

Do homeowners association members benefit from — or even want — the dissolution of municipalities and local zoning?

Revolution or Evolution?

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IN HIS ARTICLE (P. 40), ROBERT H. NELSON suggests that states should replace municipalities with private community associations. As his data show, his goal seems to be well on the way to fruition. Developer-designed community associations have grown astoundingly since 1970. They were led first by the condominium boom, which required a collective body to govern common areas and regulate neighborhood property, but they morphed in the 1980s into an enormous and continuing growth in private governance of conventional single-family subdivisions.

Nelson suggests that state governments realize that neighborhood associations are replacing municipalities. Municipalities, at least those smaller than counties, should face the music and go out of business, yielding their authority to provide local services and land-use regulation to private neighborhood associations.

In response to Nelson, I want to make both a positive and a normative argument. The positive point is that neighborhood associations have not displaced any municipality or induced any municipality to give up its regulatory powers. It appears that community associations are not substitutes for municipal governance, as Nelson would suggest, but complements to it. The rise of neighborhood associations seems to be a response to an increasing demand for protection of home values. Homeowners appear to want both more zoning and more private regulation. They do not seem to want to substitute private for public regulation.

My normative point is that it would probably be a bad idea to displace municipal governance entirely with private governance. This is not because private governance is undesirable,

but because municipalities provide an important function in our federal system of governance that neighborhood associations would be unable to fulfill unless they simply became municipalities. Nelson's desire to limit the reach of zoning outside of currently built-up areas can be accomplished in ways short of wholesale displacement of one America's most venerable institutions, municipal corporations.

DISPLACING MUNICIPAL ZONING?

As Nelson rightly points out, neighborhood associations already perform functions that municipalities have offered traditionally. They collect garbage and remove snow; they provide local infrastructure such as roads, sidewalks, and sewers; they regulate land-use and occupancy; and they provide collective services such as recreation and sometimes even health-maintenance for their residents. The municipality in which the neighborhood association is located may contract with the association to provide such services and give its residents a break on their local taxes if they use association revenues to pay for those services. The city may even have required the developer of the association to provide some municipal services as a condition for a zoning permit.

In all cases, though, the city retains the right to exercise its own powers both within and around the neighborhood association's territory. No city cop can be stopped by a neighborhood association's security guard and be told the neighborhood is not the cop's jurisdiction. More to the point that is important to Nelson, the city retains all of its zoning and related land-use powers over the association's territory as well as beyond it. Municipalities cannot contract away their police powers even if they wanted to.

Nor is there any evidence that neighborhood associations would prefer that their city get out of the land-use business, at least as it pertains to the zoning of territory outside the association's boundaries. Despite the enormous growth in com-

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munity associations in the past 30 years, I know of no instances in which a municipality has attempted to surrender its zoning authority. Below are some examples that suggest the opposite is true: Community associations seem to increase the power of municipal zoning.

■ **HOUSTON** The City of Houston is famous, at least among land-use professionals, as the only big city not to have zoning. Its suburban parts that are within the city's boundaries are typically developed within neighborhood associations. Houston would seem to meet Nelson's ideal and be the wave of the future in local governance: a passive city government that allows developers and, hence, new residents to set up their own local governance structure. Yet, events in Houston suggest that community association residents would prefer the city to have zoning.

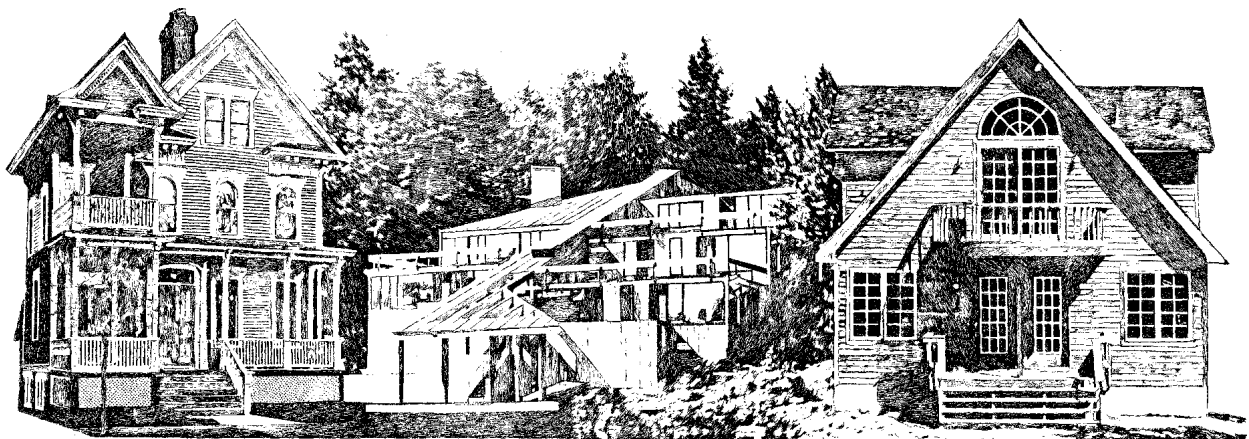
Houston lacks zoning because its residents keep voting down proposals to adopt it. The latest of several referenda was held in 1993. The voting pattern revealed that zoning was most opposed by Hispanics and lower-income blacks and whites. In Houston, most members of those groups live in areas that are not subject to covenants or neighborhood associations. Those who favored zoning were higher-income whites and blacks. Most upper-income people in Houston live in places that have covenants and neighborhood associations. It seems likely, then, that zoning was most desired by people who already have the private institution that is supposed to displace it.

■ **SEATTLE** Another event that illustrates the complementary nature of zoning and covenants is the formation of new local governments in the Seattle area. As I noted in my 2001 book *The Homevoter Hypothesis*, formation of the 10 new cities in King County, Washington, during the 1990s was motivated by the desire to have local control of zoning. But a large fraction of the homes in the new municipalities had long been governed by neighborhood associations. The city that incorporated most recently, Sammamish, is almost entirely composed of gated communities, yet its first order of business after incorporation was to seize the reins of zoning from the county and issue a growth moratorium.

■ **SOUTHERN CALIFORNIA** It is commonly regarded as curious, if not ironic, that the Standard State Zoning Enabling Act was promulgated by the U.S. Department of Commerce in 1928 by Herbert Hoover. Zoning is quintessentially local, after all, and Hoover is usually (though not entirely correctly) thought of as a conservative who would oppose infringements on property rights. The real force behind the act, if Marc Weiss's 1987 book *The Rise of the Community Builders* is correct, came from an even more ironic source. Developers in Southern California in the early part of the twentieth century were among the first to build large subdivisions of homes. To protect the value of those homes and make them more marketable, the developers imposed covenants that regulated the subsequent use of land in the area. But the developers found that their investments were often compromised — and homebuyers repelled — by incompatible uses on the borders of their subdivisions and elsewhere in the community.

To deal with the problem, California developers were among the primary lobbyists in favor of the new legal device of zoning. In order to make it more readily available in other places they operated, developer organizations lobbied the federal government to come up with a standard act. Thus, one important phase of zoning — the standardization of its legal structure — was promoted by developers who already had experience with covenants, the predecessor of neighborhood associations. The problem was not that covenants did not work; the problem in the view of developers (and their customers) was that covenants did not control territory outside of the immediate neighborhood. In short, the reason for zoning's popularity was exactly that feature that Nelson finds objectionable: its ability to control the use of land outside of the immediate neighborhood.

■ **OHIO** In a 2001 journal article, Gerald Korngold examined three early-twentieth century Ohio municipalities that were laid out by a single developer who imposed community-wide covenants. All three of the communities later adopted zoning, but none of them dismantled the covenants. The mayors of the three cities, in fact, administer the covenants. Korngold found that



covenants and zoning law developed side by side in many jurisdictions. The famous Kansas City developer J.C. Nichols likewise encouraged the privately governed suburbs that he developed in the early 1900s to adopt zoning.

EXISTING ASSOCIATIONS One of the functions of existing neighborhood associations is to see to it that zoning laws are enforced outside their own borders. Although this is usually done informally, sometimes associations will go about it systematically. For instance, one of the objectives of the Forest Ridge (Texas) Property Owners Association's Architectural and Land Zoning Committee is to "monitor zoning changes within five miles of the neighborhood." Another example is the Spruce Hill Community Association, an area within the city of Philadelphia. According to its Web site, the association's formal activities include this:

Zoning changes — SHCA has for many years maintained an active Zoning Committee. The Association subscribes to a service that alerts the Committee when any change in Spruce Hill area zoning is requested. The Committee reviews the requested change, determines a course of action consistent with the Association's guidelines and brings to the attention of the SHCA Board of Directors any change that might adversely affect the community.

In sum, then, it seems likely that neighborhood associations, both those created by covenants such as Forest Ridge or simply by voluntary association like Spruce Hill, currently act as complements to the zoning process. The associations are interested in what happens to land use outside of their boundaries as well as within them. The associations help lower the transaction costs of dealing with complex zoning issues. They are more effective than individual homeowners because their greater numbers and common interests make government officials pay more attention. It thus seems unlikely that zoning will wither away as neighborhood associations proliferate.

THE GROWTH OF NEIGHBORHOOD ASSOCIATIONS

If zoning and covenants are complements rather than substitutes, their rapid growth in the last 30 years could be accounted for by an increase in the demand for land-use regulation. I offer two explanations for this shift in demand.

The first is that higher-density communities tend to require more regulation. Modern covenants and community associations were pioneered by the developers of condominiums, which are usually high-density apartment houses with individual owners. City zoning and other regulation do little to govern relationships among apartment dwellers within the same building. In traditional apartments, disputes among neighbors are mediated by the landlord. Where everyone is his own landlord, as in the condominium, a collective governance structure is necessary.

Neighborhood associations are now applied to single-family home developments. The interesting question is whether the homes are typically developed at higher densities than other subdivisions that appeal to a similar market. My casual impression from planned and gated communities (in which the exist-

ence of a community association can normally be presumed) is that they are developed at higher densities than typical subdivisions. For example, the gross densities (population/total land area) of Reston, Va., and Columbia, Md., are about twice that of other suburbs that were not similarly planned and built by a single development company.

A second reason for the growing popularity of covenants and neighborhood associations could be rising concern by homeowners that zoning's "suburban wall" might soon be breached. Legal attacks on zoning and attempts to override zoning by state or regional governments might worry homebuyers that the exclusive community they are buying into might soon be peppered with low-income housing developments or uncomfortably close commercial developments. This problem was accelerated by the completion of the interstate highway system and the near-universal ownership of automobiles by 1970. The highway system liberated almost all industrial jobs from central cities, and the reduced cost of automobiles allowed many of the poor to follow jobs to the suburbs. The "open suburbs" movement began its legal career as it became clear that the jobs were moving out of central cities.

COURT CHALLENGES The New Jersey Supreme Court's 1983 *Mount Laurel* decision has forced some suburbs to take low-income housing they do not want, and the legislatively adopted Massachusetts "Anti-Snob Zoning" law likewise offers a similar entitlement. Federal law now provides certain groups, such as churches, the mentally handicapped, and the telecommunications industry, with ammunition to override local zoning restrictions. As zoning has become more vulnerable to legal attack, developers of residential housing may have wanted to assure buyers that they would not be subject to such inroads in their neighborhoods by disallowing such uses.

There was a parallel to this explanation early in zoning's history. One of the first uses of zoning was to establish legally enforced racial segregation. Apartheid-like zoning ordinances were becoming popular in southern cities until they were struck down by the U.S. Supreme Court in the 1917 ruling *Buchanan v. Warley*. Both the state and federal courts thereafter kept racial zoning off the books. In the meantime, covenants were used in many places as substitutes for racial zoning. Racially restrictive covenants were not struck down until the *Shelley v. Kraemer* ruling in 1948. (I would add that covenants were not an adequate substitute for zoning for maintaining segregation, because many landowners refused to agree to them.)

This account points to an inconsistency in my contention that zoning and covenants are complements, not substitutes. Instead of both advancing arm in arm, covenants advance precisely because zoning is receding. But on balance, the "complements" story seems more plausible. The inroads on zoning have been rather modest in their effects. Even the federal fair-housing act that entitles group homes to be put in residential neighborhoods allows localities to spread such uses out so that they do not cause too much anxiety in any particular neighborhood. The *Mount Laurel* decisions have built only modest amounts of housing, and most of what is built has been isolated from existing homes.

Moreover, suburbs have come up with powerful new zoning

rules to offset the inclusionary devices. A wide array of exclusionary devices, such as farmland zoning, wetlands preservation (which includes, in my experience, ground that will not get your feet wet in any weather), urban growth boundaries, and historic preservation, have been developed at the same time that the open-suburbs movement was making its inroads on suburban zoning. Despite all the litigation and attempts to regionalize local land-use regulation, local control of zoning is at least as strong in 2004 as it was in 1974. Indeed, by extending the ability of anti-development interests to regulate land outside their own communities, regional land-use bodies arguably have made zoning more exclusionary, not less. On balance, the rise of community associations and private land-use regulation looks like it is strongly complementary with public zoning. We should not, therefore, expect zoning to recede as covenants advance.

MEDIATING INSTITUTIONS

The exclusionary aspects of zoning and covenants are the unsavory side of local government. I have argued that they emerge from the excessive amount of financial assets that most people have in their homes and the fact that home values cannot be insured or diversified. Even people who do not care what happens next door have to care what prospective homebuyers think. A negative verdict by the homebuyers' market severely hurts homeowners. Most homeowners do not own any other asset of comparable size.

The upside of homeownership is that it induces people to pay attention to the quality of life in their communities. They will vote for reasonable expenditures to improve schools (even if they do not have kids), patch sidewalks (even if they always drive), and create parks (even if they watch TV all day). As long as prospective homebuyers care about those things, owners have some reason to pay attention to them and help promote them. That is one reason, I submit, why local governments work as well as they do. Concern about home values makes homeowners into more active, or at least attentive, citizens.

Bob Nelson's normative argument would transfer this source of energy — concern for home values — from local municipal government to the neighborhood association. As I have argued, that is less a displacement than an augmentation because neighborhood associations are active and effective watchdogs of municipal affairs. Nelson's main concern, though, is that municipal zoning extends the power of regulation outside of what he regards as its legitimate bounds, the neighborhood. He is less concerned by the "Not In My Back Yard" folks than by the "Not Anywhere In My Community" people. He would like to disfranchise the latter by encouraging community associations to be permitted to displace municipalities so that more pro-development forces could be in control of land ripe for development or redevelopment.

I have argued that, at least in the land-use area, displacement of municipalities by neighborhood associations is unlikely. But if I could wave a magic wand, would I buy Nelson's program? I have elsewhere argued that the problem he worries about, low-density zoning, is a real problem, and I have also defended his proposal against the criticism that it infringes too much on property rights by forcing some landowners to join associations. (The gist

of my defense is that Nelson's proposal is in practice less coercive than many zoning laws.) But I remain skeptical of active efforts to displace local governments by neighborhood associations.

America's federal system has many layers. The formal, constitutional layers are the national "federal" government and the states. The states, however, have numerous geographic layers, too. Counties are ubiquitous, and most are divided into municipalities, school districts, and various special-purpose districts.

Federalism has a duality to it that is often overlooked. The flows of power go both upward and downward in the federal hierarchy. The downward flow is most familiar. Federal law is paramount for the states. The Supreme Court's occasional exceptions that give states constitutional protections raise much uproar in legal circles, but they do not amount to much as a practical matter. Even less contested is the power of the state government over the local governments. Cities and towns are "creatures of the state," and their creator can remold or even destroy them pretty much at will.

This downward-flowing hierarchy has much to recommend it as a coordinating device. If a state wants to set out an easily followed system of roads, it is best not to give localities too much discretion in the matter. If the federal government desires a uniform foreign policy, it is best not to let cities and states have embassies in other nations.

LABORATORIES The other face of federalism is somewhat neglected. It is the bottom-up version that allows for a variety of experiments in governments. It is most famously expressed in Justice Louis Brandeis's dictum about states being "laboratories of democracy." The same idea applies to local governments. Local governments have originated many good ideas (and some bad ones) that the states and the national government later adopted.

By most accounts, the primary impetus for free public education came from localities, not the state and national governments. America's bottom-up, decentralized system of local governance produced the high school decades before most European nations, with their nationally controlled education systems, came around to universal secondary education. According to Claudia Goldin's research, America's high school success emerged precisely because a few local majorities were able to adopt it before the state and national majority of voters were convinced of its desirability. The success of the high school was then imitated by other localities that wanted the same competitive advantage in attracting households and businesses in a "race to the top."

A more recent example of local innovation is the advancement of civil rights. Gay rights did not originate as a national or even state movement. Cities in which homosexuals have substantial political presence adopted laws to protect their civil rights. From that base, gay activists have been able to persuade state and national legislators and courts of the rightness of their cause and, perhaps more importantly, show that granting gay rights did not upset the social order. Indeed, much of the backlash on civil rights has come from the state level, not from localities, in the form of attempts to limit what local governments can do.

The filtering of new ideas is the side of the federal system that would be compromised by the replacement of local governments by neighborhood associations. Municipalities are better at trans-

mitting new norms to the state and national government than private neighborhood associations would be. Municipalities possess most of the trappings of state law. Although I have argued that municipal governments can be analyzed in ways similar to private corporations, the fact remains that they have the coercive powers of government. This means that they at least partly displace the powers of the state government.

The local police can do most of the things that the state police can do, but a neighborhood associations' security guards cannot. If security guards displaced city police, the first line of true government authority — the authority that can put you in jail — would be the state. Likewise, displacement of city zoning authority by covenants means that the uncovenanted land that remains is subject to zoning by the state. The state's exercise of that control is apt to be different and not necessarily more efficient or less exclusionary than its exercise by local governments.

The independent exercise of the police power by municipalities is important for social and political experimentation. Independence permits the locality both to keep the state at bay and to exercise its own discretion. If the experiment is a success, other municipalities will imitate it, and the idea may well filter up to the "higher" governments. If it is a failure, then only a small area has to suffer its consequences. Because neighborhood associations lack the ability to displace the state in its governance function, experiments of interest to higher governments would be less frequent and less persuasive to it.

The other reason that municipalities perform their mediating function more successfully is that higher-government elected officials will pay them more attention. Part of this comes from legislative districting, which at both the congressional and state legislative levels pays attention to local government boundaries. Thus, a state or national representative is apt to be responsive to voters in particular towns and cities because most voters in a given town or city will be in the same district. Districting in a state with only neighborhood associations would be less likely to collect a community of interest.

The road to becoming a state legislator or achieving a higher office often begins with a local government office. Those who have attained higher office have good reason to pay attention to their origins and to respect the prerogatives of local government. While neighborhood association leaders might follow a similar path up the political ladder, their experience in local politics would be considerably different and on a smaller scale than that of most local politicians.

COERCION All of this presumes that Nelson's neighborhood associations would stay like they are today. A key feature of their governance is that they can (and usually do) allocate votes according to property ownership. This regime is one feature that Nelson (among others) believes is key to the regulatory limits that promote their efficiency. The one-person, one-vote rule of local governments makes it possible for existing residents to gang up on underrepresented landowners and regulate undeveloped land without regard to its most valuable potential use. Displacement of municipalities by neighborhood associations would forestall such redistribution by enabling owners of larger tracts of land to have more votes than smallholders would possess.

But, as Steven Eagle pointed out in his 1999 journal article "Privatizing Urban Land Use Regulation," creating a neighborhood association under Nelson's plan requires a degree of coercion. In order to overcome the holdout problems of landowners who decline to join a neighborhood association, Nelson would allow a supermajority of landowners to force the holdouts to join the neighborhood association. Even if one regards the supermajority provisions of his plan as adequate protection against majoritarian tyranny, the resulting set of associations would start to look a lot like a government. Several commentators and political figures have already called into question the property-based voting allocations of neighborhood associations. Their voices would become more numerous and persuasive if such associations became the only local governance mechanism in town. If activist courts did not force the issue, then state legislators might start to trim the discretion of neighborhood associations to allocate voting rights. In short, local governments as they are now constituted may provide a useful cover for the less-than-democratic structure of neighborhood associations. Take away that cover, and the populist attack on them would become more persuasive.

In sum, local governments serve as useful mediating institutions in the federal system. Neighborhood associations do, too, insofar as they augment the voices for their members in local government. To merge the two might cause a loss of the chief virtues of both institutions by increasing the local power of the state and compromising the self-ordering nature of neighborhood associations.

ALTERNATIVES

Nelson's proposal to enable neighborhood associations to displace municipalities is motivated chiefly by the tendency of local governments to zone undeveloped land at inefficiently low and inflexible densities. I have argued above that his imaginative cure, empowerment of neighborhood associations, may have some adverse side-effects. I cannot close without mentioning alternative approaches to local zoning's excesses that do not require wholesale restructuring of municipal and property law.

FIFTH AMENDMENT The first is to bring the regulatory takings doctrine and related constitutional doctrines to bear on local zoning. There is precedent and doctrinal justification (neither of which is uncontested) for using the Fifth Amendment's "just compensation" principle to make local government pay landowners when zoning gets too restrictive. This responds to development-minded landowners who are at the front lines of municipal zoning.

At present, most courts are highly deferential to municipalities when regulations are challenged. Courts will hold for developers only when the municipal authorities have perpetrated extreme abuses of zoning authority — and often not even then. One reason for this deference is the judges' anxiety that it could be used to overturn desirable regulations along with those that are inefficient and unfair. In response to that concern, several commentators have advanced a legal doctrine that would assist landowners without undermining the legitimate authority of municipalities to protect their residents. I cannot fully articulate this doctrine here, but at its core is the

golden rule: Allow owners of undeveloped property to develop it in ways that some previous landowner was allowed to develop the homes in which local resident-voters now live.

This seems consistent with the answer to the question that current residents should ask themselves: If you were not a resident of your community but were considering buying a home there, what sorts of land-use policies would you like to see in place? On the one hand, prospective residents would be repelled by overly permissive zoning that resulted in unattractive development. On the other hand, overly restrictive zoning would cause housing prices to be so high that the prospective residents would be unable to afford a home there. The golden mean would presumably be a zoning policy that allows development much like that in which current residents live, but that also preserves the overall character of the community.

SECESSION The second and less talked-about reform is to promote municipal fragmentation. The breaking-up of monopolistic cities is almost impossible under present state laws because the consent of the entire city is usually needed. A more liberal doctrine would allow cities to incorporate more easily in currently unincorporated areas of counties, and, more importantly, allow residents of parts of an existing city or town to secede and form their own municipality.

Much of the problem of suburban exclusion is caused by the fact that existing residents of a large-area town seek to keep the population small. There are good reasons for that desire. Smaller-population towns allow for more citizen control of the government. Local services, including schools, are better because those providing them are more responsive to watchful voters.

The way to keep a small town small without excluding others is to allow the residents of the less-developed area of town to secede and incorporate as a separate town. The new town can then develop to a reasonable density and still keep its small-town character. That is, in effect, what Nelson's proposal to form community associations would do, too, but secession would not entail the creation of a neighborhood association with its share-voting arrangement. The drawback of secession as an option right now is that in most states it requires a vote of the majority of the existing town, and so it hardly ever gets done.

A not-too-radical reform by state government would allow secession of parts of municipalities with only the vote of those in the seceding parts. There would have to be some state-level oversight of this process so as to discourage secessions that would promote racial segregation, leave the original town in poor fiscal straits, or create undesirable spillovers on other towns. But such review is already in place for proposed annexations and incorporations in many states. Having another duty imposed on boundary review boards would not be especially taxing.

Nor would unilateral secession conflict with the one-person, one-vote rule as it is now interpreted. The rule currently does not require that proposed mergers of cities be successful if only a majority of the two combined cities approves. (That would allow a larger city to annex a smaller city whose residents opposed it.) The rule insists on per-capita voting rights only within general-purpose political jurisdictions as defined by the state, so allowing the state to subdivide existing political jurisdictions by a majority of

one of the proposed subdivisions would seem not to violate it.

In sum, there are political and legal approaches to municipal zoning's excesses that do not require subverting the municipality entirely. The reason they have been underplayed, I think, is that most municipal reformers want to go the other way. They seek to consolidate local governments into metropolitan governments. Consolidation has not worked well for school districts. As David Brasington has argued, in general, the larger the district, the worse the performance. There is little reason to suspect that it would be different for municipal functions.

Larger local government is less effective local government, at least when there exist other layers of government — the state and federal levels — that provide large-area public goods and mediate disputes among the smaller bodies. Nelson's proposal would move to the opposite extreme, eliminating the municipal sector almost entirely. His analysis is a useful counterweight to the centralizers' voices, which are so dominant in the academic and planning world today. As a practical measure, however, Nelson makes the same error as those who favor large-area government by throwing out the virtues of local government in order to cure one of its vices. **R**

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