that such covenants are not inevitable. Also, governments have interfered by voiding provisions in the documents of private communities, reducing their private character and original intent.

Some of the abuses illustrated in the book do not even involve contracting. One RA claimed that an adjoining property was within the RA's borders and assessed the owner for a membership she had never agreed to. A judge ordered her to pay. The proper ruling would have been to remove her property from the RA jurisdiction, since it was not on the developer's land. Another problem, well noted by McKenzie, is that, in many cases, governments have reduced the liability of board members and developers—even though businesses are subject to civil tort liability.

McKenzie claims that the renters of RAs are disenfranchised. In condominiums only the unit owners can vote, but in RAs often tenants do vote. In the Reston Association in Virginia, each resident has a vote and each owner has a vote (owner-occupants having two votes). In Columbia, Maryland, residents as well as nonresident owners have a vote. Even in

condominiums renters often have influence by serving on and chairing committees, by participating in meetings, and by enlisting the aid of their landlords. And, as Tiebout pointed out, renters, being highly mobile, can vote with their feet.

Another charge by McKenzie is what Robert Reich calls the "secession of the successful"—that is, common-interest developments (CIDs) serve the affluent, *splitting society into segregated classes*. However, some low-income housing has been built in RAs, there are low-income private neighborhoods in St. Louis, and some land trusts, not examined by McKenzie, cater to low-income residents. Still, CIDs have been mainly upper and middle-income communities because of double taxation. In most areas, property owners pay the same amount of tax whether or not they own and finance their own neighborhood streets, just as parents who send their children to private schools still pay taxes for government schools. If the RA members could deduct from their tax liabilities the normal costs of providing their own services, then lower-income neighborhoods could better afford to become private communities.

McKenzie also charges that CIDs have evolved a culture of nonparticipation instead of fostering the sense of community that Howard envisioned. But in my study of Arden as well as RAs, I found a great deal of voluntary community involvement, both in the committees that provide services and governance, and in the many clubs and charities that thrive in RAs.

Although McKenzie places responsibility for many of the RAs' problems on private agents rather than on government restrictions and privileges, his book is useful for those interested in homeowner associations and consensual communities. The legal and historical backgrounds are well laid out, and the problems he points out can serve as a basis from which reforms fostering more choice and better governance can be developed. The book is also an excellent source of information on the powerful impact that government agencies, such as the FHA, have played in American real estate.

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References

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