2002

Does It Take a Village - Privatization, Patterns of Restrictiveness and the Demise of Community

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Recommended Citation
Paula A. Franzese, Does It Take a Village - Privatization, Patterns of Restrictiveness and the Demise of Community, 47 Vill. L. Rev. 553 (2002).
Available at: http://digitalcommons.law.villanova.edu/vlr/vol47/iss3/2

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ABSTRACT: As presently structured, common interest communities—the promised land of connection and civility—are destined to disappoint those seeking an authentic sense of community. Finding meaningful solutions to this fundamental paradox is important, because community does matter and our diminishing stocks of "social capital" impose considerable strain on social and legal systems. Understanding more about social capital, norms of generalized reciprocity and the dynamics of community building sheds new light on common interest community deficiencies and bolsters the resolve to discover creative ways to mend the broken promises of this main staple of suburban and metropolitan development. Relevant community paradigms help to recast the reform dialogue and accompanying legal discourse in terms that facilitate cooperation, compromise and "self-interest rightly understood."

I. INTRODUCTION

We have entered the golden age of "privatization,"¹ the somewhat pejorative term used to describe the "shift of government functions from the public to the private sector."² The latter part of the twentieth century witnessed the growth of private residential communities, referred to collectively as common interest communities (CICs),³ in record

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3. See RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 6.2 (2000) (defining common interest community as "a real-estate development or neighborhood in which individually owned lots or units are burdened by a servitude that imposes an obligation that cannot be avoided by nonuse or withdrawal" to pay dues to home-
numbers.\textsuperscript{4} Once considered a remote alternative or the domain of the affluent, today condominiums,\textsuperscript{5} cooperatives,\textsuperscript{6} planned, walled and gated communities\textsuperscript{7} represent the main staple of suburban owners' association empowered to provide services, oversee common areas and enforce servitudes burdening property).

\textsuperscript{4} See Community Associations Institute, \textit{Facts About Community Associations} [hereinafter Community Associations Institute] ("There are 231,000 community associations in the United States. In 1965, there were only 500. Approximately 50% of all new homes built in major metropolitan areas fall within community associations."), at http://www.caionline.org/about/facts.cfm (last visited Oct. 29, 2001). The Community Associations Institute, a national amalgam of developers, homeowners' association leaders, residents and lawyers, takes as its self-declared aim the education and representation of America's residential homeowners' associations and service providers. See id. (explaining role of Community Associations Institute). It reports on its website that as of June, 2001, approximately 47 million Americans live in community associations. See id. (noting surprisingly facts); see also McKenzie, \textit{supra} note 1, at 11 (estimating that homeowners associations grew from 10,000 in 1972 to 150,000 in 1992, and that at least 32 million Americans were members); Robert C. Ellickson, \textit{New Institutions for Old Neighborhoods}, 48 DUKE L.J. 75, 81 (1998) ("Residential community associations . . . have been greeted with resounding approval in new real estate developments."); Michael A. Heller, \textit{The Boundaries of Private Property}, 108 YALE L.J. 1163, 1183 (1999) (describing common interest communities as "perhaps the most significant form of social reorganization of late twentieth-century America"); Robert H. Nelson, \textit{Privatizing the Neighborhood: A Proposal to Replace Zoning with Private Collective Property Rights to Existing Neighborhoods}, 7 GEO. MASON L. REV. 827, 863 (1999) ("By some estimates, neighborhood associations will house more than 50 million Americans, or about 20% of the population by the year 2000.") (citation omitted); Patrick J. Rohan, \textit{Preparing Community Associations for the Twenty-First Century: Anticipating the Legal Problems and Possible Solutions}, 73 ST. JOHN'S L. REV. 3, 5-6 (1999) ("[T]he age of community association living . . . is upon us. The rental market in every urban center is rapidly disappearing as high-rise buildings are torn down, devoted to commercial uses, or converted into condominium or cooperative housing."); Laura Castro Trognitz, "Yes, It's My Castle", A.B.A.J., June 2000, at 30, 30 [hereinafter Trognitz, "Yes, It's My Castle"] (citing Community Associations Institute statistic that "[a]t least 42 million U.S. residents are members of 205,000 condominium, cooperative and homeowners' associations"); Laura Castro Trognitz, \textit{Co-Opted Living}, A.B.A.J., Oct. 1999, at 54, 55 (noting Community Associations Institute estimate that as of 1998, there are 205,000 homeowners associations in United States).

\textsuperscript{5} See WAYNE S. HYATT, CONDOMINIUM AND HOMEOWNER ASSOCIATION PRACTICE: COMMUNITY ASSOCIATION LAW 14 (2d ed. 1988) (explaining that condominiums, a twentieth century phenomenon, are organized so that residents own their respective units in fee simple and own common areas as tenants in common).

\textsuperscript{6} See 2A PATRICK H. ROHAN & MELVIN A. RESKIN, COOPERATIVE HOUSING LAW AND PRACTICE §§ 9.01, 9.02 (2001) (explaining that cooperative vests title in corporate structure, with each resident owning stock in corporation).

and metropolitan residential development⁸ across diverse economic strata.⁹

These proliferating forms of housing rely on a declaration of covenants, conditions and restrictions (CC&Rs) to privately control land use, services and conduct.¹⁰ Written by developers and in place from the start of development construction, these servitudes are likened to covenants that “run with the land.”¹¹ Essentially, they serve as a sort of privatized zoning smorgasbord. Residents’ consent to the restrictions is implied upon purchase, because the declaration of CC&Rs is recorded from the inception of the project.¹² Changing the rules is exceedingly difficult because amendments to the declaration of CC&Rs typically require a supermajority vote (such as two-thirds).¹³

In the CIC setting, covenants have been devised to regulate everything from whether pets are limited¹⁴ or prohibited,¹⁵ to the permissibility

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⁹. See John B. Owens, Westec Story: Gated Communities and the Fourth Amendment, 34 Am. Crim. L. Rev. 1127, 1136-37 (1997) (describing why individuals from all social strata are moving into their own “security zone communities”).

¹⁰. See Restatement (Third) of Prop.: Servitudes § 6.7 (2000) (noting that common interest community groups have implied power to adopt reasonable rules); see also Rohan, supra note 4, at 4 (“Covenants now represent the backbone of community association arrangements of all types and should be recognized to be as necessary and beneficial as zoning or other measures passed by local governments.”). The Restatement explicitly incorporates into its definition of the common interest community the premise that individual units in the given development are burdened by servitudes. See Restatement (Third) of Prop.: Servitudes § 6.2 (defining common interest community).


¹². See Brian L. Weakland, Condominium Associations: Living Under the Due Process Shadow, 13 Pepperdine L. Rev. 297, 299 (1986) (discussing reason why pure contract law analysis cannot be used in condominium setting). For a discussion of whether or not it is fair and appropriate to impute consent in this setting, see infra notes 189-203 and accompanying text.

¹³. See Restatement (Third) of Prop.: Servitudes § 6.10 (2000) (setting forth power to amend declaration); see also Rishikof & Wohl, supra note 11, at 518 (explaining that CC&Rs are “subject only to modification by a super-majority of all members”).


and style of one's screen and storm doors, to the ratio of grass, trees and shrubs allowed on one's property. Restrictions are imposed to regulate the mounting of basketball hoops, the retrieval of dog droppings, the posting of for-sale signs, the trimming of bushes and the color of window curtains. Servitudes exist mandating that any doghouse be made of the same material as the master house (either wood or brick) and hidden from view by a six-foot fence or prescribed greenery. Rules exist to prohibit wok-cooking, compel "poorly dressed guests" to ride in service elevators and ban those wearing "flip-flops" from sitting in common-area chairs.

Homeowners' or community associations (associations) are formed and a governing board of directors (board) is elected to privately oversee and enforce the restrictions. The typical declaration vests governing bodies with broad authority to establish and impose penalties for infractions of the rules. These penalties can take the form of fines, harass-


18. See Dennis R. Judd, The Rise of the New Walled Cities, in SPATIAL PRACTICES 144, 144-45 (Helen Liggett & David C. Perry eds., 1995) (listing issues that have initiated litigation).

19. See Kirp, supra note 17, at 22 (describing regulations imposed on residents living in Celebration).


21. See N.R. Kleinfeld & Tracie Rozhon, In Flat Market, Co-op Life Has Sleep Ups and Downs, N.Y. TIMES, Oct. 30, 1995, at A1 (describing interactions between co-op residents and board members). See generally Todd Brower, Communities Within the Community: Consent, Constitutionalism, and Other Failures of Legal Theory in Residential Associations, 7 J. LAND USE & ENVTL. L. 203, 204 (1992) (discussing restrictions which "have pervaded all aspects of residents' lives, from the provision of services and amenities to the control of behavior outside and inside the individual unit").

22. See RCA Characteristics and Issues, in RESIDENTIAL COMMUNITY ASSOCIATIONS: PRIVATE GOVERNMENTS IN THE INTERGOVERNMENTAL SYSTEM? 9, 15 (U.S. Advisory Comm'n on Intergovernmental Relations ed., 1989) (explaining that board of directors is elected by unit owners, whose "votes are based on property holding. . . . In homeowners' associations, each unit or lot usually has one vote, regardless of the number of residents in the unit. In condominium associations, votes are often apportioned on the basis of the size of the individual unit, with larger units receiving greater weight.").


24. See Rishikof & Wohl, supra note 11, at 518 (discussing structure of private communities).
ment, resort to self-help and other punitive measures. 25 Often, associations have the extraordinary right to non-judicial foreclosure, entitling them to privately repossess and resell a resident's home to collect unpaid fines, dues and fees. 26 Associations are further empowered to tax residents to finance lawsuits, leading to what some describe as a "vicious cycle" of litigiousness. 27 One commentator observed that "[w]hen associations know that their legal fees will be reimbursed, as is typical, they are more prone to sue. This stems from the common belief that the slightest deviation—a cracked flowerpot, an errant rosebush—will be the transgression that plunges a neat neighborhood into decay." 28

The most frequently invoked rationales for the imposition of covenants and other restrictions are the protection of property values, the preservation of aesthetics and the promotion of orderly conduct. 29 But there is more to it—and even more at stake—than financial investment, visual niceties and control. In theory, and at least in rhetoric, common interest communities, with their comprehensive and commonly imposed restraints, are supposed to provide a "complete living package and the simplicity and convenience" of private ownership. 30 They vow to confer a sense of community and a sense of place, offering "residents common emotional, psychological, social, and financial advantages." 31 They hold out the promise of connection in an increasingly disconnected world.

Compelling portraits of Americans' changing behavior over the past several decades describe the modern-day breakdown of social bonds and

25. For a discussion of conflicts that arise between the boards and homeowners, see infra notes 139-54 and accompanying text.

26. See Matthew Benjamin, Hi, Neighbor, Want to Get Together? Let's Meet in Court!, 129 U.S. News & World Rep., Oct. 30, 2000, at 56, 57 (defining right to self-help foreclosure as meaning that "the association doesn't need a hearing or a judge to sell a resident's house to collect fines and legal fees. Associations can also tax residents to finance lawsuits. Members must pay or face fines, lawsuits, or, ultimately, foreclosure."). For examples of this practice in action, see infra notes 148-51 and accompanying text.

27. See id. at 56-58 (describing power possessed by associations).

28. Id. at 58.

29. See Community Associations Institute, supra note 4, at http://www.caionline.org/about/facts.cfm (last visited Oct. 29, 2001) (noting development of community associations). On its informational website, which is peppered with lots of "interesting facts," the Community Associations Institute states that "[c]ommunity associations help protect property values by insuring compliance with rules and deed restrictions." Id.; see also McKenzie, supra note 1, at 122 (concluding that "narrow private purpose" of CICs is "protection of property values"); Wayne S. Hyatt & Jo Anne P. Stubblefield, The Identity Crisis of Community Associations: In Search of the Appropriate Analogy, 27 Real Prop. Prob. & Tr. J. 589, 612 (1993) (noting that "[t]he most common rationale in support of use restrictions is that they enhance the value of property").

30. Rishikof & Wohl, supra note 11, at 513.

31. Id.
the ill effects of our increasingly withering community ties. Noted theorists and social observers poignantly chronicle our yearning to go back to a time "when public-spiritedness really did carry more value and when communities really did 'work.'" In a wide range of settings "[w]e tell pollsters that we wish we lived in a more civil, more trustworthy, more collectively caring community." I believe that in many ways the concurrent proliferation of common interest communities reflects the same longing. Ironically, as presently structured, CICs—the promised land of connection and civility—are destined to disappoint.

The parade of justifications trotted out in support of CIC patterns of restrictiveness would seek to belie this conclusion. In addition to traditional rationales linked to economics and aesthetics, restrictions on what members are allowed to do or must refrain from doing are supposed to provide the "comforts" of predictability and conformity, honor common expectations and facilitate effective compliance and enforcement mechanisms. Covenants and other conditions give the developer "the power to create a distinct lifestyle in a development, which the developer can use as a powerful marketing tool." Rules and "rule police" are supposed to contribute to the collective's peace of mind, promote harmonious exchange and provide the antidote to the feelings of vulnerability and insecurity that presumably inspired the move to the common interest community in the first place.

These suppositions, however, yield to what we do know about the litigious, often acrimonious, realities of common interest community living. Moreover, the relevant literature, which is rich and varied and comes from a host of disciplines, suggests that in actuality the predicates for successful community building are apt to be stifled, if not obliterated, by the sort of restrictiveness and attendant preoccupation with compliance that is inher-


33. Id. at 287.

34. Id. at 402.

35. See Marc A. Weiss & John W. Watts, Community Builders and Community Associations: The Role of Real Estate Developers in Private Residential Governance, in RESIDENTIAL COMMUNITY ASSOCIATIONS: PRIVATE GOVERNMENTS IN THE INTERGOVERNMENTAL SYSTEM?, supra note 22, at 95, 95 (offering reasons why community builders have created and supported community associations).

36. MCKENZIE, supra note 1, at 127-28.


38. For a discussion of troubles in common interest communities, see infra notes 131-61 and accompanying text.
ent in the traditional CIC model. As a result, the relevant inquiry of resident relations is reduced to the adversarial “what is my neighbor doing?” as opposed to the far more desirable “how is my neighbor doing?”

The organizational, structural and social foundations of the typical common interest community do not promote trust, which is an important anchor of community. Distrust kindles dissension, disagreement and misunderstanding, and is a potent impediment to problem solving. That by various indicators the social fabric of many common interest communities is falling apart at the seams should come as no surprise.

Certainly, more meaningful and comprehensive empirical data is needed to discern precisely “[w]hat type[s] of communities are taking shape in our community associations[..]” Apart from the limited surveys and anecdotal accounts, we do not know the full extent to which common interest community dwellers’ lives are appreciably enhanced or burdened by association practices. Reports of association overreaching, excessive preoccupation with rule enforcement and mounting resident disenchantment are at significant odds with the internal (and arguably self-serving) surveys that have been conducted. For example, a survey by the Community Associations Institute reports that 75% of association members are satisfied.

The effects that CIC restrictions and their patterns of enforcement are having on property values and market forces remains to be critically explored. In at least some communities, the preservation-and-enhancement-of-property-values rationale for the imposition of aggressive use restrictions accedes to recent realtors’ reports that today the absence of homeowners’ associations and attendant restrictions has become a selling point. A twelve county survey of resale buyers in California found that

39. For a discussion of privatization and the unrealized determinants of community, see infra notes 162-242 and accompanying text.
40. For a discussion of trust in communities, see infra notes 189-203 and accompanying text.
41. For a discussion of increased tension in common interest communities, see infra notes 131-57 and accompanying text.
42. Winokur, supra note 8, at 1175.
43. For examples of research indicating growing discontent with lack of community adhesiveness, see infra notes 131-57 and accompanying text.
44. See Winokur, supra note 8, at 1175 (addressing associations’ financial issues that influence society’s sense of community).
45. See Community Associations Institute, supra note 4, at http://www.caionline.org/about/facts.cfm (last visited Oct. 29, 2001) (noting that Community Associations Institute is national trade organization of homeowners’ associations).
46. See id. (quoting Ellen Hirsch de Haan, president of Community Associations Institute, who cites to 1999 internal survey).
48. For a discussion of one group’s protection against associations and boards, see infra notes 155-57 and accompanying text.
84% of those who did buy into a common interest community did so only by default. They were hoping to avoid the CIC, and found themselves in one simply because of the scarcity of alternatives.\footnote{49}

The premise of this Article is that the patterns of regimentation that accompany CIC living promote cultures that do more to destroy community than to build it. The increase in litigation, conflict and tension between associations, boards and residents over the far-reaching content, application and enforcement of imposed CC&Rs\footnote{50} suggests that “common interest community” has become a misnomer of sorts. Just what are the “common interests” shared by residents? And most essentially, where is the “community”?

Finding meaningful solutions to this fundamental paradox is important, first because community does matter.\footnote{51} Second, common interest communities’ diminishing stocks of social capital (i.e., the value created by neighborly relations and networks of give and take)\footnote{52} impose considerable strain on social and legal systems.\footnote{53} Third, there is hope and promise in the CIC construct. Precisely because of their flaws as well as their potential, common interest communities have the capacity to be catalysts for a renewed, revitalized sense of community and sense of place. Realizing this goal would satisfy the need for housing and, at least in some part, the search for social connectedness.

\footnote{49. See Stephen E. Barton & Carol J. Silverman, \textit{Shared Premises: Community and Conflict in the Common Interest Development}, in \textit{Common Interest Communities: Private Governments and the Public Interest} 129, 137 (Stephen E. Barton & Carol J. Silverman eds., 1994) (explaining that many homeowners who might have known of common interest community restrictions would not have purchased their home; they only purchased because “ordinary neighborhoods were too few”); see also James L. Winokur, \textit{The Mixed Blessings of Promissory Servitudes: Toward Optimizing Economic Utility, Individual Liberty, and Personal Identity}, 1989 Wis. L. Rev. 1, 58 ("[A]s more and more residential properties are bound by servitude regimes, . . . the option to reject the model(s) of servitude regimes prevailing in a given area become less realistic for substantial segments of the real estate market . . .") (footnotes omitted).

\footnote{50. See Winokur, \textit{supra} note 49, at 63-64 (discussing increase in litigation between association boards and members); David J. Kennedy, Note, \textit{Residential Associations as State Actors: Regulating the Impact of Gated Communities on Nonmembers}, 105 \textit{Yale L.J.} 761, 761 (1995) (noting that “[a]s the number of residential associations has increased, the consequent litigation has arisen largely in the context of disputes between residential associations and their members over the context of frequently intrusive rules and regulations"). For a discussion of litigious patterns and escalating conflicts in the CIC setting, see \textit{infra} notes 131-57 and accompanying text.

\footnote{51. For a discussion of the significance of the sense of community and the consequences of its decline, see \textit{infra} notes 57-84 and accompanying text.

\footnote{52. For a detailed definition of social capital and the benefits of facilitating connections between people, see \textit{infra} notes 95-108 and accompanying text.

\footnote{53. For a discussion of ineffective legislative solutions and remedial judicial attempts to decrease social animosity in associations, see \textit{infra} notes 131-61 and accompanying text.}
Common interest communities have a significant role to play in the
difficult task of recreating social capital and reinventing civic engagement.
As community is restored, a strong social fabric and meaningful patterns
of routine exchange would come to provide effective alternatives to for-
malized controls and commands as the principal determinants of compati-
ble and responsible land use. Authentic communities are able to develop
and promote appropriate norms that are relevant, persuasive and thereby
sustainable without excessive reliance on legal codification, mandates or
punitive sanctions for noncompliance.

As existing deficiencies bring developers back to the drawing board,
now is the time for finding new formats and innovative prototypes rooted
in the resolve to actively cultivate the determinants of community. Under-
standing more about social capital, which at its essence concerns the
private as well as public gains that are reaped by fostering connections
between people, is crucial to the reform process. The touchstones of so-
cial capital and the predicates to successful connection have been studied
and tracked by several disciplines in a variety of relevant settings. The
findings shed new light on common interest community flaws and bolster
the resolve to discover creative ways to mend the broken promises of this
dominant force in housing development.

Perhaps most essentially, these studied constructs have the potential
to beneficially inform the legal and political discourse that surrounds the
CIC reform effort. Existing lexicons need to be fortified with a working
vocabulary that allows reformers to recast the relevant dialogue in terms
that more sharply focus on understanding and supporting the dynamics of
social connections and connectedness. Recognition of the promise of
community and the determinants of its success places rightful emphasis on
the values of cooperation, compromise, shared understanding and trust.

The following sections of this Article support the conclusion that pre-
sent CIC planning patterns and modes of dispute resolution, with their
emphasis on formalized mandates and broad enforcement mechanisms,
create cultures of distrust. This unintended consequence impedes (if not
precludes) the development of authentic community. As a result, there
are few, if any, mechanisms in place to allow rigidity, suspicion and dissen-
sion to yield to cooperation, mutual aid, interdependence and respect.
Transaction costs escalate in a myriad of ways, perhaps most noticeably as

54. For a discussion of the benefits and drawback of social capital, see infra
notes 95-108 and accompanying text.

55. For a discussion of shared characteristics in communities explored as an
agenda for reform, see infra notes 163-242 and accompanying text.

56. See Mary Ann Glendon, Rights Talk: The Impe-ovenishment of Political
Discourse xi (1991) (discussing failure of American political discourse to take into
account meaningful social environments and systems, so that controversies are
framed in terms that impede "compromise, mutual understanding and the discov-
ery of common ground").
formal legal institutions are called upon to accomplish what once was left (and is best left) to informal networks and social capital.

Covenants, conditions and restrictions do, however, have a role to play in CIC planning. Within reason, resorting to servitudes can be useful and efficient. How, then, might the worthier aims of privately-imposed restrictions be advanced without overreaching, so that "community" is not discarded in the name of "common interest community" planning? To respond meaningfully, it is helpful first to explore why community matters and then how and why present CIC models are faltering.

II. Why Community Matters

A. The Decline of Connectedness and Its Consequences

The cohesive, close-knit community is part of the American dream, a coveted icon that builds social capital, nurtures the soul and encourages civic responsibility. Yet, community has declined in our time, a trend chronicled by scholars, pollsters and social observers alike. Sadly, over the past two generations, "Americans have had a growing sense at some visceral level of disintegrating social bonds." The "ebbing of com-


58. See Mark Baldassare & Claude S. Fischer, Suburban Life: Powerlessness and Need for Affiliation, 10 URB. AFF. Q. 314, 315 (1975) (explaining that "social capital" theory takes as its essential premise notion that social contacts and networks confer private as well as public gains, and that well-connected community tends to be more efficient). For a discussion of the desirability of social capital in communities to enhance social norms and relationships, see infra notes 95-108 and accompanying text.

59. See Katz, supra note 57, at ix (noting community degradation as responsible for social alienation and rising crime rates); see also Putnam, supra note 32, at 21 ("Civic engagement and social capital entail mutual obligation and responsibility for action.").

60. See Putnam, supra note 32, at 30-47 (engaging in impressive and careful review of trends in American social capital and civic engagement).

61. See id. at 287. See generally Mark Baldassare & Georgeanna Wilson, More Trouble in Paradise: Urbanization and the Decline in Suburban Quality-of-Life Ratings, 30 Urb. Aff. Rev. 690, 691-92 (1995) (examining "whether suburban residents have experienced a decline in their perceptions of the quality of their lives" and noting that "the discrepancy between real conditions in today's suburban regions and the ideals and expectations residents have about community life seems to predict declining perceptions of the quality of life"). Many social theorists have chronicled and decried the diminished sense of community in American life. See, e.g., Ralph Keyes, We the Lonely People Search for Community 9-10 (1973) (describing loss of community and noting that today "a sense of community . . . rarely includes the neighbors"); Larry Lyon, The Community in Urban Society 68-70 (1987) (examining James Coleman's "Gresham's Law of Conflict," which holds that those in community who advocate conflict prevail over those who advocate order); Seymour B. Sarason, The Psychological Sense of Community: Prospects for a Community Psychology 2 (1974) (criticizing present communities as providing little kinship and lack of feeling needed among its members); H. Warner Dunham,
community over the last several decades has been silent and deceptive. We notice its effects in the strained interstices of our private lives and in the degradation of our public life, but the most serious consequences are reminiscent of the old parlor puzzle: 'What's missing from this picture?' The withering state of community is lamentable in light of research from an array of disciplines revealing that "civic connections help make us healthy, wealthy and wise."

Sociologists and psychologists report that people with a strong sense of community are happier, worry less and feel more competent. Well-being is enhanced appreciably when one feels part of a larger and dependable network of relationships. By contrast, research suggests that the decline in feelings of belonging and attachment to our neighborhoods is a root cause of contemporary malaise, expressed in terms of loneliness, alienation and isolation.

In recent years, researchers have carefully chronicled the growing sense of civic discontent and accompanying distress at weakening community bonds. Vast data on social, political and lifestyle trends reveal that...
an overwhelming majority of the United States' workforce believes that "the breakdown of community" and 'selfishness' are "serious" or 'extremely serious' problems in America."69 Several national surveys report that more than 80% of respondents think that "there should be more emphasis on community, even if that puts more demands on individuals."70

B. The Value of a Sense of Community and Community of Place

The concept of "sense of community" has assumed significant importance in the field referred to, aptly, as "community psychology."71 The term was introduced in the mid-1970s as "the overarching value by which to judge [any community effort]."72 Sense of community has been explained as "the feeling an individual has about belonging to a group and involves the strength of the attachment people feel for their communities or neighborhoods. It is primarily a psychological construct; the presence or absence of a sense of community is experienced as an abstract concept in the human mind."73

Empirical research reveals that the experience of sense of community, when activated, confers benefits to the individual as well as to the collective.74 Leading champions of this work urge us "to learn to use sense of community as a tool for fostering understanding and cooperation."75 With a sense of community in place, rigidity and distrust yield to consciously cultivated tolerance and collaboration. Neighborhoods rich in sense of community tend to "embody the qualities of safety, harmony, and vitality."76

69. PUTNAM, supra note 32, at 25 (citations omitted).
70. Id. (citations omitted).
71. See, e.g., Cochrun, supra note 64, at 92-93 (describing value of sense of community in community psychology); Thomas J. Glynn, Neighborhood and Sense of Community, 14 Am. J. COMMUNITY PSYCHOL. 341, 341 (1986) (noting that interest in community psychology is developing and growing because of loss of sense of community in contemporary society); W.J. Goudy, The Ideal and the Actual Community: Evaluations from Small Town Residents, 18 Am. J. COMMUNITY PSYCHOL. 277, 285 (1990) (discussing results of study supporting existence of psychological sense of ideal community).
72. SARASON, supra note 61, at 9.
73. Cochrun, supra note 64, at 93 (citations omitted).
74. See Glynn, supra note 71, at 341 (describing psychological sense of community as common theme and subject of interest in contemporary society); David W. McMillan & David M. Chavis, Sense of Community: A Definition and Theory, 14 Am. J. COMMUNITY PSYCHOL. 6, 6 (1986) (indicating positive relationship between sense of community and ability to function competently in community).
75. McMillan & Chavis, supra note 74, at 20.
76. Cochrun, supra note 64, at 98.
Prior to the twentieth century phenomena of industrialization and urbanization, sense of community was a natural part of daily life.\textsuperscript{77} Historians describe the ancient Greek polis as "a mecca of connectedness," where frequent interaction, loyalty and trust contributed to a strong sense of community.\textsuperscript{78} Later, agrarian life relied predominantly on interdependence, norms of reciprocity and trustworthiness.\textsuperscript{79} Sense of community was intrinsically felt, "closely woven into the fabric of tradition and morality as to be scarcely more noticeable than the air people breathe."\textsuperscript{80}

Post-industrial changes eviscerated many of the pre-determinants of community.\textsuperscript{81} The consensus from a myriad of disciplines is that today "sense of community is no longer a natural by-product of daily life; sense of community must be consciously defined and understood if it is to be maintained and enhanced in modern society."\textsuperscript{82} Communitarians warn that our social environment, much like our ecological environment, can no longer be taken for granted, and instead must be actively nurtured if not revived wholesale.\textsuperscript{83} The good news comes from empirical work suggesting that strategies and techniques exist to effectively accomplish this reactivation.\textsuperscript{84}

People "can have a psychological sense of community in a variety of contexts. They can have such a sense about a geographically defined territory like their neighborhood, or about an aspatial or extended space community, for example, their church, job, professional group, or those

\textsuperscript{77} See, e.g., METROPOLITAN AMERICA IN CONTEMPORARY PERSPECTIVE 24 (Amos H. Hawley & Vincent P. Rock eds., 1975) (noting that metropolitan growth is changing concept of community from agricultural to urban).

\textsuperscript{78} See John Samples, Introduction to the Transaction Edition, in FERDINAND TONNIES, COMMUNITY AND SOCIETY xvi (1957) (examining historians' approaches to forms of community dating back to classical tradition).

\textsuperscript{79} See ROBERT A. NISBET, COMMUNITY AND POWER 82 (1962) (emphasizing that system of agriculture is communal where history indicates few alternatives than for villagers to subordinate to group for benefit of convenience and necessity).

\textsuperscript{80} Cochrun, supra note 64, at 92 (quoting NISBET, supra note 79, at 57).

\textsuperscript{81} See THOMAS BENDER, COMMUNITY AND SOCIAL CHANGE IN AMERICA 45 (1978) (engaging in historical and analytical examination of changing sense of community in United States); KENNETH T. JACKSON, GRABBRASS FRONTIER: THE SUBURBANIZATION OF THE UNITED STATES 231-45 (1985) (chronicling post-industrial changes in housing patterns and post-World War II boom in suburban development).

\textsuperscript{82} Cochrun, supra note 64, at 92.


\textsuperscript{84} See Glynn, supra note 71, at 351 (describing community-wide actions such as ability to elect officials who care about one's neighborhood, as aid in diminishing common theme of community erosion); McMillan & Chavis, supra note 74, at 19 (analyzing various methods employed by specific groups within neighborhoods to develop stronger sense of community). For a discussion of empirical work supporting common constructs that build and can aid in re-building community, see infra notes 169-242 and accompanying text.
committed to a certain lifestyle." The former category is referred to as "community of place" and the latter as "community of interest."

Before the advent of modern transportation and communication technologies, these two categories were largely inseparable, as "people lived, worked and built social networks within a limited geographic area." The observation has been made that the decline in a sense of community may be attributable at least in part to "an improper balance between local and centralized levels of interaction—that is, a misalignment between a person's community of place and community of interest."

This Article, with its focus on common interest communities, is concerned with "community of place." Theorists maintain that it is in this context that planners have the more significant potential to affect and influence sense of community. The rewards of doing so are great.

People who have a strong sense of community feel like they belong in their neighborhoods, they believe they exert some control over what happens in their neighborhoods while also feeling influenced by what happens in them, and they believe that their needs can be met through the collective capabilities of their neighbors. Through their sense of a shared history, people with a strong sense of community also feel a strong emotional bond to and a personal investment in the success of their neighborhoods.

The sociological and psychological literature is replete with instruments or "social measures" intended to help planners "identify the effects of their plans and policies on resident practices and perceptions of community." These instruments allow respondents to indicate the intensity


86. See, e.g., Lynne C. Burkhard, Old Values in a New Town: The Politics of Race and Class in Columbia, Maryland 151 (1981) (describing community of interest, in which individuals seek out like-minded groups); David M. Chavis et al., A Sense of Community Through Brunschwilk's Lens, 14 Am. J. Community Psychol. 24, 26 (1986) (articulating sense of community as expanding outside locality and including communities based on interest, profession and race); Cochrun, supra note 64, at 92 (noting that community of interest is defined by personal relationships).

87. Cochrun, supra note 64, at 92.

88. Id.

89. See David M. Chavis & Abraham Wandersman, Sense of Community in the Urban Environment: A Catalyst for Participation and Community Development, 18 Am. J. Community Psychol. 55, 56 (1990) (describing community development process as connected to physical and social environment of community and arguing that stronger sense of community provides planners with greater influences).

90. Cochrun, supra note 64, at 93.

91. See, e.g., John C. Buckner, The Development of an Instrument to Measure Neighborhood Cohesion, 16 Am. J. Community Psychol. 771, 772 (1988) (discussing devel-
of their agreement or disagreement with itemized factors such as the presence of supportive relationships in the given area, individual involvement in the community, the quality of interaction among residents, the number of neighbors known by name and the number of neighbors considered friends. These scales, when tested, reveal that the stronger the so-called "social capital" in a given area the greater the sense of community among its members.

C. Social Capital

"Social capital" is a term used by researchers in a host of disciplines to refer to the value and benefits of "social networks and the norms of reciprocity and trustworthiness that arise from them." The term incorporation of instruments designed to measure attributes of community, thereby making community analysis easier; Thomas J. Glynn, *Psychological Sense of Community: Measurement and Application*, 34 HUM. REL. 789, 807 (1981) (noting that sense of community may be considered as measurable as behaviors and attitudes); Goudy, supra note 71, at 277 (analyzing subjective evaluations of sociological criteria thought to indicate ideal community); McMillan & Chavis, supra note 74, at 19 (concluding that clear and empirically validated understanding of sense of community provides basis for planners to develop programs); Nasar & Julian, supra note 85, at 179 (assessing psychological sense of community using short-form measure in study of sample residents); see also Dennis E. Poplin, Communities: A Survey of Theories and Methods of Research 291 (2d ed. 1979) (introducing methods of community research and examination); Carolyn R. Shaffer & Kristin Anundsen, Creating Community Anywhere: Finding Support and Connection in a Fragmented World 208-09 (1993) (creating "how-to" guide to building and strengthening community bonds); Colin Bell & Howard Newby, Community Studies: An Introduction to the Sociology of the Local Community, in 5 STUDIES IN SOCIOLOGY 218, 218 (Professor W.M. Williams ed., 1971) (describing important early formulation of community study as methodology).

92. See Glynn, supra note 91, at 807-08 (describing results of study measuring psychological sense of community which can provide specific information for program planning); Goudy, supra note 71, at 285-86 (discussing results of study indicating sociological attributes that separate ideal community from actual community).

93. For a discussion of social capital being advantageous to a strong sense of community, see infra notes 95-108 and accompanying text.

94. For a discussion of essential attributes necessary to develop and maintain a strong sense of community, see infra notes 169-242 and accompanying text.

95. See Jane Jacobs, The Death and Life of Great American Cities 55 (1961) (being one of first to coin term). Professor Jacobs, an early proponent of what is now considered "new urbanism," believed that the physical design of communities should enhance and encourage informal contacts among neighbors, the sum total of which would build "a web of public respect and trust, and a resource in time of personal and neighborhood need." Id. at 56. Later, Professor James S. Coleman applied the concept of social capital to education, to demonstrate how the educational process is enriched and improved by social ties. See James S. Coleman, Foundations of Social Theory 349-52 (1990) (describing post-World War II social changes that have undermined social capital necessary to accept and abide by implicit constitutions in schools). See generally James S. Coleman, Social Capital in the Creation of Human Capital, 94 AM. J. SOC. 95, 95 (1988) (introducing concept of social capital and examining social structure conditions under which it arises).

96. Putnam, supra note 32, at 19.
incorporates notions of civic virtue and highlights "the fact that civic virtue is most powerful when embedded in a dense network of reciprocal social relations. A society of many virtuous but isolated individuals is not necessarily rich in social capital." 97

The first benefit of social capital is that it imposes norms and networks to help people more effectively address and, when necessary, readdress collective dilemmas. These social norms and relationships encourage cooperation and inspire voluntary compliance with the sort of behavior that is in the collective's best interests. A community rich in social capital will rely on informal social controls to solve problems. 98

Second, social capital is desirable because by "greas[ing] the wheels that allow communities to advance smoothly," 99 it reduces transaction costs. "Where people are trusting and trustworthy, and where they are subject to repeated interactions with fellow citizens, everyday business and social transactions are less costly." 100

Third, social capital expands "our awareness of the many ways in which our fates are linked," 101 thereby encouraging tolerance and empathy. By contrast, loners and isolationists, their views untested, "are more likely to be swayed by their worst impulses." 102

Notwithstanding its benefits, however, social capital too "can be directed toward malevolent, antisocial purposes, just like any other form of capital." 103 Further, there is always the risk that emphasizing the creation of community will inadvertently encourage sameness and exclusion, because social capital is no doubt easier to build in homogeneous settings. To maximize the benefits of social capital and minimize its potential to foster division and generate other negative external effects, researchers make an important "distinction between bridging (or inclusive) and bonding (or exclusive)" social capital. 104

The upside of bonding social capital is that it can promote in-group solidarity and loyalty as well as provide support for worthy start-up ventures and otherwise disempowered groups. 105 A significant downside is its abl-

97. Id.
98. See Oscar Newman, Community of Interest 13 (1981) (explaining that in societies today, where neighbors are strangers, grouping dwellings for residents of similar age and lifestyle may be only way to ensure common interests among neighbors); see also Jacobs, supra note 95, at 56 (noting necessity of community support and development of trust through advice of fellow citizens); McMillan & Chavis, supra note 74, at 15-16 (recognizing enjoyment of helping others as necessary reinforcement in developing successful communities).
100. Id.
101. Id.
102. Id. at 289.
103. Id. at 22.
104. Id.
105. See id. (explaining, by example, that bonding social capital can "provide crucial social and psychological support for less fortunate members of the commu-
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Bridging social capital, in contrast, reaches across customary lines of demarcation to “encompass people across diverse social cleavages.” It promotes cooperation, shared understanding and discovery of common ground.

Empirical accounts reflect the reality that “bonding and bridging are not ‘either-or’ categories into which social networks can be neatly divided, but ‘more or less’ dimensions along which we can compare different forms of social capital.” The emphasis, although somewhat imprecise, is on bridge-building, so that broader alliances and identities are forged. Systems of reciprocity encourage this sort of connectedness.

D. Systems of Reciprocity

An essential building-block of social capital is the norm of “generalized reciprocity,” perhaps best described by the age-old rule “Do unto others as you would have them do unto you.” A sense of community relies on this norm to help satisfy what is described by community psychologists as a fundamental human desire to feel interdependent with others, and then “maintain this interdependence by doing for others what one expects from them.” Examples of the principle in practice might include picking up your neighbor’s mail while she is away, keeping an eye on a neighbor’s house in his absence, or “raking your leaves before they blow onto your neighbors’ yard.”

In a significant exploration of social order, reciprocity is described as an essential characteristic of community, and covers “a range of arrangements and relations and exchanges, including mutual aid, some forms of cooperation and some forms of sharing.” This notion of “mutual aid” is explained as follows:

Each individual act in a system of reciprocity is usually characterized by a combination of what one might call short-term altruism and long-term self-interest: I help you out now in the (possibly vague, uncertain, and uncalculating) expectation that you will help me out in the future. Reciprocity is made up of a series of acts each of which is short-run altruistic (benefiting others at a community, while furnishing start-up financing, markets, and reliable labor for local entrepreneurs”).

106. Id. at 23.
107. Id. at 22.
108. Id. at 23.
109. See id. at 134 (describing generalized reciprocity as “[t]he touchstone of social capital,” defining it this way: “I’ll do this for you now, without expecting anything immediately in return and perhaps without even knowing you, confident that down the road you or someone else will return the favor.”).
110. SARASON, supra note 61, at 157.
111. PUTNAM, supra note 32, at 135.
Reciprocity has been cast in terms of Alexis de Tocqueville’s observation that American democracy functions well because we pursue “self-interest rightly understood.” Thus, generalized reciprocity is like altruism, but members of a community that practice its tenets discover that their own self-interest is served too, whether the gain is immediate, long-term or attenuated. “When each of us can relax her guard a little, what economists term ‘transaction costs’—the costs of the everyday business of life, as well as the costs of commercial transactions—are reduced.” Trusting communities, then, “have a measurable economic advantage.”

The almost imperceptible background stress of daily “transaction costs”—from worrying about whether you got back the right change from the clerk to double-checking that you locked the car door—may also help explain why students of public health find that life expectancy itself is enhanced in more trustful communities. A society that relies on generalized reciprocity is more efficient than a distrustful society, for the same reason that money is more efficient than barter. Honesty and trust lubricate the inevitable frictions of social life.

Trust is an important anchor of community. Without it, the potential for rigidity, dissension and strife escalates. Closely knit communities tend to inspire trust and cooperation because members are likely to have multiple dealings with each other mindful that reputations count. In contrast, communities with weak social fabric have little leverage available to support norms of “good citizenship.” In other words, “the civically disengaged believe themselves to be surrounded by miscreants and feel less constrained to be honest themselves.”

113. Id. at 28-29.
114. PUTNAM, supra note 32, at 135 (citing ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 525 (1839)).
115. See id. (acknowledging generalized reciprocity as more difficult to distinguish from altruism when return of favor is long-term).
116. Id.
117. Id.
118. Id.
119. See MARK BALDASSARE, TROUBLE IN PARADISE: THE SUBURBAN TRANSFORMATION IN AMERICA 101 (1986) (discussing several important roles that trust plays in human relations).
120. See id. (warning of dangers associated with absence of trust).
122. PUTNAM, supra note 32, at 137.
A system of reciprocity builds friendships, which is another important dimension of community. Friendship "involves mutual concern, and although 'the reciprocity of friendship means that one gets back what one gives,' there is no calculation of benefits and costs. It requires an approximate equality and strong, secure selves." Friendship allows members of a community to experience "the goodness of others while demonstrating goodness to them."  

III. PRIVATIZATION, COMMON INTEREST COMMUNITIES AND THE LURE OF COMMUNITY

In this age of increasing depersonalization and isolation, the lure of community is real and very appealing. The prevalence of common interest communities is linked, in significant ways, to this larger search for connection, community and sense of place. That advertisements for CICs, posted on the Internet and elsewhere, use this longing to sell community is no accident. For example, one advertisement states, "Remember the street you grew up on? Where neighbors knew neighbors. Live there again—at Greenfield at The Wheatlands. Greenfield is a traditional hometown for families who aspire to the good life."  

The Disney Company's pitch for its "Celebration" community promises the return of vintage neighborhood. Its advertisement reminisces, "There once was a place where neighbors greeted neighbors in the quiet of summer twilight. . . . Where children chased fireflies . . . . The movie house showed cartoons on Saturday. The grocery store delivered . . . . Remember that place? . . . It held a magic all its own. The special magic of an American hometown." Two recent books offer insiders' perspectives on life in Disney's model towns. A significant part of the allure of these planned developments is described as the yearning to live in a more civil, more caring place.  

Sadly, common interest communities, as presently configured, are hard-pressed to provide any genuine sense of community or connection. This fundamental default has allowed tensions to mount and battles to

123. Taylor, supra note 112, at 31.
124. Id.; see also C. Fischer, To Dwell Among Friends 2-5 (1982) (chronicling importance of personal connection as necessary component of community life).
126. Kirp, supra note 17, at 22.
128. Ross, supra note 127, at 34 (noting that homeowners in planned developments are willing to gain "sense of community" in exchange for smaller house and lot).
escalate.129 Addressing this central CIC failure is of immediate and long-term relevance. Restoring social bonds and repairing damaged social fabric is essential to our individual and collective well-being. Moreover, the inability of common interest communities to live up to their rhetoric is compounding transaction costs as the burdens on social and legal systems grow.

In this vast arena, critical study and commitment to reform is well worth the effort. Notwithstanding their paradigmatic and practical shortcomings, common interest communities, in one form or another, are a force to be reckoned with. Demographic trends lead inescapably to the conclusion that “[w]hether one focuses on the housing pattern in large cities or upon suburbia . . . the age of community association living, as opposed to renting or owning a one-family home, is upon us.”130

A. Trouble in Common Interest Community Paradise

With increased frequency, common interest community residents are balking at the restrictions to accompany association living.131 A practitioner on the front lines cites to the “growing trend” of residents “fighting back against associations.”132 Others describe this trend as a “budding national backlash,”133 “turning serene subdivisions into raucous battle zones.”134

At a concomitant rate, courts are awkwardly entering the fray as the reluctant arbiters of chagrined complainants’ challenges to the propriety

129. For a discussion of the tensions of CIC living, see infra notes 131-57 and accompanying text.
130. Rohan, supra note 4, at 5.
131. See Robert Jay Dilger, Neighborhood Politics: Residential Community Associations in American Governance 135-41 (1992) (describing CIC residents’ dissatisfaction); Judd, supra note 18, at 158 (chronicling homeowners’ associations “tendency toward autocratic rule” and resultant litigation or threats of litigation); Kleinfield & Rozhon, supra note 21, at A1 (describing New York’s intra-co-op disputes); Trognitz, “Yes, It’s My Castle”, supra note 4, at 30 (noting that lawsuits by unhappy residents against homeowners’ associations are growing); Tim Vanderpool, But Isn’t This My Yard? Revolt Against Neighborhood Rules, CHRISTIAN SCI. MONITOR, Aug. 18, 1999, at 2 (“[H]eavy handed rules and arbitrary enforcement are sometimes blamed for pitting neighbor against neighbor, and turning serene subdivisions into raucous battle zones. The result may be a budding national backlash.”); Weakland, supra note 12, at 310-26 (describing “litigation-plagued” CIC in Los Angeles).
133. Vanderpool, supra note 131, at 2; see also Trognitz, “Yes, It’s My Castle”, supra note 4, at 31 (quoting Nevada State Senator Mike Schneider, who said “There is a backlash by the public toward these homeowner associations,” and California practitioner, Alexandria Phillips, who stated that “There’s going to be a backlash as long as there is an abuse of power”).
134. Vanderpool, supra note 131, at 2.
of given rules and association or board actions to enforce them. A survey of 600 homeowners' associations discovered that "more than 44% of the boards had been threatened with lawsuits in a year's time."

Conversely, "homeowners' associations are increasingly using the courts to make wayward residents comply with rules dictating everything from home colors to fences." Conflicts are not limited, however, to residents suing associations or associations suing residents. Increasingly, neighbors are turning on each other.

The trend toward litigation and state statutory intervention, coupled with erupting patterns of dissension, supports the premise that "something is rotten" in CIC-land. Reported instances of trouble in paradise abound. Newspapers and periodicals tell the story of how CIC residents "are increasingly jumping the fence of civility." The published accounts are troublesome and telling.

For example, a couple living in a California subdivision returned from vacation to find that their board had, without warning, retained a landscaper to cut down their three very expensive pine trees. Apparently, a neighbor complained that the trees were in violation of one of the development's restrictive covenants prohibiting foliage from blocking views, this notwithstanding the fact that the association had approved the trees in the first place. The couple has taken their grievance to court.

Many courts apply a rule of reasonableness to common interest community rules, and will not disturb a given restriction unless it lacks a sufficient factual basis or is rendered in bad faith. See, e.g., Hidden Harbour Estates, Inc. v. Norman, 309 So. 2d 180, 182 (Fla. Dist. Ct. App. 1975) (upholding restriction as reasonable and in good faith); Riss v. Angel, 934 P.2d 669, 684 (Wash. 1997) (striking down board decision because it lacked sufficient factual basis); see also David C. Drewes, Note, Putting the "Community" Back in Common Interest Communities: A Proposal for Participation-Enhancing Procedural Review, 101 COLUM. L. REV. 314, 349-50 (2001) (proposing that judiciary encourage participatory CIC governance by varying standard of review based upon presence or absence of participatory procedures in association's decision-making process); Paula A. Franzese, Common Interest Communities: Standards of Review and Review of Standards, 3 WASH. U. J.L. & POL'Y 663, 666-71 (2000) (detailing standards of review adopted by courts to review common interest community rules and governing board actions and proposing multifactored test to honor resident expectations as well as best interests of collective).


See id. (showing trend of neighbors turning on each other); Harvey Rice, Flurry of Lawsuits Divides Carriage Hill Neighbors, HOUS. CHRON., Sept. 3, 2000, at A43 (explaining dissension between neighbors).

For a discussion of new resident protection laws, see infra notes 158-61 and accompanying text.

For a discussion of examples of the trend towards litigation, see infra notes 142-57 and accompanying text.

Vanderpool, supra note 131, at 2.

See Trognitz, "Yes, It's My Castle", supra note 4, at 30 (explaining how Bergen family's trees were cut down).
Elsewhere, "clipboard wielding board members" zealously patrol in search of CC&R violations, which are reported "on little blue cards" and sent to owners. In the words of one disgruntled resident, who incurred the board’s wrath for putting a big red stuffed dog on his porch during the holidays, "I grew up and moved away from Mom and Dad a long time ago. . . . The blue card is like 'clean up your room.'" In another community, an angry resident tells of a conflict that "started with a fresh coat of paint to an old gate. Now, after two years of battling his homeowners’ association over the color he chose—off-white to match his house—[he] says he is ready to pack up and move out." In Atlanta, Georgia, a family recounts that its homeowners’ association fined them $25 per day "for having green grass in winter." An applicable covenant obliges residents to plant Bermuda sod in their front yards, which turns a telltale dormant brown during the winter months.

In Charlotte, North Carolina, a condominium owner was fined $75 per day by his homeowners’ association because his dog exceeded the weight limitations imposed by covenant. $11,000 in fines forced him to declare bankruptcy. When a Houston, Texas, CIC resident who was suffering from a brain tumor fell behind on $600 in dues, his association sued him, generating $4,600 in legal fees. "When he couldn’t pay in time, the association sold his house, valued at $55,000, for $17,000." Later, the foreclosure was voided.

In many communities, the neighbors are the ones who take on the role of zealous enforcers. Using missiles to kill mice, petty quarrels can become the basis for the imposition of stiff fines and protracted litigation. For example, in an Arizona planned community, one neighbor turned in another for installing a modest solar panel. The association declared the installation an eyesore and demanded its removal. A lawsuit erupted, generating more than $100,000 in legal fees. The resident won, "but the association vows to fight on." Other even more disturbing instances of neighbors turning on neighbors abound. In a Michigan CIC, a

143. See Razzi, supra note 20, at 88 (discussing how homeowners associations have great power over homeowners).
144. Id.
146. Duane D. Stanford, Covenants a Basis for Turf Battles, ATLANTA J. & CONSTR., May 8, 2000, at 1A.
147. See id. (describing requirement that certain type of grass be planted).
149. See id. (noting rule’s impact on homeowner).
150. Benjamin, supra note 26, at 57.
151. See id. (highlighting fact that foreclosure was voided).
152. See id. (stating that “disagreements over these neighborhood covenants are growing much more serious than simple spats”).
153. Id.
couple who painted their home purple (their favorite color) had sand dumped in their pool, their mailbox vandalized and their car stolen. 154

In Arizona, a support group called “Homeowners Supporting Homeowners in Associations” has adopted a purple flamingo as a symbol of solidarity and protest against associations and boards. 155 The group’s founder, chagrined by association overreaching, has one in his front yard, “just to bug the association,” and has sold at least 100 of the flamboyant steel sculptures to other irked residents. 156 The term “No HOA” (meaning, “No Homeowners’ Association”) is starting to appear in real estate ads because, in the words of one realtor, “[f]or most people it is a real selling point.” 157

Increasing levels of acrimony and conflict have prompted some state legislatures to intervene “in the name of consumer protections. State legislation governs issues such as RCA [Residential Community Association] and member tort liability, association self-dealing, and the required disclosure of the RCA structure and powers.” 158 Across the nation, legislatures are considering other bills to curb overreaching restrictions and potentially troublesome association and board action.

For example, in Nevada, legislative enactments have created an ombudsman’s office to assist CIC residents with association problems and to require that association managers be licensed. 159 “In Vermont, a ‘right to dry’ bill was introduced last year that would void most prohibitions on clotheslines . . . [I]n Virginia, legislation has been proposed that would make it a misdemeanor for any entity or locality to prohibit a homeowner from flying the American flag.” 160 In California, legislation was recently enacted to prohibit associations from banning pets. 161

These patchwork legislative solutions and judicial responses are endeavoring to do the work that is best left to informal networks and social capital. The need for formal intervention is attributable in considerable part to the breakdown, if not wholesale depletion, of these touchstones of community. The traditional CIC paradigm does little to inspire trust, a bulwark of community, and provides few, if any, tools to build a sense of interdependence, collective responsibility and cooperation. In this re-

154. See Feighan, supra note 137, at Al (telling tale of vandalism to couple’s home and property).
155. See Razzi, supra note 20, at 88.
156. See id. (describing actions taken against homeowners association).
157. Id.
158. A. Dan Tarlock, Residential Community Associations and Land Use Controls, in RESIDENTIAL COMMUNITY ASSOCIATIONS: PRIVATE GOVERNMENTS IN THE INTERGOVERNMENTAL SYSTEM?, supra note 22, at 75, 76.
159. See id. (providing example of legislative action intended to assist association residents).
161. See Benjamin, supra note 26, at 58 (describing new legislation forbidding homeowners associations from prohibiting pets).
gard, the dynamics and benefits of successful community building offer insight and provide guidance for reform.

B. Privatization and the Unrealized Determinants of Community

"Community" has been described as "a horribly 'open-textured' concept, that is to say there is not and there cannot be an exhaustive specification of the conditions for its correct use."\(^{162}\) Nonetheless, even those inclined to be more circumspect do concede that there are certain central or shared characteristics of community, "attributes or characteristics possessed in some degree by all communities."\(^{163}\) Further, research suggests that it is possible to consciously direct and then nurture sense of community.\(^{164}\)

Significantly, two leading studies found constancy even among very diverse neighborhoods in the social variables likely to build community or, according to respondents, contribute to an "ideal community."\(^{165}\) One study compared three very different communities: Greenbelt, Maryland, a planned community of 18,000; Hyattsville, Maryland, a less affluent suburb of Washington, D.C. with a population of 16,000; and Kfar Blum, a 1,100 member kibbutz near Israel's Golan Heights.\(^{166}\) Across the board, residents' actual experiences of community were remarkably similar to their ideal.\(^{167}\) The later second study revealed consistency across twenty-seven diverse neighborhoods.\(^{168}\)

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163. Id. at 26; see D.M. Hummon, Commonplaces: Community Ideology and Identity in American Culture 1-13 (1990) (understanding how people define community and relate to each other in cities, suburbs and small towns); R.L. Warren, The Community in America 9-14 (1972) (setting forth model for analytical study of community and community change); Karim Benammar, Absences of Community, in Who Is This "We"? 31, 31-41 (Eleanor M. Godway & Geraldine Finn eds., 1994) (studying instances where cohesiveness is absent, aiming to provide enhanced understanding of what actually does build and encourage community); Daphne Spain, Been-Here Versus Come-Here: Negotiating Conflicting Community Identities, 59 J. Am. Plan. Ass'n 156, 157-59 (1993) (describing how study of residents' conflict contributes to understanding of community). See generally Emilia E. Martinez-Brawley, Perspectives on the Small Community; Humanistic Views for Practitioners (1990) (examining meaning of community and small community relationships).
164. For a discussion of important determinants of community, see infra notes 169-242 and accompanying text.
165. See Glynn, supra note 91, at 789 (finding similar characteristics of community in diverse neighborhoods); Goudy, supra note 71, at 277 (testing theory using small-town residents).
166. See Glynn, supra note 91, at 789-818 (illustrating idea that similar variables constitute ideal community even among diverse communities).
167. See id. (finding similarities in actual and ideal sense of community).
168. See Goudy, supra note 71, at 279-85 (showing commonality in sense of community).
Additional empirical work supports the premise that there is a commonality of constructs that build community.\textsuperscript{169} The most important of these have been identified as 1) the sense of belonging, or \textit{membership}; 2) the feeling of having some control with respect to what takes place, or \textit{influence}; 3) the belief that one’s needs will be met as one contributes to meeting others’ needs, or \textit{integration and fulfillment of needs}; and 4) the sense of shared history as well as the quality of interaction, or \textit{shared emotional connection}.\textsuperscript{170} These factors, when present even in part, confer significant private as well as public gains.\textsuperscript{171} Each will be explored and then applied as a helpful lens through which to view common interest community deficiencies and set an agenda for reform.

1. \textit{Membership}

Membership has been described as “a sense of shared destiny within the territorial community.”\textsuperscript{172} Two of the most important predicates to experiencing this sense of membership or belonging are personal investment and the establishment of boundaries that delineate and mark the given community as separate and distinct from the world at large.\textsuperscript{173} Per-

\textsuperscript{169} See, e.g., Chavis & Wandersman, \textit{supra} note 89, at 56-81 (evaluating three components of community, including one’s perception of environment, social relations and perceived control and empowerment within community); Davidson & Cotter, \textit{supra} note 65, at 246-53 (analyzing relationship between sense of community and happiness); McMillan & Chavis, \textit{supra} note 74, at 6-23 (indicating that strongest predictors are length of residency, satisfaction and number of neighbors known by first name); Grace M. H. Pretty, \textit{Relating Psychological Sense of Community to Social Climate Characteristics}, 18 \textit{Am. J. Community Psychol.} 60, 61-65 (1990) (identifying factors that influence sense of community); Stephanie Riger & Paul J. Lavrakas, \textit{Community Ties: Patterns of Attachment and Social Interaction in Urban Neighborhoods}, 9 \textit{Am. J. Community Psychol.} 55, 55-57 (1981) (determining factors affecting attainment of community); Oddvar Skjaeveland et al., \textit{A Multidimensional Measure of Neighboring}, 24 \textit{Am. J. Community Psychol.} 413, 422-25 (1996) (measuring factors that contribute to sense of community).

\textsuperscript{170} See McMillan & Chavis, \textit{supra} note 74, at 9-14 (identifying four most important elements of community); see also Leanne Rivlin, \textit{The Neighborhood, Personal Identity, and Group Affiliations}, in \textit{9 Human Behavior and Environment: Advances in Theory in Research: Neighborhood and Community Environments} 1, 1-8 (Irwin Altman & Abraham Wandersman eds., 1987) (emphasizing importance of community members’ bonding with each other, and exploring potential for conflict that can arise in neighborhoods).

\textsuperscript{171} See generally Baldassare & Fischer, \textit{supra} note 58, at 314-15 (noting that well-connected community is, among other things, more efficient); McMillan & Chavis, \textit{supra} note 74, at 9 (stating that these four factors contribute to feeling of belonging among each member of group and shared faith among group as whole of commitment to be together).

\textsuperscript{172} Blakely & Snyder, \textit{supra} note 7, at 32.

\textsuperscript{173} See McMillan & Chavis, \textit{supra} note 74, at 9-11 (discussing how membership has boundaries and how personal investment contributes to sense of community); see also Roger S. Ahlbrant, Jr. & James V. Cunningham, \textit{A New Public Policy for Neighborhood Preservation} 8-9 (1979) (stating that boundaries contribute to residents’ sense of community); William B. Davidson & Patrick R. Cotter, \textit{Measurement of Sense of Community Within the Sphere of City}, 16 \textit{J. Applied Soc.}}
sonal investment involves the expenditure of time, money and/or labor to attain a place in the community. Thus, "[p]urchasing a home or undertaking home improvements makes membership more meaningful and valuable to a neighborhood resident." Neighborhood boundaries, such as naming the community, providing a separate means of ingress to and egress from the area, or otherwise marking the locale also help to develop a sense of community.

Interestingly, both of these prerequisites are amply present in the common interest community setting. In fact, CICs have been assailed for their often exclusionary practices in staking out boundaries and rendering access physically as well as economically prohibitive. While CICs are now available across a more diverse spectrum of economic brackets, the investment of capital remains a condition precedent to admission. Typically, that capital represents the most significant financial investment that the home or unit owner is likely to make. Attendantly, one would think that residents’ shared concern with preserving property values would also be a significant factor in fostering a locality-based sense of belonging. For that matter, the presence of boundaries is a defining hallmark in the CIC setting, taking the usually benign form of naming the development or, on a scale of extremes, the potentially more troublesome forms of guard booths, guard rails, gates, and even walls.

PSYCHOL. 608, 608-19 (1986) (stating that civic activities contribute to sense of membership).

174. Cochrun, supra note 64, at 93.
175. See McMillan & Chavis, supra note 74, at 9-10 (explaining that neighborhood boundaries protect residents against threats of nonresidents).
176. See, e.g., Blakely & Snyder, supra note 7, at 8 (criticizing resort to gated and walled communities and recognizing that gated, or private residential, communities separate their residents from nonresidents); McKenzie, supra note 1, at 141, 186-87 (discussing CIC preoccupation with security measures); Judd, supra note 18, at 155 (stating that CICs were “the means of continuing the housing industry’s and the federal government’s decades-old policies that segregated residential areas by income, social class, and race”); id. at 160 (comparing walled communities to “walled cities of the medieval world, constructed to keep the hordes at bay”); Kennedy, supra note 50, at 765 (concluding that “[r]esidential associations cause harms to nonmembers by developing exclusive communities, by gating formerly public streets and neighborhoods, and by increasing the fiscal burdens of cities and states”).
177. See Kennedy, supra note 50, at 767 n.34 (noting that residential associations in economically disadvantaged communities could be deterrent to crime).
179. See McKenzie, supra note 1, at 141-42 (describing one development as "surrounded by six-foot block walls topped with two-foot-high bands of barbed wire," with in excess of three hundred private security guards on patrol).
While considered foundational factors, boundaries and personal investment, by themselves, will not build neighborhood attachment without the additional presence of "social bonding and behavioral rootedness."\footnote{180} In other words, without social capital, membership does not have its privileges.

Researchers report that "people who know their neighbors and feel part of the neighborhood experience strong social bonding."\footnote{181} Bonding takes time and includes the expectation that one will continue to live in the neighborhood for a significant period of time. Communities must be stable to cultivate reciprocity. In studies, respondents who scored highest on actual sense of community scales were those who knew many of their neighbors and who believed that they would remain in the community for some considerable duration.\footnote{182}

2. Influence

Residents experience a sense of community when they feel that they have some modicum of influence in the community.\footnote{183} The notion of influence as a determinant of sense of community draws upon norms of reciprocity. It refers to the success with which the community is able to inspire and move the individual as well as the extent to which the individual is able to experience personal freedom and contribute to the establishment of collective goals and norms. Influence, then, is the feeling that one is autonomous and able to express his or her individuality while also feeling part of the group by adhering to appropriate social norms.

To help build community, influence must be a two-way street. On the one hand, residents feel pressure "to conform with certain social standards or norms to fulfill their needs for consensual validation."\footnote{184} On the other hand, each individual is made to feel that he or she has a say in the matter. Thus, "an individual can influence a community, and the community can influence the individual."\footnote{185}

The premise that "[i]n tightly knit communities, researchers expect to see both types of influence operating simultaneously"\footnote{186} is of central importance to the common interest community reform dialogue. Shared power and mutuality of influence, rather than rule by force, fiat or declaration, leads to civic-mindedness, neighborhood cohesion and greater per-

\footnote{180. See Cochrun, supra note 64, at 93 (citing Riger & Lavarakas, supra note 169, at 55-66).}
\footnote{181. Id.}
\footnote{182. See Glynn, supra note 91, at 789-93 (showing correlation between actual sense of community and length of time one lives in community).}
\footnote{183. See Cochrun, supra note 64, at 94 (discussing power of influence of individuals in community).}
\footnote{184. Id. (citations omitted).}
\footnote{185. Id.}
\footnote{186. Id.}
sonal responsibility for the common good. A resident must have some baseline sense of personal power and influence before he or she is able to embrace a strong sense of community.

The concept of influence is related to another core component of community, that of trust. "The existence of trust means that there is agreement about the rules, actions, intentions, and expectations in local settings." By contrast, when one is not in agreement with the rules and feels powerless to change them, one is less inclined to trust. This premise is of great relevance to the common interest community dilemma.

Considerable commentary and scholarly debate surround the issue of whether or not participation in a CIC association is voluntary rather than forced. Some maintain that common interest communities are intrinsically coercive in nature, depriving residents of meaningful choice because of the relative scarcity of desirable housing alternatives in tight markets. By contrast, it has been asserted that the “decision to join [a homeowners'] association is as voluntary as a human decision can be.” This dialogue is best recast by asking whether or not existing CIC constructs and practices promote sufficient mutuality of influence, which is an important component of trust and a predicate to community-building.

187. See Etzioni, supra note 83, at 253-67 (setting forth communitarian objectives).
188. See Chavis & Wandersman, supra note 89, at 59 (stressing importance of control and empowerment at individual level).
189. For a discussion of trust, see supra notes 116-22 and accompanying text.
191. See Gregory S. Alexander, Freedom, Coercion, and the Law of Servitudes, 73 Cornell L. Rev. 883, 900-02 (1988) (explaining how common interest communities are coercive); see also McKenzie, supra note 1, at 21 (characterizing homeowner associations as "illiberal and undemocratic"); Gregory S. Alexander, Conditions of "Voice": Passivity, Disappointment, and Democracy in Homeowner Associations, in COMMON INTEREST COMMUNITIES: PRIVATE GOVERNMENTS AND THE PUBLIC INTEREST 145, 152 (Stephen E. Barton & Carol J. Silverman eds., 1994) (arguing that "moral order of modern suburbia is characterized by avoidance"); Brower, supra note 21, at 246-50 (recognizing that consent theories are "unrealistic").

The declaration containing the recitation of covenants is required to be recorded. See RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 6.2 (stating that “[d]eclaration means the recorded document or documents containing the servitudes that create and govern the common interest community”). Thus, the argument is made that buyers are at least on constructive notice of its contents, and thereby have tacitly consented to its terms. See id. § 6.2 cmt. e (deducing that because documents are written, buyers have impliedly consented). In reality, many residents are without actual notice of the declaration’s contents, calling into debate whether the commonly-imposed restrictions truly represent the general consensus. See Winokur, supra note 49, at 59 & n.246 ("Most prospective owners do not intelligently review the restrictions to which they subject themselves upon acceptance of a deed to land burdened by servitudes.").
Viewed in this light, the traditional common interest community paradigm, with its emphasis on the imposition of rules and regulations arrived at without explicit consensus, is lopsided. Too often, "community" takes the form of complicated regimes of restrictiveness and imperious governing bodies which endeavor to exert influence without sufficient avenues for the individual to do the same. There is not enough mutuality of influence.

The "declaration" (a telling use of language) of covenants, conditions and restrictions is established by the developer and recorded at the inception of the development, before residents have even purchased their properties.\textsuperscript{193} Trying to amend the declaration is a Herculean task. In most instances, amendments require a supermajority vote, such as two-thirds or greater.\textsuperscript{194}

Further, many buyers are merely on record or constructive notice of the declaration's contents, without having actually read the document. Put mildly, often purchasers do not appreciate that a host of rules and regulations may well prescribe (and proscribe) all sorts of conduct.\textsuperscript{195} In a recent survey conducted by the Community Associations Institute, owners' ignorance of governing restrictions ranked as one of the top three causes of association discord.\textsuperscript{196}

Even residents with actual notice of the declaration's provisions, having endeavored to navigate its murky contents, are likely to emerge confused. The law of covenants has been explained by one of the brightest thinkers as "the province only of a hardy band of real estate lawyers with the temerity to master a complex and imposing body of rules."\textsuperscript{197} Across the board, then, to conjecture that CIC buyers experience "a significant component of innocent ignorance" is not a stretch.\textsuperscript{198} Moreover, because the declaration's terms are tied together as a package, "transaction costs are certain to prevent buyers who dislike some terms to bargain to have them removed before purchasing the property."\textsuperscript{199}

\begin{flushleft} 193. \textit{See} \textit{Restatement (Third) of Prop.: Servitudes} § 6.2 cmt. e (explaining that declaration is written before any properties are sold); \textit{see also Hyatt, supra} note 5, at xi (describing declaration document).\end{flushleft}

\begin{flushleft} 194. \textit{See} \textit{Restatement (Third) of Prop.: Servitudes} § 6.10 (2000) (noting usual voting requirement, but also that sometimes unanimous consent is necessary to amend declaration).\end{flushleft}

\begin{flushleft} 195. \textit{See} Barton & Silverman, \textit{supra} note 49, at 136 (noting that community associations define and enforce neighborhood rules, some of which people welcome and some of which people resent).\end{flushleft}

\begin{flushleft} 196. \textit{See} Wayne S. Hyatt, \textit{Creating Community in Community Association, in ALI-ABA Course of Study: Drafting Documents for Condominiums, PUDs, and Golf Course Communities}, 1 A.L.I.-A.B.A. 443, 467 (2000) (reporting top three causes as "apathy, lack of knowledge of the restrictions at the time of purchase, and a lack of understanding of the board's fiduciary duties").\end{flushleft}

\begin{flushleft} 197. Epstein, \textit{supra} note 192, at 906.\end{flushleft}

\begin{flushleft} 198. Benjamin, \textit{supra} note 26, at 57 (quoting practitioner and leading expert Wayne Hyatt).\end{flushleft}

\begin{flushleft} 199. \textit{Joseph William Singer, Introduction to Property} 360 (2001).\end{flushleft}
to purchase does not necessarily represent agreement with all or even most of the terms of the declaration.

If the market is working perfectly, one might hope that purchasers could find appropriate housing where they want to live that contains the terms they want to find, but, in reality, the terms created by developers may not magically line up with the demands of all consumers. It is therefore arguable that this market failure may justify a skeptical attitude to declaration terms that seem onerous or go too far in limiting the legal rights of unit owners to control their own units or to be free from control by the community. 200

Surely, it is "difficult to develop a sense of place and purpose when people feel they and their ideas 'just don't matter.'" 201 Residents' lack of perceived and actual influence contributes to the "laments of apathy, conflict and lack of participation" 202 that run as a common thread through much of the literature on community associations. Notwithstanding their inherent structure as "pseudo-governments" of sorts, they do not "breed higher levels of participation and self-governance." 203

In this vein, the concept of influence as a predicate to building community is relevant to the academy's ongoing colloquy with respect to the constitutional dimensions and implications of CIC living. Here, some have concluded that homeowners' associations, notwithstanding their legal status as nonprofit corporations, actually function as "private governments." 204 As de facto "state actors," the argument proceeds, they should be required to satisfy due process, equal protection and first amendment guarantees. 205 Some suggest that common interest community residents

200. Id.
201. Hyatt, supra note 196, at 463.
202. BLAKELY & SNYDER, supra note 7, at 35.
203. Id.
204. See McKenzie, supra note 1, at 122 (noting that "homeowner associations have full legal rights, limited responsibility for the individuals who operate them, a potentially infinite lifespan, and a dedication to . . . protection of property values"); Hyatt & Stubblefield, supra note 29, at 634-41 (arguing that community association is quasi-government paralleling powers, duties and responsibilities of municipal government). In carrying out this purpose, homeowner associations function as private governments. See Brower, supra note 21, at 203 (arguing for stricter judicial review); Rishikof & Wohl, supra note 11, at 511-16 (examining CIC governing board actions as possible state action).
ought to be afforded a bill of rights. At a minimum, associations need to be subject to some meaningful system of checks and balances.

The phenomenon of privatization and the increasing role played by common interest communities as local governments (of sorts) may be attributed in part to citizens' otherwise unsatisfied desires to feel influential. Studies report that “[p]eople often feel like they have no influence over large entities like states or federal governments, but they are more likely to feel that they have some influence over local neighborhood organizations.” However, the promise of influence in the CIC setting is more illusion than reality, because of most common interest communities' fundamental failure to kindle trust.

Significantly, in the suburban setting links have been found “between community characteristics and trust in local government.” Residents with confidence in their local government may have more positive attitudes about their communities, and vice-versa. The most pertinent elements to inspire trust in local government are:

- performance, or the degree to which citizens view their local government as able to solve problems that occur in the community.
- The second is efficiency, or the extent to which citizens perceive that their local government uses the resources at its disposal in a careful, unwasteful manner.
- The third is attention to citizens, or the perception among residents that government is responsive to individuals' needs and acts in ways to avoid political alienation among its constituency.
- The fourth is overall feelings of confidence in local government, a general measure of trust derived by summing the attitudes in the first three areas.

To apply these variables specifically to the common interest community setting would reveal considerable deficiencies. If homeowners' associations are indeed the functional equivalent of mini-governments, one could reasonably conjecture that many associations would not fare very well in residents' estimation of their performance, efficiency, responsiveness to individuals' needs and ability to inspire feelings of overall confidence.
dence. As CICs come to function more and more like larger, inflexible bureaucracies, poor performance ratings seem inevitable.\textsuperscript{211}

If low levels of trust in homeowners' associations diminish social capital, finding ways to enhance residents' confidence should strengthen social fabric. Associations should be concerned with residents' estimation of their performance and with building the esteem in which their leadership is held. Developers and planners should turn their attention to finding structural forms that promote association accountability and encourage member participation. As antidotes to residents' feelings of powerlessness and lack of influence are found, trust should grow.

3. Integration and Fulfillment of Needs

The concept of integration and fulfillment of needs is best understood as the sense that "we're all in this together," and that a system of reciprocity bolstered by shared values and common expectations will contribute both to the collective's as well as to the individual's best interests. The idea is reflected in Martin Buber's account of "the need of man to feel his own house as a room in some greater, all-embracing structure in which he is at home, to feel that the other inhabitants of it with whom he lives and works are all acknowledging and confirming his individual existence."\textsuperscript{212} Essential to this elusive state is "a sense of belonging and mutual affirmation."\textsuperscript{213}

The very premise and promise of the common interest community construct is that "in unity there is strength." Part of its attraction is that residents' joining together "makes possible a more comfortable lifestyle than the owners could afford individually."\textsuperscript{214} To achieve a sense of integration and fulfillment of needs, however, community leadership must be able to prioritize its agenda mindful of its residents' personal needs for diversity, affiliation, belonging and feeling productive.\textsuperscript{215}

Integration and fulfillment of needs can be thought of in terms of reinforcements for certain behaviors. For a group to maintain a sense of togetherness, the individual-group association must offer positive reinforcements to the members. Positive reinforcements might be status of membership, success of the community, or the competence or capabilities of other members.\textsuperscript{216}

\textsuperscript{211} See id. at 119 ("As local governments become more bureaucratic and specialized, residents consider these institutions inflexible and overly complex. Under these conditions the view of government as wasteful would follow.").

\textsuperscript{212} MARTIN BUBER, PATHS IN UTOPIA 140 (R.F.C. Hull trans., 1949).

\textsuperscript{213} TAYLOR, supra note 112, at 32.

\textsuperscript{214} Razzi, supra note 18, at 87.

\textsuperscript{215} See SARASON, supra note 61, at 181-60 (recognizing that community is comprised of myriad of groups, transient and permanent, which may vary in size and have both similar and different purposes).

\textsuperscript{216} Cochrun, supra note 64, at 94 (citing McMillan & Chavis, supra note 74, at 6-23).
The literature suggests that carrots, rather than sticks, work best to achieve a sense of cohesiveness and belonging. The bundle of sticks used by common interest community associations and boards to compel compliance may, therefore, do more harm than good. "Negative reinforcements" do not build community, nor do they contribute to the individual's sense of the larger whole as an inviting, embracing structure.

4. Shared Emotional Connection

The premise of shared emotional connection as a community-builder is that the greater the quality and quantity of resident interaction, the better. A central component of community is social exchange. Neighbors who share experiences and get to know each other are more likely to trust each other and to participate in a system of reciprocity. That positive interactions lead to tighter cohesiveness while negative interactions fray the fabric of community is no surprise. People who feel emotionally connected to their neighborhood will often avoid conflict and competitiveness for the sake of the community's stability.

Elements of space and design play an important role in fostering positive interactions. The spatial layout of a given development has the potential to become an important contributor to social capital. "New urbanism" is the name of the relatively recent ideological movement rooted in the premise that the built environment can help to create community. This movement is described as "[p]art planning and part politi-
ical theory, part social structualist and part environmentalist.\textsuperscript{225} It relies on use of the physical environment to help redress "many of the ills of our current sprawl development pattern while returning to a cherished American icon: the compact, close-knit community."\textsuperscript{226}

For example, to encourage meaningful resident interaction, new urbanism advocates resort to smaller lots positioned close to pedestrian-friendly streets, front porches, additional common areas and multi-use open spaces.\textsuperscript{227} Its design recommendations endeavor to promote inclusionary and heterogeneous housing practices by encouraging mixed-use developments that incorporate not only single-family homes but apartment buildings and townhouses as well.\textsuperscript{228} New urbanism, then, represents an important antidote to the often economically exclusionary effects of more homogeneous, single-use CICs. Diversity in architecture, in other words, can promote so-called "building" social capital.\textsuperscript{229}

One segment of new urbanism embraces "neo-traditional town planning,"\textsuperscript{230} an architectural technique that endeavors to strengthen sense of community by replicating the design patterns of America's small towns as they existed prior to World War II.\textsuperscript{231} Neo-traditional towns have been described as "tightly clustered villages featuring narrow streets, front porches, and a seamless mix of residential, commercial, and civic structures all within easy walking distance of each other."\textsuperscript{232} Community inter-
action is facilitated by developing common areas that are pedestrian accessible.233

Where launched, new urbanist designs have been lauded as commercially successful234 and "promising."235 In the CIC arena, "[m]any of the most successful master planned communities of the late 1990's have significant neo-traditional aspects."236 This finding supports the premise that a sense of community is important to CIC prosperity and that spatial layout can help to build social capital.

Still, "master-planned picturesqueness,"237 by itself, does not make a community. While spatial and physical design innovations represent important steps, more than architecture is required to cultivate community. Recent accounts of the struggles of life in Disney's model towns238—the pinnacles of neo-traditional planning—support the proposition that true community cannot be prepackaged, and that the artifices of design must be supplemented by institutional reform and the conscious as well as conscientious resolve on the part of leaders and residents to build figurative bridges of spirit.

Shared emotional connection is built by communication, a factor so important that some would place it into its own category as a universal characteristic of community.239 A sense of community grows when communication between members is direct and many-sided.240 Significantly, "relations between members should be direct ... to the extent that they are unmediated—by representatives, leaders, bureaucrats, institutions such as those of the state, or by codes, abstractions and reifications."241

The point here is relatively straightforward: "[A] group of individuals amongst whom relations are to some extent mediated is to that extent less

233. See DONALD APPLEYARD, LIVABLE STREETS 244 (1972) (showing streets to be neighborly territories).
234. See Hyatt & Stubblefield, supra note 29, at 605 (giving examples of success).
236. Hyatt, supra note 225, at 331.
237. See Lawrence W. Cheek, Control Thy Neighbor, SEATTLE Wkly., May 7, 1998, at 22 ("The problem is that [New Urbanism] is master-planned picturesqueness .... It fakes a village.").
238. See FRANTZ & COLLINS, supra note 127, at 95 (noting problems in home construction including porches installed using incorrect material and painting problems); ROSS, supra note 127, at 96-97 (describing performance anxiety of Celebration's residents who are always being tested and examined for success).
239. See, e.g., KARL DEUTSCH, NATIONALISM AND SOCIAL COMMUNICATION 60-80 (1953) (defining communication in terms of nationality).
240. See TAYLOR, supra note 112, at 27-28 (explaining that members' relations must be unmediated by others).
241. Id.
of a community than a group in which relations are relatively direct." The problem in the common interest community setting, then, is that there are few incentives for residents to deal directly with each other. Instead, the system is set up to require dealings with a centralized medium—the board of directors or homeowners' association—who in turn enforce a formal code, in the form of the declaration of covenants, conditions and restrictions. At work is a rigid and abstract perception of what the community should be. This hinders the formation of actual community.

IV. COMMON INTEREST COMMUNITIES AND THE PROMISE OF COMMUNITY: AN AGENDA FOR REFORM

Traditional common interest community models, which over-emphasize covenants, conditions and restrictions as a planning and control device, give developers too much power for too long. Conventional paradigms favor regulation and enforcement to the detriment of social networks and produce rigid, uninspired leadership models. Imposing restrictions upon people who are largely strangers to each other, and then prescribing aggressive measures to enforce those regulations, leads to a misplaced preoccupation with control and compliance. A sense of community cannot develop in a climate of mandates and distrust. Regimentation without consensus or perceived legitimacy is destined to fail.

Excessive restrictiveness contributes to a false sense of what “community” as a construct should be, rather than what it could be. Relying on edicts and restraints to impose commonality of interest does not work, and is more likely to make enemies of neighbors and disenfranchised complainants of association members. Cultures of litigiousness are bound to follow.

Such a result is ironic, because implicit in the very concept of the common interest community is the belief that social capital is important. Yet, social capital cannot be nurtured, let alone sustained, in settings of unbridled restrictiveness, with their attendant self-absorption in the rules and methods of rule enforcement. Rather than providing incentives to act collaboratively and in furtherance of the common good, the CIC prototype is pre-programmed to have the opposite effect. More often than not, the result is apt to be divisiveness and residents' preoccupation with self-interest, so that the individual and the collective become adversaries. Transaction costs then escalate as time, money and resources are devoted to monitoring others' obedience, imposing sanctions for their disobedience, and litigating the inevitable stand-offs as given targets fight back.

242. Id. at 28.
243. See, e.g., Wayne S. Hyatt & James B. Rhoads, Concepts of Liability in the Development and Administration of Condominium and Homeowners' Associations, 12 Wake Forest L. Rev. 915, 917-18 (1976) (describing CIC associations as "a vehicle for individual unit owners to work together").
In a telling view of our litigious ways, the observation has been made that:

Almost imperceptibly, the treasure that we spend on getting it in writing has steadily expanded since 1970, as has the amount that we spend on getting lawyers to anticipate and manage our disputes. In some respects, this development may be one of the most revealing indicators of the fraying of our social fabric. For better or worse, we rely increasingly—we are forced to rely increasingly—on formal institutions, and above all on the law, to accomplish what we used to accomplish through informal networks reinforced by generalized reciprocity—that is through social capital.244

In the common interest community setting, the consequences of this reliance on formal institutions to do the work of social capital are found in this snapshot of life:

In the past, suburbanites used gentle nudges to prod neighbors to act responsibly—when their grass grew a bit too high, for instance. Now a representative from the community association comes by to precisely measure grass and, for a fee, will mow lawns that have grown unruly. The whole process formalizes a social exchange that has historically been informal.245

Rather than leaving it to a network of relationships and social norms to kindle cooperation, excessive reliance on formalized rules and procedures creates systems of cynicism and suspicion, with neighbors turning on neighbors, neighbors turning on associations, and associations turning on individual targets. Lawyers, courts and legislatures become the arbiters, managers and referees of this fracas, as formal institutions clumsily attempt to do what an intact social fabric would have helped to avert in the first place.

Common interest community developers, in coming up with existing models, did not intend to stifle community or to promote some “anti-community” mission. Rather, “the early drafters and ‘creators’ were searching for answers with very little guidance. They had no utopian or anti-utopian agenda.”246 Guidance is available today. The shortcomings of the present state of affairs, coupled with what is known about community building, offer potent incentives and insights for informed reform. Developers are (and should be) experimenting with new formats,247 if not altruistically, then opportunistically. Strife does not sell.

244. PUTNAM, supra note 32, at 147.
246. Hyatt, supra note 225, at 328.
247. See id. at 321-23 (offering examples of new developer formats).
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A better way exists. Common interest communities, at least in theory, have the potential to be models for a revitalized, revivified sense of community. This moment in time presents a significant opportunity. As the rental market in urban centers continues to shrink, the retirement age population continues to grow, and more and more people demonstrate their preferences for residential developments instead of isolated tracts, common interest communities have the capacity to satisfy more than just the need for housing. Planners and leaders of common interest communities should be concerned with building the sorts of networks and contacts among residents that are likely to elicit a sense of continuity and shared responsibility. With this sense of place and purpose intact, adherence to reasonable practices that are in the collective’s best interests would not have to be compelled. Indeed, “societies which rely heavily on the use of force are likely to be less efficient, more costly, and more unpleasant than those where trust is maintained by other means.”

Building social capital is not easy and takes time. Initial change may have to be more evolutionary than revolutionary. Planners and leaders must actively cultivate the determinants of community, and patiently commit to the premise that a strong social fabric is not only desirable but attainable. Once in place, forced compliance with behavior in the best interests of the community would become the exception rather than the rule, as routine patterns of exchange would come to serve as the principal basis upon which to enforce agreements.

Presently, most common interest communities put the cart before the horse, relying on elaborately prepackaged mandates to impose “community,” rather than facilitating the development of a genuine social fabric, which in turn would render many of those edicts simply unnecessary. In other words, “[w]e need a change in the way we draft documents and apply them so that the emphasis is not on telling people what they can’t do, but helping them to do things that genuinely create communities.”

To facilitate this end, practitioners and community leaders need to build a lexicon that recasts the dialogue in terms that facilitate cooperation, compromise and “self-interest rightly understood.” “Community” as a concept and a work in progress must be featured prominently in the words and constructs chosen to depict initiatives and resolve controversies. Prevalent modes of legal discourse and dispute resolution do not do a very good job of this, as they struggle to deal with “social environments—the criss-crossing networks of associations and relationships that constitute the

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248. See Rohan, supra note 4, at 5-6 (describing trend of people opting for residential communities over urban living).


251. For a discussion of creating communities, see supra notes 114-18 and accompanying text.
fine grain of society." 252 Here, the lessons learned and paradigms borrowed from other disciplines, including community psychology, help to bring into focus the importance and value of intact social infrastructures and networks.

A leading practitioner, author and former president of the Community Associations Institute astutely observed that "[t]here has been too much focus on restrictions and not enough on people." 253 With this in mind, existing models must be reconfigured. First, to preclude developers from exerting strong-arm protracted control over association policies and procedures, developers should take their cue from the Restatement (Third) of Property and turn control over to the community association "[a]fter the time reasonably necessary to protect [their] interests in completing and marketing the project . . . ." 254

Reform initiatives should move away from corporate governance models in favor of more participatory structures that redistribute and decentralize authority. Governance structures should actively chip away at patterns of regimentation and reject rules that are not reasonably related to protecting unit owners’ legitimate interests. Applicable restrictions must be perceived as fair, rational and beneficial. The Restatement (Third) provides meaningful guidance when it states that, in the absence of a broader grant of authority contained in the declaration, the association’s power to regulate conduct inside given units is limited to rules aimed at curbing “nuisance-like activities” that interfere with other unit owners’ use or enjoyment. 255 The Restatement’s Comments explain that this provision is consistent with “the traditional expectations of property owners that they are free to use their property for uses that are not prohibited and do not unreasonably interfere with their neighbors’ use and enjoyment of their property.” 256

Instead of imposing an exhaustive litany of covenants, conditions and restrictions from the start, the declaration should contain only those few rules deemed essential to promoting the community’s basic structure and well-being. The declaration should empower associations to carefully and deliberately supplement its skeletal frame with appropriate regulations on an as-needed basis. Residents’ involvement in the augmentation process should be actively solicited and encouraged, as should their entitlement to participate in subsequent modification and amendment procedures.

This “wait and see” approach to the implementation of restrictions allows time for the development of norms of generalized reciprocity. In other words, it gives social capital a chance to do its work, relieving formal institutions and formalized prohibitions of the burdens of having to ac-

252. GLENDON, supra note 56, at 115.
255. See id. § 6.7 cmt. b (setting limits on association’s power).
256. Id.
complish what is best left to informal networks. Liberalizing the amendment process leaves more room for change as the community takes form. Residents in turn will have to accept their power and become engaged in the life of their developments, willing to accept the duties as well as the rewards of participation, collaboration and compromise. An agenda for reform then will test "whether our thirst for great community life outweighs our hunger for private backyards, discount megamalls, and easy parking." Working creatively with space and design is another way to help to cultivate the sorts of social norms and systems of generalized reciprocity that deter neighbors from unreasonably interfering with each others' use and enjoyment. Moreover, eclectic housing styles and mixed uses are outward looking and fortify stocks of bridging (meaning inclusive) social capital. Diversity is an important aim. To this end, some new common interest communities are embracing "diversity in uses, population, demographics, architectural character, and architectural style" to render developments more affordable and more heterogeneous.

In this regard, the new resolve of the Community Associations Institute is promising. This national amalgam of homeowners' associations has directed its attention to "enhancing harmony within associations." Its spokesperson reports that rather than "nit-picking" and focusing on how to rigidly enforce rules, the group is now investing more of its energy in finding ways to build community. It has adopted its own "best practices initiative" to promulgate "national benchmarks for community association performance and a showcase for community excellence." It promises that "[t]he information compiled will help volunteer leaders manage their community's operations more effectively and will assist both communities and residents across the country." .

V. CONCLUSION

The challenge for all of us as academics, practitioners, empiricists, CIC developers, planners, leaders and residents is not to lament the withering state of community, but to help guide its restoration. Common

257. See generally Putnam, supra note 32, at 288 ("Social capital greases the wheels that allow communities to advance smoothly.").
258. Id. at 408.
259. Hyatt, supra note 196, at 448.
261. See id. (prioritizing need to build community).
263. Id.
264. See Putnam, supra note 32, at 403-14 (summarizing "an agenda for social capitalists" in order "to create new structures and policies (public and private) to facilitate renewed civic engagement").
interest communities have an important part to play in the difficult task of recreating social capital. Unfortunately, traditional models, with their reliance on restrictiveness and control, do more to weaken social connectedness than to build it.

Acknowledging the problem and continuing to gauge its dimensions is an important first step toward meaningfully reckoning with existing deficiencies and their implications. Still, the more formidable challenge persists. To actually "replenish our stocks of social capital"\footnote{Id. at 403.} in the CIC setting will require new, more creative structures and policies rooted in a collective resolve to renew community by reconfiguring existing systems of interpersonal interaction and reassessing present patterns of regimentation.

In this, as in all settings, what we think about most is what we move towards. Reinvention of the common interest community requires a comprehensive, nationwide rethinking of association goals and missions. Community associations must be redefined so that their central agenda is cast in terms of the very conscious resolve to rebuild withering social bonds. Careful, deliberate and sustained attention must be given to the arduous task of finding ways to guide community engagement so that in time a strong social fabric will become the principal determinant of compatible, harmonious land use and behavior that is respectful of the rights of others.

Change requires recognition that there is a problem and firm commitment to the premise that it is fixable. Intention is the essential catalyst for meaningful action. Although the fodder for countless jokes, the point remains that "we have to want to change." Change-averse developers and leaders must be willing to modify existing formats and surrender old models of control by proclamation. Declarations must be pared down and recrafted to allow representative and responsive associations to provide formal augmentation only when needed.

Worthwhile change may, particularly at first, seem more akin to evolutionary progression rather than revolutionary reinvention. With time, commitment and effort, however, true communities do emerge. Once in place, they offer the promise and hope of restored trust and connection. Communities are able to promote social norms that are appropriate, persuasive, intrinsically relevant and therefore sustainable without first resorting to rigid mandates or aggressive enforcement mechanisms. Communities find substantive ways to build bridges and reach shared understandings.