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## Public Actors, Private Law: Local Governments' Use of Covenants To Regulate Land Use

**ABSTRACT.** Though covenants are usually considered the private sector's alternative to zoning, governments also use covenants to control land use. Governments choose between zoning and covenants, and this choice illuminates the legal differences between the two tools. Covenants and zoning are not distinguished by the substantive restrictions each tool can impose on land use. Rather, a critical distinction between the two is that governments use the customizability of covenants, as tools of private law, to limit citizen enforcement of the covenants' land use provisions. Zoning, by contrast, allows for citizen enforcement. Zoning also requires greater public participation and involves different amendment procedures.

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## NOTE CONTENTS

INTRODUCTION	1792
I. BEYOND INSTITUTIONAL DIFFERENCES: LOCAL GOVERNMENTS' USE OF RESTRICTIVE COVENANTS	1795
II. BEYOND SUBSTANTIVE DIFFERENCES: ZONING AND COVENANTS ALLOW EQUIVALENT CONTROL OVER LAND USE	1800
III. THE PROCEDURAL DIFFERENCE: GOVERNMENTS USE COVENANTS TO LIMIT CITIZEN ENFORCEMENT OF LAND USE CONTROLS	1806
A. Citizen Enforcement of Zoning; Custom Enforcement of Covenants	1806
B. A Case Study: Riverside South	1811
C. Using the Flexibility of Covenants To Improve Land Use Planning	1814
IV. OTHER LEGAL DIFFERENCES: PARTICIPATION AND PERMANENCE	1819
CONCLUSION	1824

## INTRODUCTION

In the United States, two primary systems of land use control operate in parallel: zoning and restrictive covenants.<sup>1</sup> Zoning is the public sector's most important land use tool; it is a regulatory mechanism rooted in the state police power and entrusted to local governments by statute.<sup>2</sup> For private parties, covenants are the dominant method of controlling land use.<sup>3</sup> Covenants are creatures of the common law and available for use by all property owners.<sup>4</sup> While zoning is conventionally associated with public regulation and covenants with private regulation, this distinction is too neat. Local governments routinely use both tools, mixing and matching the two forms of land use control to suit their needs. Given that governments can impose both covenants and zoning, the difference between the tools does not merely stem from the party using them.

Rather, deep-seated legal differences between zoning and covenants remain significant. In particular, while state law generally allows citizens to enforce zoning codes in court,<sup>5</sup> local governments can customize covenants to limit—or eliminate—citizen enforcement. Many covenants between local governments and private parties include explicit provisions allowing only the local government, and not neighbors, to enforce the covenants' land use controls.<sup>6</sup> Covenants, in other words, are not simply tools of private parties. Covenants are tools of private law, and local governments harness their private law features, particularly their customizability, to better control land use regulation.

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1. See THOMAS W. MERRILL & HENRY E. SMITH, *PROPERTY: PRINCIPLES AND POLICIES* 1062-64 (2007). There are many other forms of land use regulation, from environmental regulation to nuisance law, but zoning and covenants are both extremely widespread and extremely flexible tools. *Id.* at 1061-62.
  2. See 1 EDWARD H. ZIEGLER, JR., RATHKOPF'S *THE LAW OF ZONING AND PLANNING* § 1:2 (4th ed. 2013).
  3. See 1 NORMAN WILLIAMS, JR. & JOHN M. TAYLOR, *AMERICAN LAND PLANNING LAW* § 17.1 (rev. ed. 2014) (identifying "three types of legal tools" traditionally used to regulate land use: nuisance suits, restrictive covenants, and zoning); Robert C. Ellickson, *Alternatives to Zoning: Covenants, Nuisance Rules, and Fines as Land Use Controls*, 40 U. CHI. L. REV. 681, 713 (1973) (describing covenants as "perhaps the most prevalent type of private agreement between neighbors"). Following these, and many other, scholars, this Note ignores the legal differences among covenants and in particular between real covenants and equitable servitudes. See Jay Weiser, *The Real Estate Covenant as Commons: Incomplete Contract Remedies over Time*, 13 S. CAL. INTERDISC. L.J. 269, 269 (2004) ("[T]hese contractual interests may be characterized as real covenants, equitable servitudes, or occasionally even easements, but for purposes of this article, I will follow common parlance and refer to all promises relating to land use as 'covenants.'").
  4. See 1 ZIEGLER, *supra* note 2, § 1:1.
  5. See *infra* text accompanying notes 78-84.
  6. See *infra* text accompanying notes 85-98, 103-106.

Because zoning and covenants are the dominant forms of land use control,<sup>7</sup> legal scholars have long sought to understand the differences between them.<sup>8</sup> In the early twentieth century, legal scholars emphasized that covenants provided a greater level of substantive control over development.<sup>9</sup> Given the weaker regulatory state of the time, covenants could impose more precise and intrusive restrictions than zoning ordinances could.<sup>10</sup> In recent years, though, those substantive differences have fallen away as zoning has developed into an extremely flexible tool of land use regulation. Both zoning and covenants are now commonly used to control every detail of what landowners may build on their property, from the size, shape, and use of a building to far more arcane restrictions.<sup>11</sup>

Accordingly, legal scholars have turned their attention to the institutional difference between covenants and zoning: they point out that private parties use covenants to regulate land use while governments rely on zoning, and that the differences between public and private regulators have significant practical effects.<sup>12</sup> Without diminishing the importance of that institutional difference, this Note reasserts the importance of legal differences between covenants and zoning. While private parties may not enact zoning ordinances, governments can and frequently do use covenants to regulate land use under certain circumstances. In these situations, the Note points out, governments choose which form of land use regulation to employ. Notably, local governments often choose to use covenants for the largest, highest-stakes developments in their jurisdictions.<sup>13</sup> By examining the government's choice between zoning and covenants, this Note holds the institutional variable constant, opening a window into the formal legal differences that still remain between zoning and covenants.

In particular, the Note shows that local governments use covenants to limit the parties who can enforce land use controls, usually to the covenants' signatories. In contrast, courts broadly allow citizen enforcement of zoning ordi-

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7. See *supra* note 3 and accompanying text.

8. See *infra* text accompanying notes 15-20, 40-42.

9. See *infra* text accompanying notes 40-42.

10. See *infra* text accompanying notes 40-42.

11. See discussion *infra* Part II.

12. See *infra* text accompanying notes 15-20. This distinction is complicated by the prevalence of homeowner associations, which can be understood as akin to private governments. See generally EVAN MCKENZIE, *PRIVATOPIA: HOMEOWNER ASSOCIATIONS AND THE RISE OF RESIDENTIAL PRIVATE GOVERNMENT* (1994). But since their origins remain in the private sector, homeowner associations fall outside the scope of this Note.

13. See, for example, the New Haven Coliseum project, *infra* notes 25-28, or the Riverside South development, *infra* Part III.B.

nances. Furthermore, there are likely several other important legal differences between zoning and covenants as used by local governments. For example, covenants allow governments to avoid the public participation built into the zoning process. Covenants and zoning also differ in their degree of permanence. Zoning can potentially last forever but is subject to unilateral amendment by the government—another legal factor that may drive a government's choice of land use control.

Where covenants are used to eliminate citizen enforcement, as municipalities commonly do, covenants empower government officials and disempower neighbors—a group that often has the most at stake for any development proposal but just as often dominates local land use politics with its obstructionist, Not-In-My-Backyard (NIMBY) mentality. To counteract this tendency, I propose using the customizability of covenants not to eliminate but to recalibrate citizen enforcement of land use regulations. Municipalities should allow citizens to enforce particular provisions of covenants—or even allow only particular citizens to do so—and retain the sole power to enforce the remainder. This proposal would strike a balance between the anti-development system of complete citizen enforcement in zoning law<sup>14</sup> and the anti-accountability status quo of no citizen enforcement in covenants.

Part I of this Note establishes that governments use covenants for land use planning purposes, thereby challenging the scholarly consensus that covenants and zoning are primarily distinguished on institutional grounds. Part II demonstrates that municipalities do not choose to use covenants in order to impose different substantive restrictions on the use of property, since zoning can achieve functionally identical outcomes. Having shown that zoning and covenants can be identical in both content and institutional origin, this Note then turns to its central argument. Based on a review of covenants and case law concerning municipally imposed covenants, Part III identifies an important reason why local governments use covenants rather than zoning: to limit citizen enforcement. Part III also argues that while cities are right to limit land use litigation through the use of covenants, current practice goes too far, and recommends an alternative approach. Finally, Part IV notes additional legal reasons why a municipality might choose covenants over zoning. Specifically, Part IV explains that using covenants can enable governments to circumvent public participation requirements built into zoning law. Additionally, covenants and zoning are governed by different amendment and expiration procedures,

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14. David Schleicher has identified certain procedural features of zoning law as contributing to increasingly restrictive land use regulations. See David Schleicher, *City Unplanning*, 122 *YALE L.J.* 1670, 1704-17 (2013). This Note shares Schleicher's emphasis on the importance of procedural and structural elements of zoning law.

thereby providing governments and developers with different types of certainty and permanence in the long term.

### I. BEYOND INSTITUTIONAL DIFFERENCES: LOCAL GOVERNMENTS' USE OF RESTRICTIVE COVENANTS

For most legal scholars, the primary difference between zoning and restrictive covenants is institutional: governments use zoning, while private parties use covenants. Scholars tend to “posit zoning and restrictive covenants as alternative and more or less interchangeable means of producing generally similar results.”<sup>15</sup> Put differently, zoning and covenants are thought to differ in origin, not in legal effect. The legal consequences of regulation by a covenant or by zoning are seen as largely the same. As one scholar wrote, “There is really little difference between restrictive covenants imposed by a developer and zoning regulations relating to setback lines, lot size, house size and the like, except that one is a property right while the other is a municipal regulation.”<sup>16</sup>

Even those scholars who focus on differences between covenants and zoning emphasize institutional origins as the most important distinction between the two systems. Robert Ellickson, for example, argues that the private-sector nature of covenants imposes market discipline on their content and allows covenants to optimize resource allocation among landowners.<sup>17</sup> For Ellickson, it is the fact that private parties impose covenants, not the legal differences in how covenants and zoning operate, that makes covenants economically preferable to zoning. In the same law-and-economics tradition, William Fischel has argued that although “[s]ome observers regard zoning and private covenants as essentially the same thing,” they are distinct because those establishing covenants own the land being regulated and therefore must bear the opportunity cost of not using the land for activities barred by the regulation.<sup>18</sup> Similarly, Richard Briffault distinguishes the two systems of land use control based on how much consensus is required to impose restrictions on landowners: zoning requires only a majority of politically engaged residents, while imposing covenants re-

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15. Valerie Jaffee, Note, *Private Law or Social Norms? The Use of Restrictive Covenants in Beaver Hills*, 116 YALE L.J. 1302, 1306-07 (2007).
  16. Robert R. Wright, *Constitutional Rights and Land Use Planning: The New and the Old Reality*, 1977 DUKE L.J. 841, 847 n.27.
  17. Ellickson, *supra* note 3, at 713-14.
  18. WILLIAM A. FISCHEL, *THE ECONOMICS OF ZONING LAWS: A PROPERTY RIGHTS APPROACH TO AMERICAN LAND USE CONTROLS* 28 (1985).

quires the unanimous consent of the affected property owners.<sup>19</sup> Like Ellickson, Briffault emphasizes the different origins of covenants and zoning regulations—in the consensual private sphere and the majoritarian public sphere, respectively—rather than the ways in which covenants and zoning might function differently from a legal perspective. Drawing from work by Richard Brooks, Valerie Jaffee has argued that the use of covenants allows private parties to send signals about the character of a neighborhood.<sup>20</sup> Even where zoning renders covenants legally superfluous, Jaffee showed, because they are privately drafted, covenants allow homeowners to express what kind of community they are; zoning, in contrast, can only send signals about the government's values. Each of these analyses shows a sophisticated understanding of how zoning and covenants differ, but each identifies institutional origin as the source of that difference.

The scholarly emphasis on the institutional origins of zoning and covenants is generally appropriate: zoning is publicly generated and most covenants are privately generated. Of course, only governments can zone, and ninety-one percent of local governments in the United States's fifty largest metropolitan areas have done so.<sup>21</sup> Private land use regulation through covenants is similarly widespread. Homeowner associations established by covenants govern more than half of all new housing in the fifty largest metropolitan areas,<sup>22</sup> and covenants presumably govern some additional share without the added layer of homeowner association governance.

However, covenants are not merely a private replacement for zoning. Outside the narrow context of conservation easements,<sup>23</sup> legal scholars have largely

19. Richard Briffault, *Our Localism: Part II—Localism and Legal Theory*, 90 COLUM. L. REV. 346, 367 (1990).
20. Jaffee, *supra* note 15, at 1328–29, 1333–34. See generally RICHARD R. W. BROOKS & CAROL M. ROSE, *SAVING THE NEIGHBORHOOD: RACIALLY RESTRICTIVE COVENANTS, LAW, AND SOCIAL NORMS* (2013) (arguing that racially restrictive covenants served to signal the racial preferences of a neighborhood in addition to legally excluding non-whites).
21. Rolf Pendall et al., *From Traditional to Reformed: A Review of the Land Use Regulations in the Nation's 50 Largest Metropolitan Areas*, BROOKINGS INSTITUTION METROPOLITAN POL'Y PROGRAM 10 (Aug. 2006), [http://www.brookings.edu/~media/research/files/reports/2006/8/metropolitanpolicy%20pendall/20060802\\_pendall.pdf](http://www.brookings.edu/~media/research/files/reports/2006/8/metropolitanpolicy%20pendall/20060802_pendall.pdf) [<http://perma.cc/6CCW-3UJG>].
22. Eran Ben-Joseph, *Land Use and Design Innovations in Private Communities*, LAND LINES, Oct. 2004, at 8, 8, [https://www.lincolnst.edu/pubs/dl/967\\_Land%20Lines%2010.04%20final.pdf](https://www.lincolnst.edu/pubs/dl/967_Land%20Lines%2010.04%20final.pdf) [<http://perma.cc/Z3HZ-XFCF>].
23. See ROBERT C. ELICKSON & VICKI L. BEEN, *LAND USE CONTROLS: CASES AND MATERIALS* 820 (3d ed. 2005) (describing the government's acquisition of conservation easements to preserve farmland and similar low-intensity land uses); Jessica Owley, *Use of Conservation Easements by Local Governments* (Buffalo Legal Studies Research Paper No. 1698109, 2010), <http://ssrn.com/abstract=1698109> [<http://perma.cc/58P6-RHQS>].

overlooked the fact that the same local governments regulating land use through the zoning code also do so through covenants.<sup>24</sup> Take, for example, the largest-ever downtown redevelopment project in New Haven, Connecticut: the \$395 million redevelopment of the New Haven Coliseum site.<sup>25</sup> To facilitate that project and others nearby, the City designed and enacted a brand new zone, the BD-3 business district, tailored to the development's needs.<sup>26</sup> At the same time, though, the City also signed a land disposition agreement—an agreement to convey the land to a private developer, subject to various restrictions and covenants—governing the development of the same parcel.<sup>27</sup> The City thereby subjected the property to two independent sets of restrictions, each of which the owner is obligated to follow.<sup>28</sup> Rather than rely solely on zoning or solely on its land disposition agreement, even though both were custom-designed for the project, the City chose to layer the two systems on top of each other. Clearly, the City of New Haven believed that some municipal goals for this high-profile project would be best served through zoning and others through covenant.

Of course, a local government may not impose a covenant on a private property owner unilaterally. To impose a covenant, it must have some power over the property that allows the consensual negotiation of a covenant with the property owner. For example, governments have this power when selling, transferring or otherwise conveying publicly owned land to private developers, as with the New Haven Coliseum, or when negotiating with landowners over

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24. See, e.g., Robert C. Ellickson, *Three Systems of Land-Use Control*, 13 HARV. J.L. & PUB. POL'Y 67, 71 (1990) ("The imposition of new covenants is impractical in established urban neighborhoods where landholdings are fragmented."); Lee Anne Fennell, *Contracting Communities*, 2004 U. ILL. L. REV. 829, 833 ("[M]y analysis centers on a particular subset of difficulties—those arising from land use controls in private developments made up of single-family residences."). A notable exception is Susan French, the Reporter for the Restatement of Servitudes (Third), who has briefly noted that "public regulation itself often uses private servitudes as tools of regulation." Susan F. French, *Toward a Modern Law of Servitudes: Reweaving the Ancient Strands*, 55 S. CAL. L. REV. 1261, 1263 (1982).
25. See Thomas MacMillan, *Coliseum Plan Coasts On*, NEW HAVEN INDEP., Nov. 14, 2013, [http://www.newhavenindependent.org/index.php/archives/entry/coliseum\\_plan\\_coasts\\_on](http://www.newhavenindependent.org/index.php/archives/entry/coliseum_plan_coasts_on) [<http://perma.cc/CWP3-9QDF>].
26. Rachel Chinapen, *New Haven Seeks Zone Change on Coliseum Site*, NEW HAVEN REG., Oct. 7, 2013, <http://www.nhregister.com/general-news/20131007/new-haven-seeks-zone-change-on-coliseum-site> [<http://perma.cc/7JAZ-7MLZ>].
27. *Agreement Signed Today for Redevelopment of New Haven Coliseum Site*, OFF. MAYOR (Dec. 12, 2013), <http://www.cityofnewhaven.com/Mayor/ReadMore.asp?ID=%7B5BF9E78F-B89A-40A5-880F-0661FFB459E1%7D> [<http://perma.cc/JVB7-GSCC>].
28. See, e.g., *Whiting v. Seavey*, 188 A.2d 276, 280 (Me. 1963) ("The law is well established that restrictive covenants in a deed as to use of property are distinct and separate from the provisions of a zoning law and have no influence or part in the administration of a zoning law.").



discretionary land use approvals.<sup>29</sup> The limited circumstances in which governments can legally impose covenants shape the practical conditions in which governments do so. First, covenants are more useful for regulating individual projects than for broad, neighborhood-scale planning. It is unlikely that an entire neighborhood would be publicly owned, or that all owners in the neighborhood would be seeking a land use approval and be willing to subject themselves to covenants in exchange for those approvals. Second, governments are likely to use covenants to regulate projects they support, on sites where they want to promote development. Disfavored projects are unlikely to receive public largesse in the form of discretionary land use approvals or title to public land. A city will rarely use covenants to stifle development generally or to block a particular development—it can simply deny the approvals or land transfers that are preconditions to imposing a covenant in the first place. Covenants, therefore, will generally be used when a local government wants to support particular developments while still regulating them, not where it wants to block or slow development or engage in broad-scale planning efforts.<sup>30</sup>

Though governments cannot always impose restrictive covenants on private developments, such covenants are still a regular part of the land use process. Conveyances of public land are less common today than in recent decades, when first urban renewal and then mass tax foreclosures in urban areas generated large portfolios of government-owned land.<sup>31</sup> Still, eminent domain is of-

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29. There may be other mechanisms by which governments subject land to covenants, but in my research these appear to be the two significant categories.
30. A caveat to this general rule is that local governments frequently use conservation easements to restrict development and preserve open space. Conservation easements are property interests—though created by statute rather than common law and different from covenants in important respects—meant to encourage the use of land for conservation in perpetuity. Sometimes, local governments own land burdened by conservation easements, in which case a local land trust may be given the power to enforce the restrictions. This, however, is not a case in which the government is regulating private landowners, as with zoning or the covenants that this Note discusses, but one in which the government is deciding how to manage its own holdings. It does, however, underscore that the ability to designate who can enforce a land use restriction is very important in the land use process, as this Note will discuss in the context of zoning and covenants. Local governments also hold conservation easements that burden privately held land, in which case the government has been designated as the enforcer of the restrictions, in a manner more analogous to many of this Note's examples. Legally, however, conservation easements are created through a different process: they are often donated to the local government, for example. See Owley, *supra* note 23.
31. See David W. Chen, *One Housing Woe Gives Way to Another; New York Is No Longer Awash in Abandoned Buildings. Now the Issue Is Supply.*, N.Y. TIMES, Dec. 21, 2003, <http://www.nytimes.com/2003/12/21/nyregion/one-housing-woe-gives-way-another-new-york-no-longer-awash-abandoned-buildings.html> [<http://perma.cc/3BYS-SBSN>] (describing the ninety-five percent reduction in the amount of housing owned by New York City due to tax foreclosure).

ten required for large and complex developments where many parcels of land must be assembled. By using eminent domain, a government takes ownership of development sites, at least temporarily. Covenants can therefore be used to govern some of a city's most high-profile developments.<sup>32</sup> Moreover, governments regularly require the imposition of a covenant when granting a discretionary land use approval.<sup>33</sup> In New York City, for example, 146 zoning map amendments—major land use decisions—have covenants associated with them.<sup>34</sup> For smaller-scale land use matters, the New York City Department of Buildings has created nine different standardized forms for landowners to use in imposing restrictive covenants on themselves as part of the land use process.<sup>35</sup> “[C]ompliance with certain provisions of zoning may require the execution of restrictive declarations,” the Department explains.<sup>36</sup> In both large and small land use matters, therefore, the City effectively conditions its grant of certain land use permissions on the imposition of a City-drafted or City-approved covenant rather than a special permit or other zoning-based mechanism. Nor is this process unique to New York City. An overview of the law of deed restrictions in Texas, for example, notes that sometimes covenants “are placed on real property as part of the governmental land use approval process or as a condition to zoning approval.”<sup>37</sup>

As this discussion shows, the institutional distinction between zoning and covenants is asymmetrical. While private developers or groups of neighbors must always use property law to control land use, local governments have the

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32. See, e.g., Lorraine Mirabella, *BDC Pushes To Finalize West-Side Contract*, BALT. SUN, Dec. 19, 2006, [http://articles.baltimoresun.com/2006-12-19/business/0612190052\\_1\\_lexington-square-dixon-mayor-omalley](http://articles.baltimoresun.com/2006-12-19/business/0612190052_1_lexington-square-dixon-mayor-omalley) [<http://perma.cc/qq4X-HC34>] (describing efforts to use eminent domain to facilitate a large-scale redevelopment of Baltimore's downtown and to regulate land use on the redeveloped site through a land disposition agreement).
33. See Land Use Law Ctr., *Beginner's Guide to Land Use Law*, PACE L. SCH. 44 (2015), <http://www.law.pace.edu/sites/default/files/LULC/LandUsePrimer.pdf> [<http://perma.cc/DQD4-XZW5>] (stating that deed restrictions are “often used to insure that the owner complies with a condition imposed by a land use body.”).
34. City Planning Comm'n, *Zoning Resolution Appendix D: Zoning Map Amendment (“D”) Restrictive Declarations*, CITY N.Y. (Nov. 18, 2010), <http://www.nyc.gov/html/dcp/pdf/zone/appendixd.pdf> [<http://perma.cc/RRE9-5SE9>].
35. *Buildings Bulletin 2008-007*, N.Y.C. BUILDINGS DEP'T 2 (Aug. 21, 2008), [http://www.nyc.gov/html/dob/downloads/pdf/bb\\_2008-007.pdf](http://www.nyc.gov/html/dob/downloads/pdf/bb_2008-007.pdf) [<http://perma.cc/PZQ7-67U2>].
36. *Id.*
37. Reid C. Wilson, *Private Land Use Regulations: Deed Restrictions*, WILSON, CRIBBS, GOREN & FLAUM, P.C. 2 (June 29, 2001), [http://www.wcglaw.net/docs/1092085270\\_PRIVATE-LAND-USE-REGULATIONS-2001.PDF](http://www.wcglaw.net/docs/1092085270_PRIVATE-LAND-USE-REGULATIONS-2001.PDF) [<http://perma.cc/PPZ2-TUP4>].

power to choose between property law and regulatory mechanisms.<sup>38</sup> In these situations, moreover, governments are not indifferent between their options: they choose one over the other or mix and match. This suggests that zoning and covenants are not merely public and private equivalents. Their formal differences must manifest functionally as well, allowing for different substantive outcomes even when used by the same party. By looking at covenants imposed by governments, this Note reasserts the importance of the legal, rather than institutional, differences between public and private land use regulation.

## II. BEYOND SUBSTANTIVE DIFFERENCES: ZONING AND COVENANTS ALLOW EQUIVALENT CONTROL OVER LAND USE

In the early twentieth century, as the use of both zoning and restrictive covenants spread quickly across the United States,<sup>39</sup> legal scholars began to explore the advantages of these two forms of land use regulation. At that time, the difference was understood to be clearly legal, not institutional. Covenants offered a much wider range of substantive land use restrictions than zoning did. "In planning the modern city, the public authorities can merely sketch the broad outlines in their zoning ordinances," wrote a 1937 note in the *Harvard Law Review*.<sup>40</sup> Covenants were required because "zoning legislation can not . . . provide for such things as regulating the cost of building, supervising the architecture, or defining the requirements for occupancy."<sup>41</sup> A decade earlier, in 1928, M. T. Van Hecke explained that covenants, unlike zoning, could be used to regulate everything from the shape of subdivided lots to the races of residents allowed to live on a property.<sup>42</sup>

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38. Another interesting arrangement is found in Houston, where there is no comprehensive zoning, but a special statute allows the city government to enforce private covenants. See generally Bernard H. Siegan, *Non-Zoning in Houston*, 13 J.L. & ECON. 71 (1970). These covenants were not drafted or negotiated by the city—many predate the statute's existence—and so they fall outside the scope of this Note. These covenants reflect private, not public, preferences for land use regulation. That said, Houston provocatively illustrates different ways in which local governments use covenants to regulate land use, and particularly the importance of enforcement in land use regulation.

39. See MICHAEL ALLAN WOLF, *THE ZONING OF AMERICA: EUCLID V. AMBLER* 28-30 (2008).

40. Note, *A New Phase in the Development of Affirmative Equitable Servitudes*, 51 HARV. L. REV. 320, 321 (1937).

41. *Id.*

42. M. T. Van Hecke, *Zoning Ordinances and Restrictions in Deeds*, 37 YALE L.J. 407, 410-11 (1928).

Today, however, the choice to use covenants rather than zoning cannot be explained by differences in their range of possible restrictions.<sup>43</sup> As this Part will demonstrate, changes in land use law have dramatically expanded the reach of zoning. Essentially anything that covenants can restrict, zoning can restrict as well. Moreover, discretionary zoning techniques have turned zoning from a set of generally applicable rules developed *ex ante* into development-specific requirements negotiated by developers and governments on a case-by-case basis. Therefore, zoning negotiations can now assume the same bargaining posture as covenant negotiations. Accordingly, zoning not only can, but often will, contain the same restrictions as covenants to the extent that negotiated zoning techniques are used. Local governments' choice of one or the other must therefore reflect some difference other than the substantive land use restrictions imposed.

Since the 1930s, the substantive restrictions that covenants and zoning ordinances can legally require have converged. Most importantly, the Supreme Court declared the enforcement of racially restrictive covenants unconstitutional in *Shelley v. Kraemer*.<sup>44</sup> Governments had long been barred from enacting racial zoning ordinances;<sup>45</sup> *Shelley* put covenants and zoning on equal footing in this regard. Outside the context of racial discrimination, zoning has become dramatically more flexible and is now capable of imposing each of the restrictions that early twentieth century scholars believed could only be imposed by covenant. Architectural restrictions are common features of zoning codes, from bans on buildings that look too different from their neighbors to bans on cookie-cutter developments with "excessive similarity."<sup>46</sup> The Georgia Supreme Court has even upheld an ordinance specifying which styles of wood fence could and could not be built in a particular zone.<sup>47</sup> Zoning ordinances can effectively require expensive homes by mandating minimum floor areas and other high-cost design elements.<sup>48</sup> Subdivision regulations, governing lot size

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43. This Part generalizes about the state of American land use law. Land use law of course varies across all fifty states, and not every claim in this Part will necessarily be true in each state. See DANIEL R. MANDELKER, *LAND USE LAW* § 1.16 (5th ed. 2003).

44. 334 U.S. 1 (1948).

45. *Buchanan v. Warley*, 245 U.S. 60 (1917).

46. 1 ZIEGLER, *supra* note 2, § 16:17. Some jurisdictions even prohibit both buildings that are too similar to their neighbors and too dissimilar from their neighbors. See Kenneth Regan, Note, *You Can't Build That Here: The Constitutionality of Aesthetic Zoning and Architectural Review*, 58 *FORDHAM L. REV.* 1013, 1019 (1990).

47. *City of Smyrna v. Parks*, 242 S.E.2d 73 (Ga. 1978).

48. See, e.g., RIVERSIDE, CAL., *MUNICIPAL CODE* art. 5, ch. 19.100, § 19.100.070 (2014) (requiring new developments to have at least two of the following three amenities: playgrounds, pools and barbecue equipment); FLORIDA CITY, FLA., *ZONING CODES* § 62-143 (2014) (requiring

and shape, are widespread,<sup>49</sup> and occupancy requirements, from single-family requirements to Berkeley, California's "use quota" system requiring diverse mixes of retail use, can be found throughout the country.<sup>50</sup>

Indeed, there may not be any meaningful limit on how prescriptive a zoning code can be. As Hannah Wiseman has described, zoning rules can now be "equally as detailed as the private covenants seen in suburban subdivisions."<sup>51</sup> In the extreme case, Jerold Kayden has argued that there are effectively no legal limits on how prescriptive a zoning ordinance can be: hypothetically, zoning could provide "a precise delineation of virtually every aspect of development . . . specifying individually for each parcel precisely what public planners want."<sup>52</sup> Regardless of whether such a comprehensive use of zoning is actually legally permissible (politically, it is surely infeasible), zoning as a method of land use regulation has gained near-total flexibility. Accordingly, it is extremely unlikely that cities today choose to use covenants rather than zoning in order to include substantively different land use controls.

The substantive convergence of zoning and covenants is made all the more striking by the widespread use of zoning techniques that create negotiated, rather than mandated, regulatory requirements. Planned unit development ordinances, for example, allow developers to approach local governments with a proposed site plan for a parcel; if approved, the site plan replaces the underlying zoning as the governing regulation.<sup>53</sup> This kind of discretionary, negotiated review of land use proposals is increasingly common. In Kansas City, for example, twenty-five square miles of the city were zoned as a "General Planned Development District," in which all development must go through discretionary review.<sup>54</sup> More commonly, municipalities simply impose extremely restric-

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both minimum lot area and minimum floor area. *But see* Eleanor Charles, *In the Region: Connecticut and Westchester; Is Minimum-Floor-Area Zoning Legal?*, N.Y. TIMES, Mar. 27, 1988, <http://www.nytimes.com/1988/03/27/realestate/in-the-region-connecticut-and-westchester-is-minimum-floor-area-zoning-legal.html> [<http://perma.cc/P2GE-JJUQ>] (noting that New Jersey and Massachusetts had eliminated minimum floor area requirements statewide).

49. *See, e.g.*, Stratford Planning Comm'n, *Subdivision Regulations: Regulations Providing for Land Subdivision in the Town of Stratford, Conn.*, TOWN OF STRATFORD ch. 5, § 7, at 13 (May 26, 2009), <http://townofstratford.com/filestorage/1302/402/619/SubdivRegs.pdf> [<http://perma.cc/W4XW-49VU>].
50. *See* *Vill. of Belle Terre v. Boraas*, 416 U.S. 1 (1974) (upholding the constitutionality of single-family zoning); 1 ZIEGLER, *supra* note 2, § 11:9 (describing the Berkeley ordinance).
51. Hannah Wiseman, *Public Communities, Private Rules*, 98 GEO. L.J. 697, 719 (2010).
52. Jerold S. Kayden, *Reconsidering Zoning: Expanding an American Land-Use Frontier*, 1 ZONING PRAC. 2, 5 (2004).
53. *See* 1 ZIEGLER, *supra* note 2, § 88:1.
54. *Id.* § 11:11.

tive zoning rules governing what may be built as-of-right, without discretionary action by the government, and wait for developers to seek variances, rezonings or other forms of discretionary relief.<sup>55</sup>

These negotiated land use regulations eliminate another important set of differences between zoning and covenants. First, traditional zoning imposed generally applicable rules enacted independently of any particular development proposal, while covenants were negotiated project-by-project.<sup>56</sup> Discretionary zoning techniques allow local governments to custom-tailor their regulations to a specific development proposed at a specific moment, just as governments can with covenants. Second, such discretionary processes put the full range of land use issues on the negotiating table. A local government might request that, in exchange for land use approvals formally related only to, say, building height, a developer provide additional parking, affordable units, mansard roofs, or land for a new elementary school.<sup>57</sup> This sort of dealing over land use permissions remains common, the Supreme Court's exactions jurisprudence notwithstanding.<sup>58</sup> Given the amount of discretion being exercised, the few

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55. See Douglas W. Kmiec, *Deregulating Land Use: An Alternative Free Enterprise Development System*, 130 U. PA. L. REV. 28, 48 (1981).
56. See RICHARD F. BABCOCK, *THE ZONING GAME* 11 (1966) (stating that "preregulation gives way to negotiation" as traditional zoning techniques are replaced with newer, flexible zoning mechanisms); see also STEWART E. STERK & EDUARDO M. PEÑALVER, *LAND USE REGULATION* 31 (2011) ("[T]raditional Euclidean zoning has 'the virtue of certainty and the handicap of rigidity.'" (quoting *Lutz v. City of Longview*, 520 P.2d 1374, 1376 (Wash. 1974))).
57. Cf. William A. Fischel, *The Economics of Land Use Exactions: A Property Rights Analysis*, 50 LAW & CONTEMP. PROBS. 101, 103 (1987) (noting that in exchange for permission to build at greater-than-allowed densities, a developer might "make payments in kind: improvements in a local park, contributions to a housing fund, or construction of a museum"); see also Vicki Been, *Community Benefits Agreements: A New Local Government Tool or Another Variation on the Exactions Theme*, 77 U. CHI. L. REV. 5, 17 (2010) (discussing the use of community benefits agreements, sometimes formally or informally incorporated into the public land use process, to regulate issues, like wages, that normally fall outside of the scope of zoning).
58. The Supreme Court has attempted to impose Takings Clause restrictions on what governments may exact from developers in exchange for discretionary land use approvals. The Court has required both a nexus between the exaction sought and the purpose of the land use regulation, *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825, 837 (1987), and "rough proportionality" between the extent of the exaction and the impact of the development, *Dolan v. City of Tigard*, 512 U.S. 374, 391 (1994). Despite the Court's intervention, however, dealmaking over these exactions—including dealmaking that likely violates the requirements of *Nollan* and *Dolan*—remains commonplace in the land use process. See David A. Dana, *Land Use Regulation in an Age of Heightened Scrutiny*, 75 N.C. L. REV. 1243, 1286-1302 (1997) (describing the likelihood that developers and local governments will circumvent limits on exactions, given the prevalence of repeat players in local land use and the desire to protect mutually advantageous deals); Mark Fenster, *Substantive Due Process by Another Name: Koontz, Exactions, and the Regulatory Takings Doctrine*, 30 *TOURO L. REV.* 403, 418 (2014) ("*Nollan* and *Dolan*'s federal constitutionalization of exactions only presaged the

factors that are legally not subject to traditional zoning, like the identity of the developer, can quietly enter into the equation as well, and all of these factors can be weighed against each other during negotiations.<sup>59</sup> Whether the result of the negotiations is a planned unit development or a covenant, it is a custom-negotiated set of plans and rules that governs development. To the extent that local governments force developers to go through a broad discretionary review process, governments can negotiate for the same deals as those they would seek in covenant negotiations.<sup>60</sup> Municipalities therefore seem not to be choosing covenants over zoning—or at least not over discretionary zoning tools—in order to impose substantively different land use controls.

Two New York City programs provide a striking illustration of how covenants and zoning have converged in terms of the substantive regulations they can impose. First is the city's (E) designation program, designed to ensure landowner compliance with promises about environmental remediation made during rezonings.<sup>61</sup> When originally created, the (E) designation, which is part of the zoning code, was used only for properties not controlled by the rezoning applicant, such as properties affected by city-initiated rezonings.<sup>62</sup> Where the rezoning applicant controlled the property, the City instead used a restrictive

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practice's wide expansion . . . and the expanded use of exactions no doubt also led to a greater absolute number of abusive conditions that landowners did not challenge.”); Roderick Hills, Koontz's *Unintelligible Takings Rule: Can Remedial Equivocation Save the Court from a Doctrinal Quagmire?*, PRAWFSBLAWG (June 25, 2013, 3:41 PM), <http://prawfsblawg.blogs.com/prawfsblawg/2013/06/koontzs-unintelligible-takings-rule-can-remedial-equivocation-make-up-for-an-incoherent-substantive-.html> [<http://perma.cc/B79Q-L7X5>] (describing *Nollan* and *Dolan* as a “dead letter” due to a remedy that is worse for developers than the un-constitutional exaction). The Supreme Court's recent *Koontz* decision, *Koontz v. St. Johns River Water Mgmt. Dist.*, 133 S. Ct. 2586 (2013), may unsettle this status quo, but its effects remain to be seen.

59. See Robert C. Ellickson, *Suburban Growth Controls: An Economic and Legal Analysis*, 86 YALE L.J. 385, 405-06, 408 (1977) (discussing developer influence over zoning through contributions and “graft”); Erin Ryan, *Zoning, Taking and Dealing: The Problems and Promise of Bargaining in Land Use Planning Conflicts*, 7 HARV. NEGOT. L. REV. 337, 367-68 (2002) (describing how negotiations over zoning, particularly “underground” negotiations, can lead to “favoritism or corruption”); Leslie Berkman, *Favoritism To Select Firms Alleged: Irvine Adopts Zoning for New Corporate Land Use*, L.A. TIMES, Jan. 15, 1986, [http://articles.latimes.com/1986-01-15/news/mn-28128\\_1\\_corporate-development](http://articles.latimes.com/1986-01-15/news/mn-28128_1_corporate-development) [<http://perma.cc/9LQ2-EDJL>].
60. Indeed, the Supreme Court's land use exactions jurisprudence subjects negotiated dedications of property interests to Takings Clause analyses similar to that applied to zoning restrictions. See *Koontz*, 133 S. Ct. 2586.
61. *E-Designation Program*, N.Y.C. OFF. ENVTL. REMEDIATION, <http://www.nyc.gov/html/oeer/html/e-designation/e-designation.shtml> [<http://perma.cc/B3FM-DBPU>].
62. *(E) Designations Text Amendment*, N.Y.C. DEP'T CITY PLAN., [http://www.nyc.gov/html/dcp/html/e\\_designations/index.shtml](http://www.nyc.gov/html/dcp/html/e_designations/index.shtml) [<http://perma.cc/R7XM-TDFW>].

declaration, a form of covenant.<sup>63</sup> In 2012, however, New York City merged the two programs on the grounds that they were entirely redundant.<sup>64</sup> The City had come to realize that using zoning for some properties and covenants for others did not produce different outcomes for the city. "Having these two different mechanisms within the (E) Program that achieve the same result is unnecessary," explained the New York City Department of City Planning.<sup>65</sup> The original distinction stemmed from a City administrative rule in place at the time, not from any underlying legal difference between zoning and covenant-based methods.<sup>66</sup> The merger was meant to make environmental remediation requirements easier for the city to monitor by bringing all (E) designations into the same legal framework.<sup>67</sup> Substantively, the zoning and covenant-based mechanisms were "exact equivalent[s]."<sup>68</sup> Notably, environmental remediation falls relatively far outside the normal bulk and use concerns of land use regulation, yet both zoning and covenants were equally capable of regulating it.

A second case study not only demonstrates the substantive equivalence between regulatory and property law-based systems of land use controls, but also points toward an important reason that municipalities choose covenants over zoning. Since 1961, the New York City Zoning Code has encouraged developers to build publicly accessible plazas and lobbies as part of their projects.<sup>69</sup> In exchange for public space at ground level, the City allows developers to build taller structures.<sup>70</sup> For fourteen years, this program was administered entirely through public law mechanisms.<sup>71</sup> In 1975, the City added a new property law mechanism for administering the plaza program: "[T]he owner would now file an additional legal instrument, a restrictive declaration running with the parcel, restating the obligations already outlined in the Zoning Resolution . . . ."<sup>72</sup>

This reform was not intended to allow greater flexibility in the type of public space that developers could provide or other substantive differences in the kinds of plazas that could be created. Rather, the addition of covenants offered

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63. *Id.*

64. *Id.*

65. *Id.*

66. Telephone Interview with Julie Lubin, Deputy Counsel, N.Y.C. Dep't of City Planning (Jan. 10, 2014).

67. *Id.*

68. *Id.*

69. See JEROLD S. KAYDEN, *THE N.Y.C. DEP'T OF CITY PLANNING & THE MUN. ART SOC'Y OF N.Y., PRIVATELY OWNED PUBLIC SPACE: THE NEW YORK CITY EXPERIENCE 1* (2000).

70. *Id.*

71. *Id.* at 17, 40-41.

72. *Id.* at 17.



“redundancy” and, more specifically, a supplemental enforcement mechanism for the City.<sup>73</sup> Enforcement is essential to the plaza program’s success: once a taller tower is complete, private owners often unlawfully restrict public access to plaza spaces, gating them off or renting them to restaurants.<sup>74</sup> When zoning rules alone govern these plazas, the restrictions must be enforced through the standard tools of zoning, namely administrative or civil actions, or criminal sanctions.<sup>75</sup> Moreover, courts allow citizens to enforce zoning provisions if they “can establish that they have suffered special damage.”<sup>76</sup> In contrast, the use of covenants to govern plazas allows a measure of private law flexibility in determining who may challenge landowner behavior in court. In the plaza context, the use of restrictive declarations allows for “different consequences on enforcement depending on how [the declaration] is drafted,” particularly affecting “who can bring the action to enforce.”<sup>77</sup> Adding covenants on top of the zoning code did not allow the City to change the substance of its plaza program; rather, it allowed the City to augment its enforcement powers on a case-by-case basis. As the next Part will show, these differences in enforcement are perhaps the most important reason why municipalities turn to covenants despite having the power to zone. Local governments choose to avoid zoning in order to control who may enforce land use restrictions.

### III. THE PROCEDURAL DIFFERENCE: GOVERNMENTS USE COVENANTS TO LIMIT CITIZEN ENFORCEMENT OF LAND USE CONTROLS

#### A. Citizen Enforcement of Zoning; Custom Enforcement of Covenants

Municipalities use covenants to control the enforceability of land use restrictions in contexts far beyond New York City’s privately owned public spaces, as this Part will show. Litigated cases concerning municipally imposed covenants, as well as the terms of the covenants themselves, reveal this sensitivity to enforcement mechanisms. Those cases and covenants show that municipali-

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73. *Id.* at 41.

74. See Jake Schabas, *Putting the Public Back in Midtown’s Privately Owned Public Spaces*, STREETS BLOG NYC (May 22, 2012), <http://www.streetsblog.org/2012/05/22/putting-the-public-back-in-midtowns-privately-owned-public-spaces> [<http://perma.cc/EB8B-QADP>].

75. JEROLD S. KAYDEN, THE N.Y.C. DEP’T OF CITY PLANNING & THE MUN. ART SOC’Y OF N.Y., *supra* note 69, at 40-41.

76. *Id.* at 41.

77. E-mail from Jerold S. Kayden, Frank Backus Williams Professor of Urban Planning & Design, Harvard Graduate Sch. of Design, to author (Dec. 23, 2013, 19:23 EST) (on file with author).

ties pay close attention to the issue of who may enforce their covenants and guard that prerogative for themselves. Usually, local governments declare their covenants enforceable only by the property owner and the municipality itself, thereby retaining total control over the actual implementation of the land use plan, as the municipality becomes the only party capable of enforcing land use regulations against the developer. In contrast, zoning is broadly enforceable by citizens, giving neighbors the power to compel compliance with land use restrictions. The starkly different enforcement regimes under zoning- and covenant-based land use controls—and municipalities' explicit efforts to use covenants to limit citizen enforcement—demonstrate that enforcement is often a principal consideration when local governments choose to use one tool or the other.

Generally, affected neighbors may challenge development as non-compliant with zoning. Zoning enabling acts authorize citizen suits both to seek review of administrative action and to directly enforce zoning rules against neighbors.<sup>78</sup> Under the doctrine of aggrievement, an analogue of standing, citizens must be specially damaged in some way to bring a challenge under the zoning laws.<sup>79</sup> However, the standards for aggrievement tend to be fairly generous to litigants. For example, Maryland considers nearby property owners to be prima facie aggrieved by zoning violations and places the burden of proving the plaintiff not aggrieved on the developer.<sup>80</sup> In most states, a person need not be a resident of a particular municipality to challenge its land use decisions, so long as she is adversely affected by them.<sup>81</sup> In some cases, citizens can even challenge a zoning decision as taxpayers without showing special damage,<sup>82</sup> an action rarely allowed in non-zoning contexts.<sup>83</sup> Courts' willingness to hear a wide range of litigants in zoning disputes reflects a belief that land use is a fundamentally public and participatory concern. As argued by the California Supreme Court, “[C]ommon sense and wise public policy . . . require an oppor-

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78. See Ross D. Cohen, Note, *Why Require Standing if No One Is Seated? The Need To Clarify Third Party Standing Requirements in Zoning Challenge Litigation*, 42 BRANDEIS L.J. 623, 642-48 (2004) (cataloguing citizen enforcement doctrine across many states).

79. See 1 ZIEGLER, *supra* note 2, § 63:3.

80. *Wier v. Witney Land Co.*, 263 A.2d 833, 838 (Md. 1970).

81. See *Scott v. City of Indian Wells*, 492 P.2d 1137, 1140 (Cal. 1972) (“States which have considered the issue have generally held that affected property owners or residents have standing to contest a municipality’s zoning even though they are not residents of the municipality.”).

82. *Dover Twp. Homeowners & Tenants Ass’n v. Dover Twp.*, 276 A.2d 156, 159 (N.J. Super. Ct. App. Div. 1971).

83. See *United States v. Richardson*, 418 U.S. 166 (1974).

tunity for property owners to be heard before ordinances which substantially affect their property rights are adopted . . . .”<sup>84</sup>

In contrast to this broadly public enforcement system for zoning, the enforcement regime for municipally imposed covenants is often tightly limited. Municipalities routinely write covenants that forbid citizen enforcement, and the courts routinely enforce those limits. In one New York case, for example, the owner of an affordable housing complex attempted to convert its property to market-rate apartments.<sup>85</sup> The residents sued, alleging that the conversion violated a covenant between the owner and New York City requiring the building to remain affordable for forty years.<sup>86</sup> Under New York law, the tenants would have had standing to enforce the covenant if it were intended for their benefit.<sup>87</sup> Although it might seem that a covenant requiring the property to remain affordable would be intended for the benefit of the very tenants receiving affordable units, the court held that this covenant reflected no such intent. A clause of the covenant “explicitly negate[d] any intent to permit its enforcement by third parties such as plaintiffs.”<sup>88</sup> Honoring that clause, the court held that the tenants were not beneficiaries of the covenant and therefore lacked standing to sue.<sup>89</sup> By the covenant’s clear terms, only the City could enforce the covenant’s restrictions.

This scenario repeats itself in other cases. Residents of a planned community in Washington, D.C., for example, were deemed merely “incidental beneficiaries” of a series of covenanted promises by the developer, including a promise that the residents would be entitled to purchase stock in the development company.<sup>90</sup> The District and the developer had limited enforcement to the District’s redevelopment authority and the federal government in not one but four different sections of their covenant.<sup>91</sup> “[N]o person other than a party to the Agreement or a successor or assign, shall have any right to enforce the terms of the Agreement against a party, its successors or assigns,” stated the covenant.<sup>92</sup> Here again, the explicit terms of the covenant made promises—whose seem-

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84. *Scott*, 492 P.2d at 1141 (quoting *Kissinger v. City of Los Angeles*, 327 P.2d 10, 17 (Cal. 1958)).

85. See *Mendel v. Henry Phipps Plaza W., Inc.*, 844 N.E.2d 748, 750-51 (N.Y. 2006).

86. *Id.* at 750.

87. *Id.* at 751.

88. *Id.*

89. *Id.*

90. *Fort Lincoln Civic Ass’n. v. Fort Lincoln New Town Corp.*, 944 A.2d 1055, 1067 (D.C. 2008).

91. *Id.* at 1060.

92. *Id.*

ingly sole purpose was to benefit a specific set of residents—unenforceable by those same residents.

Another example from New York City shows the variation that is possible in these covenant provisions limiting enforcement, as well as the high stakes of the litigation surrounding them. In 2014, Greenwich Village residents went to court to try to stop a massive, 1.9-million-square-foot expansion of New York University.<sup>93</sup> The plaintiffs argued, among other things, that the City had unlawfully lifted deed restrictions imposed on the properties being redeveloped when they were first built as part of urban renewal.<sup>94</sup> However, since those restrictions also included an explicit clause defining who could enforce the covenant, the plaintiffs were denied standing to bring that claim.<sup>95</sup> Interestingly, that covenant allowed not only the parties, but also the federal housing commissioner, to enforce its terms.<sup>96</sup> In that case, in addition to blocking citizen enforcement, the parties had drafted their covenant to create a novel joint local-federal enforcement system, which matched the local-federal political structure driving urban renewal.<sup>97</sup> Covenants can be customized to provide whatever enforcement scheme the parties deem appropriate.

Nor are these examples unique to the context of large-scale urban development. Rather, it is normal professional practice to include clauses limiting citizen enforcement in government-imposed covenants. West Publishing, which provides standardized forms of legal documents intended to serve as the foundation for lawyers drafting their own agreements, includes such a limitation in its standard form for a land disposition agreement between a city and a developer.<sup>98</sup> Limiting citizen enforcement is, at least from West's perspective, a best practice for governments drafting covenants.

The customizability of covenants' enforcement schemes can be used not only to limit citizen enforcement but also to expand it. Writing in 1954, the then chairman of the Cook County Board of Zoning Appeals described a practice of using covenants to grant residents (of the entire county or some part of

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93. *Glick v. Harvey*, No. 103844/12, 2014 N.Y. Misc. LEXIS 35, at \*12 (N.Y. Sup. Ct. Jan. 7, 2014).

94. *Id.* at \*54–55.

95. *Id.* at \*56–57.

96. *Id.* at \*56.

97. See Nestor M. Davidson, *Cooperative Localism: Federal-Local Collaboration in an Era of State Sovereignty*, 93 VA. L. REV. 959, 970 (2007) (describing urban renewal as a “[h]allmark” of an era of “[d]irect federal-local relations”).

98. See 3 STUART M. SAFT, *COMMERCIAL REAL ESTATE FORMS* pt. II, ch. 10, app. 10A, § 10A:13 (3d ed. 2014).

it) the power to enforce land use restrictions.<sup>99</sup> The Board, in considering an application for a zoning-based land use approval, would require that the applicant impose a covenant on its property.<sup>100</sup> Those covenants would “conventionally recite that their terms inure to the benefit of and may be enforced by inhabitants of the county—in some cases, property owners within a specified radius—in which the premises are located.”<sup>101</sup> Here, the zoning authority used covenants to allow citizen enforcement beyond what a court might allow under the aggrievement doctrine, as well as to choose whether all residents or only property owners would be given that power. Although today, sixty years later, the government is more likely to use covenants to limit citizen enforcement than to expand it—perhaps due to the refinement of zoning practices over those decades—Cook County’s experience shows that covenants can be employed for either purpose.<sup>102</sup>

The use of covenants to control citizen enforcement is possible only because the courts do not try to import zoning’s broad standing doctrine into covenant-based systems of land use control. Courts maintain the formalist distinction between covenants and zoning—even though functionally, covenants might contain identical substantive restrictions imposed by identical parties. That distinction reflects courts’ fundamentally different understandings of private and public law. Just as the California Supreme Court saw the broad enforceability of zoning as rooted in the nature of zoning as a fundamentally public concern,<sup>103</sup> courts see the enforcement of municipal covenants as fundamentally private, even when zoning and covenants deal with the same issues of land use regulation. Maryland’s Court of Appeals, for example, relied on the private law/public law distinction in denying neighboring landowners standing to challenge an agreement between the City of Baltimore and a private party establishing land use controls for a Baltimore redevelopment pro-

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99. Andrew J. Dallstream & Robert S. Hunt, *Variations, Exceptions and Special Uses*, 1954 U. ILL. L.F. 213, 236-38.

100. *Id.* at 236.

101. *Id.*

102. An interesting question is whether center cities—the municipalities that form the geographic or economic heart of a metropolitan area—use covenants differently from suburbs or small towns. The examples provided—New York; New Haven; Baltimore; Washington, D.C.; and Cook County—all concern center cities. This may reflect the generally higher-stakes development projects in cities, which are likelier to lead to reported cases, or the better media coverage of urban real estate, each of which make such examples higher profile. It may, however, also be the case that urban and suburban governments impose different covenants—though the West form provides reason to believe otherwise. See SAFT, *supra* note 98.

103. See *supra* note 84 and accompanying text.

ject.<sup>104</sup> According to the court, the agreement was “not a . . . land use decision[] with attendant principles extending standing to nearby aggrieved landowners. Generally defined, a land use decision is a decision (typically an ordinance or regulation) enacted or promulgated by a legislative or administrative body.”<sup>105</sup> Here, the court formalistically differentiated public and private forms of land use regulation, even though the regulations themselves might have been substantively the same. Without this formalism, local governments could not use covenants to get around zoning’s citizen enforcement mechanisms.

As express contractual clauses, these limitations on citizen enforcement reflect the clear intent of the parties writing them. New York City could have, rather than expressly denying the residents of affordable housing units beneficiary status, expressly declared that they were the beneficiaries of the covenant-based affordability requirement. The City elected to take the opposite approach. Where these clauses exist, municipalities affirmatively prefer controlling enforcement to permitting citizen enforcement or, more precisely, municipalities prefer negotiating for covenants that limit citizen enforcement to negotiating for covenants that allow it.<sup>106</sup> Given that municipalities can secure roughly identical substantive land use restrictions through zoning or covenants, this enforcement preference stands out as a distinctively legal, rather than institutional, reason for why municipalities choose covenants over zoning.

### B. A Case Study: Riverside South

Both the substantive overlap between covenants and zoning and the conscious use of covenants to tailor and limit enforcement are captured perfectly by the saga of the Riverside South development along Manhattan’s West Side. The former site of the New York Central Railroad’s rail yards, Riverside South stretches from 59th Street to 72nd Street along the Hudson River, making it one of New York City’s largest recent developments.<sup>107</sup> Plans to redevelop the

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<sup>104.</sup> See 120 W. Fayette St., LLLP v. Mayor of Baltimore, 43 A.3d 355, 356-60, 365 (Md. 2012).

<sup>105.</sup> *Id.* at 365.

<sup>106.</sup> In some cases, it may be the developer that proposes the limit on citizen enforcement; the completed documents do not capture the back-and-forth of negotiations. The municipality must still agree to the clause, however, and can trade its acquiescence for more favorable terms elsewhere in the agreement. So municipalities may consistently choose to trade away citizen enforcement because they value it less than developers do. For the purposes of this Note, which looks at why municipalities would use covenants to begin with, the result is largely the same.

<sup>107.</sup> Jim Dwyer, *Trump’s Folly Shakes City*, N.Y. DAILY NEWS, Nov. 11, 1997, <http://www.nydailynews.com/archives/news/trump-folly-shakes-city-article-1.769526> [<http://perma.cc>

area date back to 1962, when the railroad teamed up with the Amalgamated Lithographer's Union to propose 12,000 residential units on the site, as well as commercial uses.<sup>108</sup> That proposal failed, as did six subsequent plans.<sup>109</sup> Community opposition killed many of the development efforts, particularly Donald Trump's plans to build the world's tallest building on the site.<sup>110</sup> In the early 1990s, though, there was finally a breakthrough. Trump partnered with neighborhood, local and, national civic groups to develop a scaled-down site plan that included neighborhood amenities like parkland.<sup>111</sup> Though many neighbors remained livid about the prospect of waterfront development—particularly those whose views would be impeded—the project was ushered through the land use process with relative ease.<sup>112</sup>

The deal struck to govern the development of Riverside South was extremely complex and required a lengthy series of city approvals.<sup>113</sup> Even so, the most important document regulating land use at Riverside South was not the New York City zoning resolution but rather the restrictive covenant signed by Trump.<sup>114</sup> That covenant regulates even those aspects of land use most traditionally regulated through zoning: floor area, the building envelope, and the

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/6SNC-FU7H] (“Riverside South is said to be the largest private development in the history of the city.”).

108. Julia Vitullo-Martin, *The West Side Rethinks Donald Trump's Riverside South*, MANHATTAN INST. (Jan. 2004), [http://www.manhattan-institute.org/email/crd\\_newsletter01-04.html](http://www.manhattan-institute.org/email/crd_newsletter01-04.html) [<http://perma.cc/3XV7-ZEY8>].
109. *Id.*
110. *Id.*
111. David W. Dunlap, *Plan Readied for a Smaller Trump City*, N.Y. TIMES, Feb. 16, 1992, <http://www.nytimes.com/1992/02/16/realestate/plan-readied-for-a-smaller-trump-city.html> [<http://perma.cc/MY2J-74KJ>].
112. See, e.g., Eliot Brown, *Remember Trump City?*, N.Y. OBSERVER, Aug. 5, 2008, <http://observer.com/2008/08/remember-trump-city> [<http://perma.cc/S6HL-EDEV>]; James C. McKinley, Jr., *Trump's Riverside West Plan Appears To Be Gaining Favor*, N.Y. TIMES, Nov. 17, 1992, <http://www.nytimes.com/1992/11/17/nyregion/trump-s-riverside-west-plan-appears-to-be-gaining-favor.html> [<http://perma.cc/WLD8-4RAU>].
113. *Report, Application C 920357 ZMM*, CITY PLAN. COMMISSION (Oct. 26, 1992), <http://www.nyc.gov/html/dcp/pdf/cpc/920357.pdf> [<http://perma.cc/F2L8-WHGA>] (describing over two dozen needed land use approvals, including amendments to the zoning map, special permits required pursuant to the zoning regulations, and others).
114. See, e.g., Eliot Brown, *Extell Steaming Ahead on Giant 'Riverside Center' Amid Early Dissent*, N.Y. OBSERVER, Oct. 31, 2008, <http://observer.com/2008/10/extell-steaming-ahead-on-giant-riverside-center-amid-early-dissent> [<http://perma.cc/G5XG-AB5C>] (discussing recent efforts to change the land use restrictions on the Riverside South site, with an emphasis on the restrictive declaration rather than on zoning).

location of retail uses, for example.<sup>115</sup> The City could easily have controlled these features of the development through the zoning code; it instead chose to do so through a covenant.

The Riverside South covenant also includes detailed language specifying who may enforce its terms, and how. First, the covenant states that no person other than the landowner, the condo association for Riverside South residents, or the City may enforce the terms of the covenant.<sup>116</sup> By including the residents of the project, this covenant allows slightly broader enforcement than some city-imposed covenants—such as the previously mentioned covenant that barred tenants from enforcing its affordability requirements—but still shuts neighbors out of the enforcement process. Second, the covenant expressly allows the City to punish violations of the covenant as if they were zoning violations, by revoking building permits, certificates of occupancy, or special permits.<sup>117</sup> In other words, it seems that the City recreated the land use enforcement regime of the zoning code in a covenant and then explicitly modified that regime to eliminate citizen enforcement. This covenant was carefully custom-drafted to cut the West Side's famously assertive neighborhood activists out of the enforcement process.

The City was right to worry that neighbors would attempt to block even this carefully negotiated deal. A slew of lawsuits attempted to halt development.<sup>118</sup> That litigation underscores how important enforcement mechanisms were in the creation of the Riverside South covenant: one of the plaintiffs' central claims was that the covenant "was illegal because it denied petitioners' members [sic] enforcement rights."<sup>119</sup> The plaintiffs were thus well aware that the covenant had cut them out of the enforcement process—they identified this feature of the covenant and highlighted it in their lawsuit—and felt that it was worth fighting in court. The project's opponents lost on that claim at trial, on appeal, and at the state's high court, which deemed the claim "without merit" without even elaborating.<sup>120</sup> Though plaintiffs attempted to bring the River-

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115. *Report, Application C 100296(A) ZSM, CITY PLAN. COMMISSION* exhibit B ("Parcel LMN Restrictive Declaration"), § 2.01(b), at 16-19 (Oct. 27, 2010), <http://www.nyc.gov/html/dcp/pdf/cpc/100296a.pdf> [<http://perma.cc/6PLW-6EAU>].

116. *Id.* exhibit B, § 7.03, at 78.

117. *Id.* exhibit B, § 7.04, at 78-79.

118. *See* *Coal. for a Liveable Westside, Inc. v. U.S. Dep't of Hous. & Urban Dev.*, No. 95 CIV. 7672 (JSM), 1997 WL 349950 (S.D.N.Y. June 24, 1997); *Coal. Against Lincoln W., Inc. v. City of New York*, 654 N.E.2d 86 (N.Y. 1995); *Cnty. Bd. 7 of Manhattan v. Schaffer*, 639 N.E.2d 1 (N.Y. 1994); *Coal. Against Lincoln W., Inc. v. Weinsall*, 799 N.Y.S.2d 205 (N.Y. App. Div. 2005).

119. *City of New York*, 654 N.E.2d at 88.

120. *Id.* at 88, 90.



side South covenant under zoning's liberal regime of citizen enforcement,<sup>121</sup> the courts were utterly unsympathetic. Indeed, understanding the stakes clearly, the appellate court stated that the intent of the covenant was to place enforcement "in the hands of responsible authorities whose actions will undoubtedly be taken for the benefit of the City and not for the benefit of a favored few."<sup>122</sup> As this litigation shows, the covenant's drafters, its opponents, and the courts all saw the covenant's enforcement provisions as factors differentiating the covenant from traditional zoning and as municipal choices of central importance in shaping the future of Riverside South.

### C. *Using the Flexibility of Covenants To Improve Land Use Planning*

As the Riverside South story illustrates, the stakes can be high in the choice between public and private law mechanisms of land use regulation. The City and developer seem to have carefully crafted enforcement mechanisms that disempowered neighborhood opponents in order to protect the project; those same opponents went to court and tried to reinsert themselves in the enforcement process in order to reshape or derail the development. These parties appear to have understood that in the land use context, as in administrative law more generally, citizen suits are powerful tools, offering the promise of greater compliance with important legal protections and the peril of over-enforcement dictated by an unrepresentative few. This Part argues that in the land use context specifically, some citizen enforcement is valuable but that local governments go too far when using covenants to eliminate citizen enforcement entirely. The following discussion calls for greater balance, suggesting that governments use covenants to limit but not foreclose citizen enforcement of land use regulations.

Administrative law scholars have debated the merits of citizen suits at length. On the one hand, citizen suits are seen as effective mechanisms for increasing the enforcement of regulations by deputizing concerned individuals to augment the capacity of often understaffed, and sometimes politically captured, agencies.<sup>123</sup> In addition to this primary function, citizen suits can also improve public enforcement of the law by providing competition; preserve public resources by placing the cost of enforcement on private parties; and

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121. Brief for Petitioner, *Coal. Against Lincoln W., Inc. v. City of New York*, 654 N.E.2d 86 (N.Y. 1995) (No. 109439/93), 1995 WL 17051591, at \*43-49.

122. *Id.* at \*47 (quoting Petitioners' Appendix at 19, *City of New York*, 654 N.E.2d 86).

123. See, e.g., Frank B. Cross, *Rethinking Environmental Citizen Suits*, 8 TEMP. ENVTL. L. & TECH. J. 55, 56 (1989); Cass R. Sunstein, *What's Standing After Lujan? Of Citizen Suits, "Injuries," and Article III*, 91 MICH. L. REV. 163, 221-22 (1992).

serve participatory goals by bringing citizens into the enforcement and judicial processes.<sup>124</sup> On the other hand, critics worry that citizen suits strip agencies of their control over the enforcement agenda and ability to exercise prosecutorial discretion.<sup>125</sup> Unlike an agency, critics argue, single-issue advocates lack the political legitimacy to set enforcement priorities, the ability to balance competing concerns, and the incentive to cooperate with regulated parties.<sup>126</sup> Citizen enforcers can also disrupt an agency's ability to negotiate with regulated parties over compliance: even if the agency promises not to bring an enforcement action, private parties can still do so.<sup>127</sup>

Both the costs and benefits of citizen enforcement generally can be felt sharply in the land use context. Citizen suits are likely to dramatically increase enforcement of zoning rules. Local governments generally have limited resources, which limits their ability to monitor violations and enforce zoning rules directly.<sup>128</sup> In contrast, the immediate neighbors of a property are both well-placed to monitor violations and invested in doing so.<sup>129</sup> Accordingly, those protective of property owners' ability to halt unwanted neighborhood changes have celebrated the liberal aggrievement doctrine in zoning.<sup>130</sup> At the same time, citizen enforcement of zoning is likely to validate the concerns of critics. Citizen suits are most likely to come from anti-development homeowners, who are famously litigious in attempting to halt unwanted changes to their

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124. See, e.g., James R. May, *Now More Than Ever: Trends in Environmental Citizen Suits* at 30, 10 WIDENER L. REV. 1, 3-6 (2003); Barton H. Thompson, Jr., *The Continuing Innovation of Citizen Enforcement*, 2000 U. ILL. L. REV. 185, 198-99.

125. See, e.g., Jody Freeman, *The Private Role in Public Governance*, 75 N.Y.U. L. REV. 543, 662 (2000).

126. See, e.g., Richard B. Stewart, *The Discontents of Legalism: Interest Group Relations in Administrative Regulation*, 1985 WIS. L. REV. 655, 673-78.

127. See Jeannette L. Austin, Comment, *The Rise of Citizen-Suit Enforcement in Environmental Law: Reconciling Private and Public Attorneys General*, 81 NW. U. L. REV. 220, 223 (1987) (“[C]itizen suits may make the attainment of the optimal mix of cooperation and deterrence under the environmental laws very difficult.”).

128. See *Clear Channel Outdoor, Inc. v. City of New York*, 608 F. Supp. 2d 477, 480 (S.D.N.Y. 2009), *aff'd*, 594 F.3d 94 (2d Cir. 2010) (“The City’s enforcement of its zoning regulations has been inconsistent and less than vigorous.”); Nicole Stelle Garnett, *On Castles and Commerce: Zoning Law and the Home-Business Dilemma*, 42 WM. & MARY L. REV. 1191, 1228 n.179 (2001) (“Zoning enforcement is notoriously lax and frequently complaint driven.”); Kathryn Wall, *Law Enforcement Sales Tax Will Now Pay for Some Positions in Greene County*, SPRINGFIELD NEWS-LEADER, Nov. 23, 2013, <http://archive.news-leader.com/article/20131123/NEWS01/311230027/Greene-County-budget> [<http://perma.cc/PKL4-ZFLY>] (reporting that zoning enforcement was being eliminated in rural areas due to budget cuts).

129. See Ellickson, *supra* note 24, at 72.

130. See, e.g., Robert A. Hendel, *The “Aggrieved Person” Requirement in Zoning*, 8 WM. & MARY L. REV. 294, 307 (1967).

neighborhood.<sup>131</sup> For controversial projects, using zoning does not merely allow citizen enforcement of land use controls; it all but guarantees such enforcement. Moreover, litigants often proceed from a parochial rather than city-wide perspective and are typically more concerned with stopping development than regulating it.<sup>132</sup> In the land use context, therefore, citizen suits are both important mechanisms for augmenting the capacity for public enforcement and potential weapons of NIMBY obstructionism.

Substantively, either over-enforcement or under-enforcement of land use regulations is undesirable. Over-enforcement of land use regulations, along with other forms of local opposition to new development, drives up housing costs, making cities and suburbs alike increasingly unaffordable for moderate-income households, and exacerbates environmentally destructive urban sprawl.<sup>133</sup> But while excessive restrictions on development are socially undesirable, some amount of land use planning is widely considered salutary.<sup>134</sup> Such

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131. See William A. Fischel, *Voting, Risk Aversion, and the NIMBY Syndrome: A Comment on Robert Nelson's "Privatizing the Neighborhood,"* 7 GEO. MASON L. REV. 881, 882-83 (1999) ("If NIMBYs fail to reduce the scale and density of the project at these reviews, they often deploy alternative regulatory rationales . . . at other local, state and federal government forums, including courts of law."); Kmiec, *supra* note 55, at 79 ("To protect their interests, individual property owners use zoning and zoning litigation to stop development or slow the development process."); see also Andrew J. Hawkins, *Upper East Side Won't Hear Defeat on Waste-Transfer Station*, CRAIN'S N.Y. BUS. (Apr. 21, 2013, 12:01 AM), [http://www.crainsnewyork.com/article/20130421/REAL\\_ESTATE/304219980/upper-east-side-wont-hear-defeat-on-waste-transfer-station](http://www.crainsnewyork.com/article/20130421/REAL_ESTATE/304219980/upper-east-side-wont-hear-defeat-on-waste-transfer-station) [<http://perma.cc/4DW8-FX3P>] (stating that Upper East Side residents have lost eleven consecutive lawsuits against an unwanted waste transfer station and continue to fight).
132. Cf. Michael Dear, *Understanding and Overcoming the NIMBY Syndrome*, 58 J. AM. PLAN. ASS'N 288, 289-91 (1992) (discussing the typical profile of community opposition to unwanted development).
133. See Robert L. Liberty, *Abolishing Exclusionary Zoning: A Natural Policy Alliance for Environmentalists and Affordable Housing Advocates*, 30 B.C. ENVTL. AFF. L. REV. 581 (2003) (integrating the vast literatures on the economic and environmental impacts of restrictions on dense development).
134. See BABCOCK, *supra* note 56, at 17 ("[T]housands of local officials regard zoning as the greatest municipal achievement since the perfection of public sanitary systems."); 1 ZIEGLER, *supra* note 2, § 1:2 ("[W]idespread . . . local recognition of how zoning may be utilized to further perceived community interests . . . virtually guarantee[s] its continued use."); *Policy Guide on Smart Growth*, AM. PLAN. ASS'N (Apr. 14, 2012), <https://www.planning.org/policy/guides/pdf/smartgrowth.pdf> [<http://perma.cc/X4Y3-BULP>] (describing the consensus among the professional planning community in support of "comprehensive planning" and "legislation that promotes . . . zoning and other land use regulations"). Even the rare places without zoning see both land use planning and the enforcement of land use regulations as important. Houston, the only major city without zoning (though it has other public land use regulations, such as subdivision regulations and off-street parking requirements) has an

planning allows for efficient use of infrastructure, aesthetically cohesive design, community self-determination, and the reduction of local externalities.<sup>135</sup> Under-enforcement also opens the door to a bait-and-switch with the public, where governments trade promises that never materialize for popular support.

Limiting citizen enforcement is an understandable response to the threat of over-enforcement in the land use context. Using zoning means that citizen suits will be brought to try to block construction. A municipality hoping to shepherd a desired development through the gauntlet of neighborhood opposition—as is often the case where covenants are used<sup>136</sup>—behaves sensibly in using private law to deny neighbors the power to enforce land use regulations. But at the same time, denying citizens this power can lead to under-enforcement. In the examples described above, citizens in New York lost their affordable apartments when the City declined to enforce its covenant,<sup>137</sup> and citizens in Washington, D.C., lost the right to buy into their community.<sup>138</sup> Those municipalities chose not to enforce even the most fundamental restrictions included in the covenants. As a result, the terms of the covenants may have prevented obstructionist litigation, but they also left people without the protections they were owed by developers.

As a policy matter, therefore, municipalities should relax, but not relinquish, their use of covenants to bar citizen enforcement of land use controls. To the extent that local governments are limiting citizen enforcement in order to ward off opportunistic litigation over minor design details or procedural irregularities, covenants offer a welcome tool for governments to fight back against NIMBY-ism. But insofar as land use controls promote important public purposes, strong citizen enforcement is an effective and important tool ensuring those purposes are actually served. Committed community activists with valuable local knowledge should be empowered through citizen suits, even as anti-development NIMBYs are defanged—the challenge is that these may be the same people. Local governments, therefore, ought not use covenants to eliminate citizen enforcement entirely. Rather, citizen enforcement of land use con-

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active city planning department and expends public resources to enforce private land use covenants under special statutory authorization. Siegan, *supra* note 38, at 71-77.

135. See sources cited *supra* note 134; see also ANDRES DUANY & JEFF SPECK WITH MIKE LYDON, *THE SMART GROWTH MANUAL* (2010) (laying out one leading vision of good urban planning, the New Urbanism, which is enforced by extensive zoning regulations); Bradley C. Karkkainen, *Zoning: A Reply to the Critics*, 10 J. LAND USE & ENVTL. L. 45 (1994) (defending zoning from its critics).

136. See *supra* Part III.B.

137. See *supra* text accompanying notes 85-89.

138. See *supra* text accompanying notes 90-92.

trols should, to the extent possible, be restricted only as far as is necessary to prevent obstructionism.

Luckily, covenants' private law nature offers the flexibility to perform the necessary tailoring. Covenants' limits on citizen enforcement are just negotiated terms, and local governments can therefore simply stop including blanket prohibitions on citizen enforcement in their covenants. There are many ways to strike a better balance. Municipally imposed covenants ought to identify certain provisions that can be enforced by directly affected citizens. This kind of tailoring would place enforcement powers in the hands of those intended to derive benefit, ensuring that they receive the land use protections to which they are entitled, while continuing to limit the enforcement powers of self-appointed, obstructionist, anti-development neighbors. These enforcement clauses could be carefully calibrated. A covenant to build a new elementary school on site, for example, could be declared enforceable only by the local PTA, or a covenant to provide affordable housing could be declared enforceable only by tenants of the affordable units. In addition to identifying which citizens are so directly affected that they ought to be given enforcement powers, covenants could identify which of their provisions are appropriate for citizen enforcement. For example, the enforcement of procedural provisions, where violations may or may not meaningfully harm the public, might be reserved for the government, which is better placed to use discretion in deciding whether to bring an action, while substantive restrictions on development might be made enforceable by citizens. Alternatively, local governments can (and sometimes do)<sup>139</sup> layer zoning and covenant-based land use restrictions on top of each other. Citizen enforcement is thereby permitted for those terms placed in the zoning code but not for those requirements placed in the covenant. This approach would not allow a city to designate certain directly affected groups as the sole citizen enforcers but has the added benefit that citizens can easily identify the provisions they may enforce by looking at the zoning code. Under either approach, covenants could still be used to limit NIMBY litigation while ensuring that some land use controls will be enforced.

How broadly to allow citizen suits will depend on the particular context of a project: how controversial it is, how litigious the opponents are, how robust the government's enforcement program is, and the substance of the land use restrictions. And who is directly affected will depend on the restriction in question: while tenants are very directly benefitted by affordability requirements, the beneficiaries of architectural design requirements, for example, are a harder to define group. Nonetheless, for most projects, some balance ought to be

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139. The New Haven Coliseum site redevelopment, *see supra* notes 25-28 and accompanying text, is an example of this strategy.

struck between complete citizen enforcement and none at all. A middle path between the all-or-nothing citizen enforcement regimes of public and private land use law offers protection for development without sacrificing public accountability.

#### IV. OTHER LEGAL DIFFERENCES: PARTICIPATION AND PERMANENCE

Of course, local governments choose covenants over zoning for more than a single reason. This Note has emphasized enforcement because local governments consider enforcement to be a matter of central importance, as shown by the close attention paid to it in the covenants put forward by municipalities. Still, other legal differences between covenants and zoning may also drive governments to choose one over the other. A local government's choice to use covenants might be driven by something as contingent as which bureaucracy is pushing a project. Further, where a local government is trying to block development, covenants might be used to evade constitutional limitations on land use regulation. More importantly, local governments might use covenants to limit the amount of public participation in the planning process, just as they try to limit public enforcement once a project is complete, or to provide land use controls with a different form of permanence. Although this Note presents less empirical evidence that local governments in fact choose covenants for these reasons, these additional differences between zoning and covenants further demonstrate that the two tools of land use regulation are legally distinct, not just institutionally distinct.

At the most basic level, different agencies within a single administration might control the zoning and covenanting processes. For example, it is common for a planning department to control zoning, while an economic development agency controls public land disposition.<sup>140</sup> For bureaucratic reasons, each agency might first turn to the land use planning mechanism it controls. Moreover, some local governments have independently elected zoning commissions,<sup>141</sup> which may have different policy preferences in addition to different bureaucratic turf. On a case-by-case basis, these organizational divisions may be important in determining whether zoning or covenants are used. How-

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140. See Susan S. Fainstein, *Promoting Economic Development: Urban Planning in the United States and Great Britain*, 57 J. AM. PLAN. ASS'N 22, 24 (1991) (comparing planners working in city planning departments, who are responsible for zoning and related activities, with those in mayors' offices and development corporations, whose work focuses on dealmaking).

141. See, e.g., Jason Bagley, *Milford Dems Hold onto Majorities, Add One More*, MILFORD PATCH (Nov. 8, 2013, 12:54 A.M.), <http://milford.patch.com/groups/elections/p/milford-dems-hold-onto-majorities-add-one-more> [<http://perma.cc/D4C3-GCKK>] (describing a switch in partisan control of the Milford, Connecticut Planning and Zoning Board).

ever, they do not provide a sufficient answer to the broader question. Where a local government has made a certain project a top priority—as with the New Haven Coliseum site discussed earlier<sup>142</sup>—mayoral coordination is likely, rendering bureaucratic turf wars less relevant.<sup>143</sup> Individual agencies also strategically choose between zoning and covenants to achieve their goals. In New York City, for example, it was a single agency that added covenants to its previously zoning-based system for creating privately operated public spaces.<sup>144</sup> Differences that are legal, and not just bureaucratic or institutional, drive these choices to use covenants or zoning.

Similarly, local governments likely sometimes use covenants to evade constitutional limits on regulation, in particular federal and state takings clauses. In the specific case of conservation easements, for example, where a covenant might prohibit all significant development in perpetuity, a government could not constitutionally achieve the same result by regulation without paying just compensation.<sup>145</sup> When local governments are attempting to limit development significantly, therefore, they have a strong incentive to use covenants, if possible, to avoid takings issues.<sup>146</sup> Relatedly, most zoning codes avoid imposing regulatory takings by allowing landowners to receive variances—exemptions or permitted deviations from the applicable zoning requirements—when zoning proves to be a hardship.<sup>147</sup> The variance process thereby limits, to some extent, local governments' ability to impose unusually harsh land use restrictions. In contrast, hardships only lead to loosened restrictions in covenants in limited circumstances.<sup>148</sup> When imposing onerous land use restrictions, therefore, governments have reason to disfavor zoning: the covenant is more likely to stick. But as with bureaucratic explanations, these constitutional issues are insuffi-

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142. See *supra* notes 25–28 and accompanying text.

143. See *Mayor, Office of the (OTM)*, N.Y.C. DEP'T CITYWIDE ADMIN. SERV., <http://a856-gbol.nyc.gov/gbolwebsite/390.html> [<http://perma.cc/D7T7-JD2R>] (defining one role of the mayor's office as coordinating among city agencies).

144. See *supra* text accompanying notes 69–77.

145. See ELLICKSON & BEEN, *supra* note 23, at 820.

146. If the covenant were imposed through negotiations over a discretionary land use approval, it would still be subject to *Nollan* and *Dolan* exactions scrutiny, though not directly as a regulatory taking. See *supra* note 58. If the covenant were imposed while the local government was acting directly as a landowner, there should be no more a takings issue than if a private landowner did the same.

147. See Jonathan E. Cohen, Comment, *A Constitutional Safety Valve: The Variance in Zoning and Land-Use Based Environmental Controls*, 22 B.C. ENVTL. AFF. L. REV. 307, 330 (1995).

148. Gerald Korngold, *Privately Held Conservation Servitudes: A Policy Analysis in the Context of in Gross Real Covenants and Easements*, 63 TEX. L. REV. 433, 486–88 (1984) (describing the relative hardship doctrine in covenant law, which is at times narrowly construed, and noting that it is typically only applied if there are other factors permitting the lifting of covenants).

cient to explain most choices to use covenants. Regulatory takings and variances are concerns where the government is trying to stifle growth, but municipalities generally use covenants to govern projects that they hope to help move forward.<sup>149</sup> To the extent that a local government is promoting a development and giving the developer what it needs to succeed and profit, land use regulations are extremely unlikely to fail the *Penn Central* balancing test for regulatory takings.<sup>150</sup> For these favored projects where covenants are commonly used, governments' choices to do so are much better explained by a desire to limit citizen enforcement, which can be a costly impediment to development.

Two additional factors, however, may drive municipalities to use covenants to regulate land use rather than zoning. First, using covenants may allow a local government to limit public participation in the planning process. The degree of public participation is not inherent to the legal forms: regulatory decisions can be made in backroom deals,<sup>151</sup> and municipalities may seek out broad public input in designing covenants.<sup>152</sup> Nevertheless, the Standard Zoning Enabling Act, which was broadly adopted across the country and governs the exercise of most local zoning powers,<sup>153</sup> requires a public hearing before zoning regulations may be enacted.<sup>154</sup> In contrast, statutes authorizing local governments to convey real property—one important source of local governments' power to impose covenants—generally do not include such hearing requirements.<sup>155</sup> Accordingly, the zoning process is more likely to include broad public

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149. The New Haven Coliseum site redevelopment, *see supra* notes 25-28 and accompanying text, is typical in this respect, as is the Riverside South project, *see supra* Part III.B.

150. *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104 (1978).

151. *See, e.g.*, Karkkainen, *supra* note 135, at 87 n.157 (noting that, of eighteen Chicago aldermen arrested for corruption in a twenty-year period, seven were convicted for bribery in connection with zoning).

152. *See, e.g.*, Jack Encarnacao, *Quincy Residents Call for Fast Track on \$1.3B Downtown Makeover*, PATRIOT LEDGER, Nov. 23, 2010, <http://www.patriotledger.com/x656203399/Quincy-residents-call-for-fast-track-on-1-3B-downtown-makeover> [<http://perma.cc/K995-7WBU>] (describing a public meeting with over 500 people in attendance for a downtown redevelopment project governed by a land disposition agreement).

153. ELLICKSON & BEEN, *supra* note 23, at 74-76.

154. ADVISORY COMM. ON ZONING, U.S. DEP'T OF COMMERCE, A STANDARD STATE ZONING ENABLING ACT UNDER WHICH MUNICIPALITIES MAY ADOPT ZONING REGULATIONS 7 n.27 (rev. ed. 1926).

155. *See, e.g.*, 65 ILL. COMP. STAT. 5/11-76-2 (2014) (requiring public notice but no public hearing for the sale or lease of public property).



participation than would a covenant negotiation. Indeed, participatory democratic values often trump legalistic ones in the zoning process.<sup>156</sup>

For local governments, public participation in the land use process is a double-edged sword. On the one hand, public participation allows governments to harness local information at the neighborhood level—information that may be impossible for a centralized bureaucracy to gather or process on its own.<sup>157</sup> On the other hand, homeowners resistant to any change in their neighborhood—even changes unlikely to have any negative effect<sup>158</sup>—routinely dominate public hearings and are often successful in demonstrating enough opposition to defeat unwanted projects.<sup>159</sup> From this perspective, public participation provides both an opportunity for better development and for unrepresentative obstructionism.

Where a government wants a project to succeed, therefore, the participatory nature of the zoning process may push a local government to use covenants to regulate land use. The century-long debate over whether more or less public participation is a good thing for land use planning is beyond the scope of this Note.<sup>160</sup> Suffice it to say that the turn to covenant-based regulation reflects municipal attempts to limit the power of citizens in development politics in two different ways. As public law, zoning brings citizens into the land use process at both the planning stage, through hearings and other participatory mechanisms, and at the enforcement stage, through citizen suits for aggrieved

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156. See generally Eric H. Steele, *Participation and Rules—The Functions of Zoning*, 11 AM. B. FOUND. RES. J. 709 (1986) (describing why the zoning process is better understood as promoting participatory political processes than as enforcing substantive rules).
157. See *Community-Based Planning*, N.Y.C. DEP'T CITY PLAN., [http://www.nyc.gov/html/dcp/html/community\\_planning/index.shtml](http://www.nyc.gov/html/dcp/html/community_planning/index.shtml) [<http://perma.cc/N7R7-PZ2X>] (“People who are close to neighborhood issues can clearly identify community needs and advocate passionately for local concerns.”). See generally JANE JACOBS, *THE DEATH AND LIFE OF GREAT AMERICAN CITIES* (1961).
158. See William A. Fischel, *Why Are There NIMBYs?*, 77 LAND ECON. 144 (2001) (showing how neighbors fight against any risk of reduced home prices even when it is unlikely that home prices would actually fall).
159. See ADVISORY COMM'N ON REGULATORY BARRIERS TO AFFORDABLE HOUS., U.S. DEP'T OF HOUS. & URBAN DEV., “NOT IN MY BACKYARD”: REMOVING BARRIERS TO AFFORDABLE HOUSING 1-8 (1991) (“NIMBY groups . . . can be very effective at packing hearing rooms and leaving the impression that public opinion is strongly against whatever project they oppose.”); LELAND WARE & STEVEN W. PEUQUET, *DELAWARE ANALYSIS OF IMPEDIMENTS TO FAIR HOUSING CHOICE* 83 (2003) (“After a flood of angry letters and phone calls and a few emotionally charged public hearings, the zoning boards will yield to the demands of residents.”).
160. See Audrey G. McFarlane, *When Inclusion Leads to Exclusion: The Uncharted Terrain of Community Participation in Economic Development*, 66 BROOK. L. REV. 861, 866-92 (2001) (tracing the “ebb and flow” of the federal government’s efforts to promote public participation in urban redevelopment programs).

neighbors. As private law, covenants can be used to push citizens out of the land use process at each of those stages. Covenants give governments the capacity to calibrate the balance of power between citizens and public officials over the entire lifetime of a development project.

A second difference between zoning and covenants is their permanence. Although less present than enforcement concerns in the text of government imposed covenants or the case law concerning them, permanence is a deep doctrinal distinction. On the one hand, statutes can last forever. Unless repealed, a zoning ordinance will remain binding in perpetuity, since courts generally cannot sunset outdated laws.<sup>161</sup> In contrast, most covenants will prove less long-lasting. First, courts are less likely to treat a covenant that does not sunset as running with the land, meaning that as property changes hands over time, covenants made in perpetuity may become unenforceable.<sup>162</sup> Second, courts will not enforce a covenant if changed conditions have rendered it obsolete.<sup>163</sup> Zoning, therefore, is potentially a much longer-lasting restriction on development.

Then again, a zoning ordinance is far easier to amend than a covenant, giving covenants a different kind of permanence.<sup>164</sup> The local government may unilaterally rezone land, while the renegotiation of a covenant requires the consent of all parties.<sup>165</sup> A subsequent rezoning will not affect a developer that has vested its rights, for example by obtaining building permits or starting construction,<sup>166</sup> but zoning still creates more regulatory risk for the landowner than does a covenant-based system of land use controls. Given the value of certainty and predictability in real estate development, developers may demand covenants, rather than zoning regulations, and local governments may want to give them that certainty.

These issues of permanence implicate deep institutional questions: when should political change be allowed to affect deals struck by a previous administration? What is the relative competence of legislatures and judges in deter-

161. Cf. GUIDO CALABRESI, *A COMMON LAW FOR THE AGE OF STATUTES* (1982) (arguing that courts should be allowed to determine whether a statute is obsolete).

162. See *Eagle Enters., Inc. v. Gross*, 349 N.E.2d 816, 819 (N.Y. 1976).

163. See *Bolotin v. Rindge*, 230 Cal. App. 2d 741, 743 (Cal. Dist. Ct. App. 1964).

164. French, *supra* note 24, at 1263 n.6. ("Because zoning ordinances and other governmental controls are usually much more susceptible to change as the result of political and economic pressures than are real covenants and equitable servitudes, one function served by private land use arrangements is to protect against uncertainty of governmental land use regulation.").

165. See Fennell, *supra* note 24, at 893-94 ("It has never been easier to bind oneself and one's successors to a covenant that benefits hundreds or even thousands of other landowners, and it has never been easier for those numerous other landowners to hold one to the covenant.").

166. See 1 ZIEGLER, *supra* note 2, § 70.

mining when a land use restriction is obsolete? Given the stakes of these issues, permanence and amendment likely affect the municipal choice of land use control. These questions of who controls land use policy, present or future officials, also intersect with the existing scholarship on zoning and covenants. As discussed earlier, this scholarship focuses on who enacts each form of regulation but only examines the issue at a particular moment in time.<sup>167</sup> Further inquiry into the differences between covenants and zoning, and particularly governmental use of covenants, should examine how questions of permanence affect municipal decision making and how they interact with the enforcement concerns identified in this Note.

## CONCLUSION

Although covenants are most commonly used as land use controls by private parties, municipal governments routinely supplement their zoning power with covenants. Covenants are not merely the private equivalent of zoning, therefore, but also a meaningfully different legal tool. The difference between the two forms of regulation does not lie in the substantive restrictions each can contain. Zoning is now sufficiently flexible and discretionary that it can impose the same substantive limits on development that covenants can. Rather, a primary distinction between zoning and covenants is the nature of the party empowered to enforce them. Zoning ordinances are broadly enforceable by aggrieved citizens. In contrast, local governments use covenants to limit citizen enforcement and reserve enforcement power for themselves, with the goal of protecting development from litigious neighbors. By using covenants, local governments can avoid public law norms of participation and accountability, and they can opt into a private law system where everything, including enforcement regimes, can be customized. While the ability to limit enforcement of covenants is not the only distinction between the two forms of land use control—in particular, zoning tends to allow for greater public participation and different forms of amendment—it is one that local governments actively embrace. In this way, covenants are not merely the equivalent of zoning for private parties. Their private law origins remain doctrinally and practically significant.

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167. See *supra* text accompanying notes 15-20.