

光华法学文丛

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城市住宅区业主自治 运行实效研究

——基于个体决策的视角

陈丹 著



法律出版社
LAW PRESS·CHINA

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本书得到四川省教育厅人文社科重点研究基地
中国经济法治研究中心资助



法律出版社
LAW PRESS·CHINA

图书在版编目(CIP)数据

城市住宅区业主自治运行实效研究——基于个体决策的视角 / 陈丹著. —北京:法律出版社,2014.10

ISBN 978 - 7 - 5118 - 6672 - 1

I. ①城… II. ①陈… III. ①城市—居住区—物业管理—研究—中国 IV. ①F299.233.3

中国版本图书馆CIP数据核字(2014)第175165号

城市住宅区业主自治运行实效研究
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责任编辑 郑导
装帧设计 汪奇峰

© 法律出版社·中国

开本 A5

版本 2014年10月第1版

出版 法律出版社

总发行 中国法律图书有限公司

印刷 廊坊市精彩印刷有限公司

印张 9.875 字数 210千

印次 2014年10月第1次印刷

编辑统筹 独立项目策划部

经销 新华书店

责任印制 张建伟

法律出版社/北京市丰台区莲花池西里7号(100073)

电子邮件/info@lawpress.com.cn

网址/www.lawpress.com.cn

销售热线/010-63939792/9779

咨询电话/010-63939796

中国法律图书有限公司/北京市丰台区莲花池西里7号(100073)

全国各地中法图分、子公司电话:

第一法律书店/010-63939781/9782 西安分公司/029-85388843 重庆公司/023-65382816/2908

上海公司/021-62071010/1636 北京分公司/010-62534456 深圳公司/0755-83072995

书号:ISBN 978 - 7 - 5118 - 6672 - 1

定价:36.00元

(如有缺页或倒装,中国法律图书有限公司负责退换)

摘 要

90年代中期开始,地方各地应实务需要开始物业自治立法,催生并扩大了一个确实与传统单位社会有着很大不同的社会形态。然而,这是否就意味着一个期待已久的公民社会已然出现在我们面前了呢?实证研究表明,目前做出这一判断还为时过早,政府权力通过法制渠道全面向下(小区)渗透并借助服务于自治的名义扩展与蔓延,只是其展现地更为隐蔽与柔性。然而,这并非严重而急迫的问题,当今中国业主自治制度的困境在于:现实中拥有业主身份的公民,且被预期会参与居住区自治的业主却并未参与,即集体无行动;更为不幸的是,在有限的参与场景中还展现出令人担忧的象征性参与(通知、咨询、列席)局面。这些事实其实说明了一个我们一直在回避的问题:为什么在经验层

面(业主)自治没有沿着法律规定的路径展开?

既有研究更多从内在视角、单极思维来分析此现象,把问题归结于文化意识、民众素质、制度缺陷,无法揭示真实世界中复杂冲突、个体认知与信息约束,以及规则系统对个体偏好和行为的塑造等,而要透彻回答“在怎样的情况下,理性的业主才会一起行动起来实现他们的共同利益”这一问题,就不得不从业主理性决策中去考察更为真实和更丰富的细节,以提高现实解释力。

本文试图在集体行动理论框架内探索我国业主自治实践与制度预期相背离的现象,以及这种背离现象背后的机制。正是在这种思路下,本文在研究业主自主运行的具体问题时将以个体行为决策的研究为主,而在进行跨学科的理论性探索时也将更依赖经验性的证据。据此,本文除导论与结论外,分为七章:

引言部分,是本文的背景、铺垫和简介,主要阐述本文研究的问题,详细扫描现有文献,进而确定本文视角、方法、框架,同时详细界定相关概念,确定本文研讨范围。

第一章理论基础,从理论和实证两个方面揭示出自治仅是国家选择的治理术,确定业主自治所在时空和展开范围;并引入集体行动理论框架,作为考察制度现状背后所蕴含的微观理性与“是如何”问题的分析工具。

主体部分包括二、三、四、五、六、七章,其中中间四章是本文关键内容所在。第二章是实效分析,从实证层面揭示在现有规则、技术等既定条件下,立法所期望的业主会更容易、更积极参与自治并且能够得到更为满意的收益,并没有得到相应经验分析结果的支持,全景式呈现出本文所确定的问题。第三、四、五、六章是制度分析主体。首先,第三章揭示出房地产开发商和物业服务企业以及一部分国家机关建立利益上共同体(分利集团),它不仅

具有很强的排外性、封闭性、垄断性、违法性,还可以游说立法与消弱司法,这种“单边垄断性”关系减弱业主对自治的期望及其行动可能。然后,第四章解析理性业主在现行制度框架下,面对自治的集体行动都会规避责任、“搭便车”和以机会主义方式行事。其中,还揭示出国家权力积极介入首次自治,是自上而下建构社区治理单元并部署权力;之后,为防止自治发展为独立于国家权力之外的“世外桃源”,国家权力抽身冷视自治。接着,第五章分析现行业主大会基本制度,揭示出意见(高度)一致性并不能推出集团行动,以及以此构造的高参与和高通过规则在现实运行中的缺陷和不能,并进一步深入到此种思路背后深藏的民主协商所涉及的包容性与深思性平衡问题。最后,第六章分析业委会基本制度,揭示现行制度不仅缺乏工作成本分担机制,还无法实现外部和内部监督,甚至造成个别业委会异化。在制度分析的基础上,本书在第七章构建自治框架,建议对业主权利进行倾斜性配置,以强化对房地产分利集团的权利约束与缩小,从而减少业主自治施行的阻力并提高业主对自治运行绩效的信心。同时,强调制裁措施的运用,以“针锋相对”为基本应对原则,以分级制裁为具体策略,避免违规行为造成合作(协议)的破裂,并帮助每个人抵挡在博弈过程中可能面临的诱惑;另外,通过业主小组、信息技术、政府帮扶等软硬方式来促使业主间的交流,提高自治绩效。

最后一章是结论部分,包括本文的发现、策略以及进一步研究方向。

关键词:参与决策 低度参与 象征性参与 集体行动 选择性激励

Abstract

Commencing from the mid – 1990s, local authorities begin to promulgate property self-government legislation which leads to a new society which is very different from the traditional one. However, does it mean a long-expecting civil society is already in front of us? Studies show that it is too earlier to make such judgment now. The government power permeates and serves for the expansion and spread of autonomy through legal channels, just show it is subtle and flexible. However, this is not a serious and urgent problem, the dilemma of today's Chinese owners for autonomy system is: the citizens of owners that are expected to participate in the residential area of autonomy but did not participate, it means

collective no action; more unfortunate is that the phenomena of symbolic participation (notification, consultation, Presence) in the limited participation of the scene. These facts expose us to a problem which we always wish to avoid: Why (the owners) autonomy from experience level does not follow up the path of the law?

Current studies tend to analyze this phenomenon from the internal perspective, and attributes the problem to cultural awareness, the knowledge of people, deficiencies in the system, which can not reveal the complex conflict in the real world, individual cognitive constraints, as well as the system of rules of individual preferences and behavior shaping, and to have a thorough answer - “ In what circumstances, rational owners will together act to achieve their common interests ” - this issue will be subject to rational decision-making from the owners to get more realistic and richer detail, to improve the reality explanatory power.

This article attempts to explore the mechanism behind owners' autonomous practice and the system which is expected to deviate from the phenomenon, and this divergence in the theory of collective action within the framework. It is within this line of thinking, we will study the owners of autonomous operation mainly on the study of the behavior of the individual decision-making, while conducting interdisciplinary theoretical exploration will become more dependent on evidence. In addition to the Introduction and conclusion part, this article is divided into seven chapters as follow:

Preface: it is the background, introduction of this article, mainly focus on the subject matter of this study, a detailed browse of the

existing studies, and thus it determine the perspective methods, frameworks of this article, and define the relevant concepts, determine the scope of discussion.

The first chapter is the theoretical basis; it reveals from both the theoretical and empirical aspects that autonomy is only the selection of national governance strategy, which determine the time, space and the range of autonomy; and the introduction of the framework of the theory of collective action as the inspection system for micro-ration it contains and analysis tools.

The main part includes second, third, fourth, fifth, sixth, seven chapters, where the middle four chapters are the key elements of this article. The second chapter is effectiveness analysis, which reveals the conditions established under the existing rules, technology that legislators desire owners would be easy, more active in participation of autonomy and be able to get a more satisfactory output and it does not get the corresponding supported results by the results. The third, fourth, fifth and sixth chapters is the subject matter of Institutional Analysis. First of all, the third chapter reveals the real estate developers and property services companies, as well as part of the national authorities in the interests of the Community (Group of Interests), which not only has a strong feature of exclusion, monopoly, illegalization and such judicial unilateral monopoly relationship weakened the owners of autonomy expectations and their actions; Then, the Fourth Chapter reveals rational owners in the current system will avoid responsibility, and act in opportunistic manner. Even if the legal use takes place, it cannot resolve the

problem. Because the owners will continue their efforts into the free-rider Union, so they can get the maximum benefits. Which also reveals that the power of the state is actively involved in self-government of community; To prevent the development of self-government independent of state power as a “paradise”, the power of the state stands by watching. The fifth chapter analyzes the basic system of the General Assembly of Owners, reveals consistency cannot generate group action, and defects of high participation and high passing rules, and further to disclose the tolerance and equity behind deep democratic consultation; Finally, the sixth chapter analyzes the basic system of General Assembly of Owners, reveals not only the lack of cost-sharing mechanisms, external and internal monitor system, even alienation caused by General Assembly of Owners. On the basis of the analysis of the system, in the seventh chapter it build a framework of self-tilted configuration recommendations to the rights of the owners, in order to strengthen the rights of the Real Estate Group, thereby reducing the owners' autonomous force resistance and increase the owners of the confidence in the performance of the autonomous running. At the same time, emphasizing the use of sanctions, “tit for tat” deal with the basic principles, to the classification of sanctions for specific strategies to avoid violations caused by the rupture of cooperation (agreements) and help everyone to resist the temptation may face in the course of the game. The same time, by the owners group, information technology, government assistance, it will promote exchanges between the owners, and improve self-government

performance.

The last chapter is the conclusion, including the findings, policies, and further research directions.

Key Words: Participation in decision-making low participation symbolic participation collective action Selective Incentives

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0 导 论

20 世纪 90 年代初,随着市场经济的发展,城市建筑逐步向多层和高层发展。同一栋建筑物不仅有在构造上能够明确区分、专属于个别业主的可独立使用部分,而且还有由全体或部分业主共同使用并享有处分权的共用部分。这种构造、权利归属与行使的不可分割关系,^[1]使得众多业主形成事实上的共同体关

[1] 各业主之间仅隔一墙,或隔一层楼板,或共居一栋大楼,再或即便不居住同一栋,但楼与楼之间亦是近在咫尺,空间距离的无限拉近,使得邻里之间的关系更加复杂和微妙,原来单个业主自身即能解决的事项,如房屋修缮、改建等,现在必须借助其他相关业主的配合才能完成;原本不可能对他人生活造成影响的,现在却可能给他人造成严重的影响,如楼上移动家具、聚会等,相互间已经高度依存,所生的纠纷亦增多。陈华彬著:《现代建筑物区分所有权制度研究》,法律出版社 1995 年版,第 4 页;[德]鲍威·施蒂尔纳著:《德国物权法》(上册),张双根译,法律出版社 2004 年版,第 635 页。