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THE EMERGENCE OF PRIVATE LAND USE CONTROLS IN LARGE-SCALE SUBDIVISIONS: THE COMPANION STORY TO *VILLAGE OF EUCLID V. AMBLER REALTY CO.*

Gerald Korngold[†]

INTRODUCTION

The milestone Supreme Court decision in *Village of Euclid v. Ambler Realty Co.*[1] in 1926, validating comprehensive public land use controls, has had a profound effect on American life and jurisprudence. The decision provided the constitutional foundation for an explosive growth in modern zoning, subdivision controls, and other governmental land use regulation that has transformed the organization and development of land and communities.[2] *Euclid* also triggered a new era of takings jurisprudence[3] and an ongoing debate on American private property rights.[4]

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[1] 272 U.S. 365 (1926).

[2] For a history of this regulation, see generally ROBERT M. ANDERSON, AMERICAN LAW OF ZONING (3d ed. 1986); NORMAN WILLIAMS, AMERICAN PLANNING LAW: LAND USE AND THE POLICE POWER (1974-1985).

[3] *See, e.g.*, Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1030 (1992) (holding that an owner of beachfront property was denied all "economically viable use of his land" by the Beachfront Management Act, amounting to a regulatory taking); Nollan v. California Coastal Comm'n, 483 U.S. 825 (1987) (finding a taking where a building permit was conditioned on the property owner's granting of a public access easement because no legitimate purpose was thereby advanced); Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104 (1978) (upholding a New York landmark law that prevented property owner from building onto a landmark because the law was substantially related to the promotion of the general welfare).

[4] *See, e.g.*, RICHARD EPSTEIN, TAKINGS (1985); Frank Michelman, *Takings, 1987*, 88 COLUM. L. REV. 1600 (1988); Frank Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165 (1967); Margaret Jane Radin, *The Liberal Conception of Property: Cross Currents in the Jurisprudence of Takings*, 88 COLUM. L. REV. 1667 (1988); Joseph L. Sax, *Property Rights and the Economy of*

But another important land use story began in the twentieth century, rooted not in governmental regulation but in consensual, market arrangements. Starting in this period, developers employed comprehensive *private* land use controls to produce large-scale residential developments and communities.[5] These developers sought to achieve a vision of beauty and tranquility through a scheme of real covenants (or "servitudes") that imposed an extensive system of building and use restrictions, aesthetic controls, and other guidelines.[6] These efforts succeeded to a great extent.[7] At the same time, these developments were often marred by the inclusion of covenants barring racial and religious minorities, a practice that continued until enforcement of such restrictions was held to be unconstitutional by the Supreme Court in 1948.[8]

Today, the development model utilizing private land use controls is more vibrant than ever. Over recent years, there has been an explosive growth in subdivision developments with underlying servitude regimes, and an increasing number of these include a homeowners association empowered to administer and enforce the covenants.[9] In

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Nature: Understanding Lucas v. South Carolina Coastal Council, 45 STAN. L. REV. 1433 (1993); William Treanor, *The Original Understanding of the Takings Clause and the Political Process*, 95 COLUM. L. REV. 782 (1995).

[5] *See infra* Part I.

[6] RESTATEMENT (THIRD) OF PROPERTY: SERVITUDES (2000) develops a modern law of real covenants, equitable servitudes, easements, profits, and licenses into an integrated and modern law of servitudes. *See also* Susan F. French, *Highlights of the New Restatement (Third) of Property: Servitudes*, 35 REAL PROP. PROB. & TR. J. 225 (2000) (surveying the changes to traditional servitudes law brought about by the *Restatement (Third) of Property: Servitudes* (2000)); Susan F. French, *Design Proposal for the New Restatement of the Law of Property—Servitudes*, 21 U.C. DAVIS L. REV. 1213 (1988) (proposing a design for a Restatement of the law of servitudes). For background on these interests, see generally GERALD KORNGOLD, PRIVATE LAND USE ARRANGEMENTS: EASEMENTS, REAL COVENANTS, AND EQUITABLE SERVITUDES (1990). For representative articles on the discussion of modernizing the law of servitudes, see Gregory Alexander, *Freedom, Coercion, and the Law of Servitudes*, 73 CORNELL L. REV. 883 (1988); Curtis Berger, *Some Reflections on a Unified Law of Servitudes*, 55 S. CAL. L. REV. 1323 (1982); Lawrence Berger, *Integration of the Law of Easements, Real Covenants and Equitable Servitudes*, 43 WASH. & LEE L. REV. 337 (1986); Robert Ellickson, *Alternatives to Zoning: Covenants, Nuisance Rules, and Fines as Land Use Controls*, 40 U. CHI. L. REV. 681 (1973); Richard Epstein, *Covenants and Constitutions*, 73 CORNELL L. REV. 906 (1988); Susan F. French, *Servitudes Reform and the New Restatement of Property: Creation Doctrines and Structural Simplification*, 73 CORNELL L. REV. 928 (1988); Susan F. French, *Toward a Modern Law of Servitudes: Reweaving the Ancient Strands*, 55 S. CAL. L. REV. 1261 (1982) [hereinafter French, *Modern Law of Servitudes*]; Uriel Reichman, *Toward a Unified Concept of Servitudes*, 55 S. CAL. L. REV. 1177 (1982); Carol Rose, *Servitudes, Security, and Assent: Some Comments on Professors French and Reichman*, 55 S. CAL. L. REV. 1403 (1982).

[7] *See infra* Parts IV, IV.A-B.

[8] *See infra* Part IV.C.

[9] There has been much discussion of community associations. *See, e.g.*, Robert C. Ellickson, *New Institutions for Old Neighborhoods*, 48 DUKE L.J. 75 (1998); Mark Fenster, *Community by Covenant, Process and Design: Cohousing and the Contemporary Common Interest Community*, 15 J. LAND USE & ENVTL. L. 3 (1999); Wayne S. Hyatt, *Common Interest Communities: Evolution and Reinvention*, 31 J. MARSHALL L. REV. 303 (1998); Gerald Korngold, *Resolving the Flaws of Residential Servitudes and Owners Associations: For Reformation Not*

1975, housing units in homeowners association developments were estimated at 2.58% of total American housing units; by 1998, the figure was 14.67%, with a total of forty-two million Americans living is such communities.[10]

A prime example of this new large-scale subdivision phenomenon was developed by the Van Sweringen brothers during the same period in which *Euclid* was decided, on land located a few miles away from the Village of Euclid.[11] The Van Sweringen development, sitting in what are now the cities of Shaker Heights, Beachwood, and Pepper Pike, Ohio, exemplifies the strengths and potential pitfalls of private land use controls.

This Article will examine the use of servitudes in major subdivision projects, using the Van Sweringen development as an illustration of the competing policy considerations, legal issues, and judicial approaches. As will be developed below, the Van Sweringen story offers important insights into fundamental issues of modern servitudes law. It shows the value of modern subdivision arrangements, demonstrates the importance of judicial validation of servitude schemes except in unusual situations, and underscores the advantage of providing for flexibility in the future so that the power of the dead hand is limited. The Van Sweringen experience, however, also cautions that administration of the servitudes by a central body must reflect democratic values and process and serves as a powerful reminder that covenants that attempt to regulate personal autonomy, status, or conduct within the home should not be enforced.

I. THE VAN SWERINGEN DEVELOPMENT

A. Land Development in Early Twentieth Century America

The Van Sweringens began their development during a period of large-scale residential development across the United States.[12] During the early decades of the twentieth century, a new breed of subdi-

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Termination, 1990 WIS. L. REV. 513; Robert G. Natelson, *Condominiums, Reform, and the Unit Ownership Act*, 58 MONT. L. REV. 495 (1997); Robert H. Nelson, *Privatizing the Neighborhood: A Proposal to Replace Zoning with Private Collective Property Rights to Existing Neighborhoods*, 7 GEO. MASON L. REV. 827 (1999); Glen O. Robinson, *Communities*, 83 VA. L. REV. 269 (1997); James L. Winokur, *The Mixed Blessings of Promissory Servitudes: Toward Optimizing Economic Utility, Individual Liberty, and Personal Identity*, 1989 WIS. L. REV. 1.

[10] *See* CLIFFORD J. TREESE, COMMUNITY ASS'N INST., COMMUNITY ASS'N FACTBOOK 19 (Frank H. Spink ed., 1999); *see also* UNITED STATES ADVISORY COMM'N ON INTERGOVERNMENTAL RELATIONS, RESIDENTIAL COMMUNITY ASS'N: PRIVATE GOVERNMENTS IN THE INTERGOVERNMENTAL SYSTEM? 1, 3 (1989) (estimating that 12%-15% of the population live in such communities).

[11] *See infra* Part I.B.

[12] *See* EVAN MCKENZIE, PRIVATOPIA: HOMEOWNERS ASSOCIATIONS AND THE RISE OF RESIDENTIAL PRIVATE GOVERNMENT 36 (1994).

viders, sometimes known as "community builders," began developing large tracts of land into complete residential communities.[13] These communities were typically developed in stages, with the subdivider dividing the land into lots and installing utilities, streets, and other communal facilities section by section.[14] These lots were then marketed to individual buyers for the construction of homes.

The first phase of community building, which reached maturity in the 1920s, created residential subdivisions for expensive homes to be occupied by the wealthy.[15] By the time of the Great Depression, luxury subdivisions had been built across the country.[16] These large-scale developers sought to produce high-quality developments with beautifully designed environments and fine homes harmonious with each other and their surroundings. The community builders believed that maintaining high standards would not only achieve their vision of beauty but would also bring far more profits than the practice of speculative lot selling.[17] The community builders represented a minority of land developers. Their belief in planning, engagement in large-scale projects, and commitment to high-quality design and environments distinguished them from typical subdividers, sometimes known as "land butchers," whose business practices were a source of scandal.[18]

Inspiration for the community builders has been traced to the late nineteenth-century Garden City movement in England, led by Ebenezer Howard.[19] Howard's work inspired a new interest in town planning and development of large-scale model communities. In England, government played a key role in building some Garden City type communities. In the United States, in contrast, the private sector developed the large land projects.[20]

A system of private restrictive covenants was the key vehicle used by the American community builders to achieve their vision of beauty and value. Early twentieth-century developers imposed restrictive covenants on the lots containing building and use restrictions, architectural and design controls, housing standards, lot size rules, landscaping guidelines, and other standards designed to accomplish their goals.[21] The covenants were the essential ingredient of

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[13] *See* MARC A. WEISS, THE RISE OF THE COMMUNITY BUILDERS 45 (1987).

[14] *See id.*

[15] *See id.* at 2. In the period after World War II, developers shifted to creating developments for more modest-income purchasers. *See id.*

[16] *See* MCKENZIE, *supra* note 12, at 43.

[17] *See* WEISS, *supra* note 13, at 46.

[18] *See id.* at 5.

[19] *See* MCKENZIE, *supra* note 12, at 2-3.

[20] *See id.* at 7-8.

[21] *See* WEISS, *supra* note 13, at 45.

these developments, and the developers and their trade associations promoted their use and benefits.[22]

B. The Van Sweringen Project

The Van Sweringen brothers—Oris Paxton and Mantis James—began acquiring land to the east of Cleveland in 1905; eventually, their holdings grew to over 4,000 acres.[23] Having previously failed in a modest-income development in another Cleveland suburb, the Van Sweringens sought to develop their new project as a high-quality residential community for upper-class and upper-middle-class families.[24] Because of geographical conditions and past under-building, demand for high-end housing was high.[25]

To accomplish their vision, the Van Sweringens engaged the F.A. Pease Engineering Company to lay out the first sections of the community in what is now part of the City of Shaker Heights. This area was the westernmost portion of the Van Sweringen holdings and is located some eight miles east of Cleveland on heights overlooking Cleveland.[26] Pease did not follow the typical grid pattern of streets, but instead laid out broad avenues, intersected by elliptical streets featuring grassy medians and following the natural topography.[27] Existing lakes were preserved and others were created. The Van Sweringens bought a railroad line and extended it into the Shaker portion of their development by 1920, providing fast commuter service to downtown Cleveland and making the new community even more desirable.[28]

The Van Sweringen brothers created the Van Sweringen Company in 1913 as the entity to subdivide and market the properties.[29] The company made extensive use of restrictive covenants to achieve the goal of developing a high-quality, aesthetically pleasing, harmonious residential neighborhood. Although these covenants varied somewhat in the different stages of the development and as the project expanded east into more modern sections of Shaker Heights and into what are now the cities of Beachwood and Pepper Pike, they typically contained building and use restrictions, lot requirements,

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[22] *See* MCKENZIE, *supra* note 12, at 36.

[23] *See* CITY OF SHAKER HEIGHTS LANDMARK COMM'N, THE VAN SWERINGEN INFLUENCE: SHAKER HEIGHTS 8 (Claudia R. Boatright ed., 4th ed. 1995); IAN S. HABERMAN, THE VAN SWERINGENS OF CLEVELAND 9, 12 (1979).

[24] *See* JOHN STILGOE, BORDERLAND: ORIGINS OF THE AMERICAN SUBURB, 1820-1939, at 240-41 (1988).

[25] *See* HABERMAN, *supra* note 23, at 10; STILGOE, *supra* note 24, at 240.

[26] *See* STILGOE, *supra* note 24, at 239.

[27] *See* CITY OF SHAKER HEIGHTS LANDMARK COMM'N, *supra* note 23, at 9; HABERMAN, *supra* note 23, at 11.

[28] *See* CITY OF SHAKER HEIGHTS LANDMARK COMM'N, *supra* note 23, at 8.

[29] *See* HABERMAN, *supra* note 23, at 12.

architectural and aesthetic controls, and anti-nuisance provisions.[30] Marketing materials touted the "good life" in the new community:

> To where, beyond the city, there is peace. Six hundred feet up in the sunshine, with trees and gardens, winding roadways and protected homes. Shaker Village is miles away from the city's grime and turmoil but only minutes away in actual time.[31]

Beneath this idyllic vision lay another story—the racial and religious discrimination permitted by the covenants[32] and the class divisions arising from such exclusive communities and their high-cost building standards.[33]

Sales of lots began in 1916.[34] Lot sales and housing construction boomed—between 1919 and 1929, an average of 300 homes were built annually and nearly all homes "cost what many Americans considered a large sum indeed."[35] Later in the 1920s, the Van Sweringens began developing the far eastern portions of their land. But by the early 1930s, after they suffered major reverses in their railroad business, the Van Sweringens lost control of their unsold land.[36] Today, the land subjected to restrictive covenants by the Van Sweringens lies in the cities of Shaker Heights, Beachwood, and Pepper Pike.

II. VALIDATION OF SUBDIVISION COVENANTS

Common law judges expressed ambivalence or even antipathy for real covenants, raising questions as to the validity of large-scale subdivision schemes and community association arrangements constructed on the foundation of covenants law. As the twentieth century began, however, there was an important shift in the way some courts viewed servitudes and in the language they used to describe and conceptualize them. This change was essential for the acceptance and validation of subdivisions. *Dixon v. Van Sweringen Co.*,[37] decided by the Ohio Supreme Court in 1929 and upholding the Van Sweringen covenants, was, and remains, a leading case in announcing this new

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[30] These covenants, and the legal issues surrounding them, are examined below. *See infra* Parts IV, IV.A-B.

[31] VAN SWERINGEN CO., PEACEFUL SHAKER VILLAGE (1927), *quoted in* CITY OF SHAKER HEIGHTS, SHAKER VILLAGE COLORS 3 (1983).

[32] *See infra* Part IV.C.

[33] *See* MARGARET MARSH, SUBURBAN LIVES 170 (1990); MCKENZIE, *supra* note 12, at 77.

[34] *See* HABERMAN, *supra* note 23, at 13.

[35] STILGOE, *supra* note 24, at 247.

[36] *See id.* at 250.

[37] 166 N.E. 887, 892 (Ohio 1929) (holding that restrictive covenants are valid so long as such covenants are not contrary to public policy).

judicial attitude. *Dixon* continues to be highly influential in Ohio and the starting point for judicial inquiry in subdivision cases three-quarters of a century later.

A. Traditional Bias Against Restrictions

Historically, American courts were quite suspicious of real covenants and spoke of them with disfavor.[38] Ohio courts were no different, and judicial opinions in the early twentieth century often contained statements to the effect that "[c]ovenants restricting the use of real property are strictly construed, and doubts as to the meaning thereof are resolved in favor of the free use of the property for lawful purposes."[39] This was "based upon the old principle that restrictions are not favored in the law."[40] This "anti-restrictions policy" was more than an empty mantra (for some courts, at least), and formed the basis for rejecting enforcement of restrictive covenants.[41] Moreover, the anti-restrictions policy continues to be resilient, with modern courts in Ohio often declaring a policy disfavoring restrictions on land as a preamble to deciding the real covenant or subdivision case at hand.[42]

B. Dixon v. Van Sweringen Co.

Dixon v. Van Sweringen Co.[43] stands in important contrast to this anti-restrictions strain in American and Ohio jurisprudence. *Dixon* is an important milestone in de-demonizing real covenants and in recognizing the value and importance of subdivision arrangements. Just as *Euclid* in 1926 validated public land use controls, *Dixon* in 1929 legitimized the newly emerging regime of private land use arrangements.

Dixon was an action to quiet title brought by Janie A. Dixon, a purchaser of a lot in Shaker Heights subject to fourteen restrictions substantially similar to those imposed on the other lots in the 4,000 acre tract that the defendant Van Sweringen Company was develop-

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[38] *See, e.g.*, Hays v. St. Paul M. E. Church, 63 N.E. 1040 (Ill. 1902); Whitmarsh v. Richmond, 20 A.2d 161 (Md. 1941); Kitching v. Brown, 73 N.E. 241 (N.Y. 1905); Ragland v. Overton, 44 S.W.2d 768 (Tex. App. 1931).

[39] Thompson v. Ketter, 5 Ohio Law Abs. 710 (Ohio Ct. App. 1926); *accord* Hunt v. Held, 107 N.E. 765, 766 (Ohio 1914) (strictly construing "only" in a deed); Olmsted v. Schrembs, 165 N.E. 51, 52 (Ohio Ct. App. 1928) (strictly interpreting "adjoining" in a conveyance of property).

[40] Hitz v. Flower, 135 N.E. 450, 453 (Ohio 1922).

[41] *See* Frederick v. Hay, 135 N.E. 535, 536-37 (Ohio 1922) (refusing to enforce a covenant because doubt should be resolved in favor of unrestricted land).

[42] *See* University Hills, Inc. v. Patton, 427 F.2d 1094, 1099 (6th Cir. 1970) ("In Ohio, as in most states, there is a policy favoring the free and unrestricted use of land."); Driscoll v. Austintown Ass'n, 328 N.E.2d 395, 404 (Ohio 1975) ("Our legal system does not favor restrictions on the use of property."); Schurenberg v. Butler County Bd. of Elections, 605 N.E.2d 1330, 1332 (Ohio Ct. App. 1992) ("This court is well aware of the law's general aversion toward efforts to restrict land use.").

[43] 166 N.E. 887 (Ohio 1929).

ing. In addition to the residential restrictions on the subdivision, Dixon challenged three particular provisions reserving to the Company the right to give approvals regarding street and utilities and the right to change or cancel the restrictions under certain stated circumstances. The Supreme Court of Ohio upheld the restrictions against these challenges. The opinion is noteworthy as it, without reference to the anti-restrictions bias of other courts, provided a theoretical and policy basis for upholding real covenants in general and subdivision covenants in particular.

1. Real Covenants as Contracts

Unlike other courts, the *Dixon* court treated real covenants like other contracts deserving of enforcement under the concept of freedom of contract:

> One of the most formal contracts known to the law is a deed for land. When the same is based upon a fair and adequate consideration, by persons competent to contract, under no duress, not overreached by fraud, and containing no provisions which affect adversely the interests of the public, the sustaining of such a contract makes an appeal to public policy quite as strong as any of the subjects within its protection.[44]

Yet real covenants differ from traditional bilateral contracts in that there is no face-to-face bargaining between the promisee trying to enforce the contract and the promisor against whom enforcement is sought. In *Dixon*, the lot in question was not conveyed directly by the Company to Dixon; rather, the lot was originally conveyed under restriction to an initial purchaser, *A*, who then conveyed the land to *B* who then conveyed to *C* who then conveyed to Dixon. Unlike with a traditional bilateral contract, Dixon never expressly undertook any obligation and never had dealings with the Company (the party claiming the benefit of the promise).

The *Dixon* court, however, leaped this theoretical gap. It found the contract theory applicable because, in its view, the acceptance by Dixon of the deed to the lot with notice of the scheme of restrictions made her "bound thereby."[45] Covenants would thus be treated as contracts and deserving of enforcement as a general matter.

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[44] *Id.* at 889.
[45] *Id.* at 888.

2. Pro-Subdivision Policy

The *Dixon* court went beyond upholding covenants as a variety of general contracts. Rather, the court indicated that it understood the particular benefits of reciprocal subdivision arrangements and those particular consensual ties: "[W]e see no reason for denying the right of these parties to contract between themselves, the result of such contracts up to date being . . . to create a highly exclusive and valuable residential district."[46]

C. Policies Supporting Covenant Enforcement

Various reasons support upholding real covenants and subdivision arrangements despite the traditional anti-restrictions policy. A number of these are reflected in the *Dixon* opinion.

1. Efficiency

Real covenants help to achieve the efficient allocation of land resources. By using real covenants, one can acquire a nonpossessory interest in the land of another but without having to buy more than she wants. For *A* to prevent a neighbor *B* from developing his land for industrial or commercial uses, *A* can purchase from *B* a promise to restrict *B*'s land to residential uses. If covenants were not permitted by the law, *A* would have to purchase *B*'s entire fee interest. This would be inefficient as *A* would be spending to acquire more land interest than she needs or will use. Moreover, by allowing *B* to sell a covenant to *A*, *B* can cash out some of the value of his land while still retaining productive use of the property since *B* can still use it for residential purposes.

In subdivision arrangements such as the Van Sweringen development, there are reciprocal burdens and benefits among the properties. Each property is made less valuable by the restrictions, such as a ban on non-residential uses, but, at the same time, each property is made more desirable by the creation of a quiet residential area because of imposition of the same restrictions on the other lots. In more modern subdivisions, even greater efficiency is achieved where the costs of common facilities (such as infrastructure or recreational amenities) are spread among the group of owners. The Van Sweringen development specifically contemplated efficiency gains from reciprocal restrictions. *Shaker Village Standards*, a pamphlet published in 1925 and 1928 describing the restrictions for new homeowners, stated:

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[46] *Id.* at 892.

> The ugly residence injures surrounding property values, particularly with relation to possibilities of re-sale. This represents a damage for which there is no insurance coverage.
>
> Against such occurrences the only safeguard is in creating definite standards for home construction. And this is practical only where land is extensively held under single control for a long period of time.
>
> Shaker Village is the largest area for high-class residences under single control. Standards and protective restrictions have been applied there from the outset. Over 2600 homes have been built there. They cover a construction span of about twelve years.[47]

Although *Dixon* arose in the early stage of American major subdivision development,[48] the court indicated that it understood the efficiency gains of real covenants and subdivision arrangements. It stated that the scheme of restrictions for the tract was "designed to make it highly attractive for residential purposes"[49] and that "these restrictions are among the very elements that may contribute to the value of the lots affected thereby."[50]

2. *Freedom of Choice*

Moreover, the decision to purchase in a residential subdivision with a scheme of reciprocal benefits and burdens is a voluntary choice that should be respected by the law unless there is a compelling reason not to do so. This is especially powerful since the family home has played a key role in the American mind and experience.[51]

The purchasers in the Van Sweringen development chose to buy lots in a development "designed to make it more attractive for residential purposes by reason of certain restrictions to be imposed on each of the separate lots sold."[52] Indeed promotional materials for the Van Sweringen development appealed to the purchaser's wish to live in an exclusive, idyllic community:

> ...On the high rolling land six hundred feet above the lake with great century-old trees, murmuring streams, and long vistas of beauty everywhere, they offer ideal sites for

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[47] SHAKER VILLAGE STANDARDS 5 (2d ed. 1928).

[48] The first phase of large-scale community development in America only reached maturity in the 1920s; later phases followed. *See* WEISS, *supra* note 13, at 2.

[49] *Dixon*, 166 N.E. at 889.

[50] *Id.*

[51] *See* Crowley v. Knapp, 288 N.W.2d 815, 828 (Wis. 1980) (Coffey, J., dissenting) (arguing that people who have purchased "a home, 'The American Dream,'" are entitled to enforcement of covenants upon which they relied when they bought the house).

[52] *Dixon*, 166 N.E. at 888.

> delightful country estates removed from town and yet within easy distance of it...At the end of the rainbow lies Shaker Village.[53]

John Stilgoe asserts that the Van Sweringens promoted their development as "cementing family ties and elevating the spirit of parents and children," and thus they "formulated a sort of secular religion of the home."[54]

The *Dixon* court indicated a willingness to respect the buyer's choice of how to achieve fulfillment:

> Doubtless all these terms, conditions, reservations, etc., were fully considered by each purchaser at the time of acquiring his lot, and, unless he was willing to transfer such personal rights as a part of what he was paying for and receiving, he would not have purchased. If he saw fit to make such a bargain, we cannot say it was against public policy.[55]

This view reflected the growing belief by lot owners in early twentieth century subdivisions across the country that the covenant schemes increased their property values and satisfaction.[56]

3. Moral Obligation

Real covenants also deserve enforcement for moral reasons. It would be unfair for *A* to purchase property at a reduced price because the land is subject to a covenant benefiting *B* and then resell it free and clear of the covenant. *B* would lose the value of a bargained and paid-for right in *A*'s land and *A* would be receiving a windfall by selling the land at its full, unrestricted price.[57] *Dixon* reflected this moral concern:

> "The purchaser who bought with the intent or purpose of disregarding the restrictions and devoting the property purchased by him to any purpose that might suit his whim or his business needs, regardless of the restrictions written in his deed, has no standing in a court of equity."
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> . . . .

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[53] VAN SWERINGEN CO., *supra* note 31, *quoted in* CITY OF SHAKER HEIGHTS LANDMARK COMM'N, *supra* note 23, at 12 (spacing in original).

[54] STILGOE, *supra* note 24, at 241.

[55] *Dixon*, 166 N.E. at 890.

[56] *See* WEISS, *supra* note 13, at 69.

[57] *See* Tulk v. Moxhay, 41 Eng. Rep. 1143, 1144 (Ch. 1848) ("[N]othing could be more inequitable than that the original purchaser should be able to sell the property the next day for a greater price.").

> . . . . [I]s it the apparent desire of a lot owner to release the property in question from strictly residential purposes, and thus throw it open to such value as it might have if unrestricted[?][58]

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The endorsement of real covenants and subdivisions by the *Dixon* court served as a break with the anti-restrictions sentiment of earlier Ohio courts.[59] Moreover, it ushered in a new attitude that has been subsequently relied upon by Ohio courts.[60]

III. MODIFICATION AND FLEXIBILITY: LESSONS FROM THE VAN SWERINGEN COVENANTS

As indicated above, courts in the era before *Dixon* typically articulated a suspicion of real covenants.[61] These courts, however, rarely if ever explained their hesitation. Thus, what emerges is an empty mantra, unfortunately echoed by a number of modern courts,[62] decrying restrictive schemes.

There are some concerns, however, with real covenants that may underlie what often appear to be empty anti-restrictions declarations of the courts. This section will explore these issues. Moreover, it will show that the drafters of the Van Sweringen covenants and the judicial opinions applying them took some important steps to address the underlying concerns with real covenants and subdivision schemes.

A. Policy Considerations

1. Marketability

Perhaps the courts' negative attitude towards real covenants lies in concerns over marketability of land. Some commentators have

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[58] *Dixon*, 166 N.E. at 889 (quoting Wallace v. Clifton Land Co., 110 N.E. 940, 942 (Ohio 1915)).

[59] *See supra* notes 38-40.

[60] *See* Ohio Turnpike Comm'n v. Goodnight Inn, Inc., 590 N.E.2d 1270, 1272 (Ohio Ct. App. 1990) ("[I]f there is a substantial value in the restrictive covenant which is sought to be protected, a court will enforce the covenant.") (citing *Dixon*, 166 N.E. at 887); Providence Manor Homeowners Ass'n v. Conner, 694 N.E.2d 176, 177 (Ohio Ct. App. 1997) ("Restrictive covenants containing a general building scheme or plan for development are enforceable if the covenants are not contrary to public policy.") (citing *Dixon*, 166 N.E. at 887); Glassburn v. Fair, 263 N.E.2d 570, 571 (Ohio Ct. App. 1970) ("Where an owner of land has adopted a general building plan for the development of a particular tract which is designed to make it more attractive for residential purposes by reason of certain restrictive covenants, such covenants are binding and enforceable.") (citing *Dixon*, 166 N.E. at 887).

[61] *See supra* notes 38-40.

[62] *See supra* note 42.

suggested that real covenants interfere with marketability.[63] Marketability should not be a real problem, though—as long as a potential purchaser has notice of the covenant that limits the value of the property, she can reduce the purchase price accordingly.[64] If, for example, a prospective purchaser were considering keeping chickens on a Van Sweringen lot, he could still go ahead with the purchase but reduce the price since the utility of the land will be less because of the Van Sweringen restriction barring chickens and livestock.[65] The lot is not rendered unmarketable because of the restriction.

In theory, moreover, a buyer seeking to purchase a parcel free and clear of an existing covenant can buy a release of the covenant from the owner of the benefited parcel. Purchasing a release may be difficult, however, in a subdivision context where one holdout can prevent the release of a covenant consented to by all of the other owners. As will be described below,[66] the Van Sweringen documents and the judicial decisions interpreting them were appropriately sensitive to this holdout problem and its effect on marketability. These covenants and cases serve as models for future developers and courts on this issue.

2. *Dead Hand Control*

Another concern underlying the anti-restrictions policy may reflect concern over dead hand control. Covenants bind the land not only as to the original purchaser but also as to all future owners, perhaps in perpetuity. This potential inflexibility creates at least two negative effects.

First, the presence of prior covenants may prevent the current landowner from altering the uses of her property to meet current societal demands as expressed in the marketplace. This may hamper the efficient use of land, always a concern since land is a limited resource.[67] The presence of covenants may prevent a beneficial current

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[63] *See* French, *Modern Law of Servitudes*, *supra* note 6, at 1282-83 (discussing many of the obstacles bona fide purchasers face in discovering encumbrances that might affect title); Reichman, *supra* note 6, at 1189-90 (explaining that English courts disliked new servitudes as potentially significant encumbrances on land).

[64] Ohio courts have, appropriately, required notice to bind a purchaser to a subdivision covenant. *See, e.g.*, Emrick v. Multicon Builders, Inc., 566 N.E.2d 1189, 1192 (Ohio 1991) (record or actual notice); Schurenberg v. Butler County Bd. of Elections, 605 N.E.2d 1330, 1333 (Ohio Ct. App. 1992) (same); Berry v. Paisley, 583 N.E.2d 430, 433 (Ohio Ct. App. 1990) (same); Abood v. Weingarten, 135 N.E.2d 899, 902 (Ohio Ct. App. 1956) (Van Sweringen covenant; record and actual notice); Copelin v. Morris, 101 N.E.2d 18, 28 (Ohio C.P. Cuyahoga County 1951) (same).

[65] *See infra* note 94.

[66] *See infra* Parts II.C.1-2.

[67] *See In re* Turners Crossroad Dev. Co., 277 N.W.2d 364, 368 (Minn. 1979) ("This Court has serious reservations about the wisdom of allowing provisions contained in a 1949 real estate transaction . . . to prevent the development of a substantial piece of real estate in 1978.")

use of the property. As will be developed below, the Van Sweringen covenants, with great foresight, included provisions to address this issue.

Second, enforcing old covenants imposes the vision of the past on current owners. This may offend current values and may frustrate the aspirations and personal autonomy of the present owners. Unfortunately, the Van Sweringen covenants contained such provisions that had to be addressed in future years.

B. Duration of Van Sweringen Covenants

Potential marketability and dead hand control problems of covenants are mitigated when the covenants are of limited duration. In the absence of an express limitation on duration in the document, however, the courts have generally been unwilling to impose a limited term and have held the covenant to be perpetual.[68] It is noteworthy that the various stages of the Van Sweringen development restrictions expressly provided for a limited duration,[69] a feature that many other developments lacked.

C. Modification and Release Provision

The Van Sweringens clearly contemplated a long life for their covenant scheme. Promotional literature presented this as a selling point, noting that the regulations "safeguard home communities [so] that you can select your neighborhood now and *safely plan for generations*."[70] At the same time, the developers included a provision allowing for modification or cancellation of the restrictions, injecting needed flexibility and alleviating marketability and dead hand control issues. While there is some variation in this provision, a typical clause states:

> The Van Sweringen Company reserves the right to waive, change or cancel any and all of the restrictions contained in this instrument or in any other instrument given by the Van Sweringen Company in respect to lots or parcels within the Van Sweringen Company's subdivisions, or elsewhere if, in its judgment, the development or lack of development war-

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(internal quotation marks and citation omitted); RESTATEMENT OF PROPERTY § 539 cmt. f (1944) (a factor in deciding to enforce a covenant is that "land should be developed to its normal capacity").

[68] *See* KORNGOLD, *supra* note 6, § 11.01.

[69] *See* Berger v. Van Sweringen Co., 216 N.E.2d 54, 57 (Ohio 1966) (noting that the covenant runs until 2026, after which it can be terminated by consent of owners); Dixon v. Van Sweringen Co., 166 N.E. 887, 888 (Ohio 1929) (noting expiration in 1999); Copelin v. Morris, 101 N.E.2d 18, 22-23 (Ohio C.P. Cuyahoga County 1951) (same).

[70] HABERMAN, *supra* note 23, at 13 (alteration in original) (emphasis added) (internal quotation marks and citation omitted).

> rants the same or if, in its judgment, the ends or purposes of said subdivisions would be better served.[71]

This provision is noteworthy in several respects. First, in the absence of such a clause, a subdivision covenant can only be modified or amended upon the unanimous consent of all owners.[72] Such a situation exposes the subdivision owners to the problem of a single holdout whose intransigence can prevent an alteration of the covenant scheme that would perhaps increase the utility of the land to the other owners or make the land in the subdivision more responsive to current communal demands. Market mechanisms alone may be insufficient in these cases—sometimes a holdout is simply eccentric and will refuse generous buyout terms offered by the other owners. The law protects the holdout's right to resist,[73] but that does not mean that the end result is good in terms of marketability and dead hand control concerns.

1. Who Can Modify or Release?

a. The Developer

Although the Van Sweringens injected desirable flexibility into the covenant scheme with the modification and waiver provision, the choice of the Van Sweringen Company as the entity with the power to make such decisions raises some concerns. Empowering the Van Sweringen Company in such matters gave the company an opportunity to maximize its market position. It could sell restricted lots and receive a premium from buyers seeking to live in a controlled residential community. At the same time, if the development concept failed to attract customers—and remember, this was the early period of large scale subdivision developments and one could not foretell the success that was to come—the developers could release the covenants as to the remaining lots and sell them to non-residential users.[74]

However, the homeowners could have interests that strongly diverge from the developer and they could be the losers with amendment and modification power being retained by the developer. For example, the Company could theoretically market the bulk of the

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[71] *Berger*, 216 N.E.2d at 58 (emphasis omitted) (citation omitted); *see also Dixon*, 166 N.E. at 888; Risman v. Van Sweringen Co., 179 N.E.2d 117, 120-21 (Ohio Ct. App. 1962); Abood v. Weingarten, 135 N.E.2d 899, 901-02 (Ohio Ct. App. 1956).

[72] *See, e.g.*, White v. Lewis, 487 S.W.2d 615, 616 (Ark. 1972); Hanchett v. East Sunnyside Civic League, 696 S.W.2d 613, 615 (Tex. Ct. App. 1985); Hening v. Maynard, 313 S.E.2d 379, 382 (Va. 1984).

[73] *See* Rick v. West, 228 N.Y.S.2d 195, 200 (Sup. Ct. 1962).

[74] Responding to similar concerns, modern developers often subdivide, restrict, and market their projects in stages to avoid being left with a large, undersold subdivision that has all lots locked in to residential uses. *See* KORNGOLD, *supra* note 6, § 9.09.

residential lots, then release the covenants on the remaining land and sell to commercial users. Commercial entities would pay a premium price to the Company to be one of the few businesses surrounded by many residential customers (a quasi-monopoly position). Thus the Company may have an incentive to release or modify the covenants even though the homeowners would object to introduction of commercial uses in their residential community.[75] During the early stages of marketing the subdivision, the Company might be unlikely to so frustrate owner expectations since that would hurt its attempts to sell lots to other customers; but in the latter stages of the development, that market constraint would be reduced.

b. The Homeowners

While retention of consent power by the developer will best serve the developer's needs, the better alternative to address the long-term marketability and dead hand control problems of real covenants is to provide for modification and amendment power by less-than-unanimous consent of the homeowners themselves. This is often done in modern subdivision developments, with modification allowed perhaps by a majority, two-thirds, or three-quarters of the owners.[76] This permits the interested homeowners, through the exercise of a democratic process, to determine the future use of the land and resolve these fundamentally local land use issues. The power of hold-outs can be minimized, flexibility can be achieved to meet new conditions, and needlessly burdensome ties on land can be modified.

Moreover, these subdivisions often create an association of the homeowners with a democratically elected governing board that is empowered to administer and enforce the covenants.[77] These bodies may exercise discretionary powers under the covenants, such as regulation of aesthetic and architecture features of the homes.[78] This increases flexibility since original documents cannot foresee all issues that will arise. Such delegation also benefits the subdivision by providing for ongoing supervision and enforcement of the covenant scheme as determined by the democratic process.

To be sure, there is a potential for abuse in modern subdivision schemes with less-than-unanimous modification provisions and pri-

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[75] *See, e.g.*, Shaker Coventry Corp. v. Shaker Heights Bd. of Zoning Appeals, 180 N.E.2d 27 (Ohio Ct. App. 1962) (referring to 1947 waiver by Van Sweringen Company of restriction barring apartment house).

[76] KORNGOLD, *supra* note 6, § 11.03.

[77] *See* Korngold, *supra* note 9, at 513; *see also* Gosnay v. Big Sky Owners Ass'n, 666 P.2d 1247 (Mont. 1983) (describing a homeowners' association); Uriel Reichman, *Residential Private Governments: An Introductory Survey*, 43 U. CHI. L. REV. 253 (1976) (describing how homeowners' associations resemble local government).

[78] *See, e.g.*, Landen Farm Community Servs. Ass'n v. Schube, 604 N.E.2d 235 (Ohio Ct. App. 1992) (allowing an association to enforce basketball hoop regulations).

vate residential governments. The deciding group of homeowners could chose to place the burden of a modification on one particular homeowner. Thus, while all of the other homeowners would benefit from a convenience store in the subdivision, the lot owner adjoining the store would be harmed by the noise and traffic, which would translate into a loss of property value. Some courts have appropriately recognized the potential danger of the tyranny of majority in less-than-unanimous consent provisions and have required that changes pursuant to such clauses must apply uniformly to all properties.[79]

c. Successor to the Developer

As originally drafted and conceived, the reservation of power to modify and amend in the Van Sweringen Company did not support democratic self-determination by the owners themselves but rather could be asserted to serve the more narrow interests of the Company. However, the power to waive or modify the covenants passed from the private Van Sweringen Company and can currently be exercised upon a majority vote of the mayors of Shaker Heights, Beachwood, and Pepper Pike (the three cities in which the original Van Sweringen subdivisions are located).[80]

Placing the power to agree to modifications and waivers in the hands of three elected public officials may provide some useful lessons for homeowners and private governments granted similar powers. There is a risk of unfairness in the process of private governments, where decision-makers are often inexperienced and not subject to express rules or norms. Thus, courts have had to impose requirements of notice and the opportunity to be heard as well as ensure that governing boards follow existing written procedures and prevent bias in decision-making.[81]

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[79] *See, e.g.*, Jaskiewicz v. Walton, 549 A.2d 774 (Md. Ct. Spec. App. 1988) (voiding amendment releasing only one lot); Ridge Park Home Owners v. Pena, 544 P.2d 278 (N.M. 1975) (same).

[80] There is some ambiguity as to the precise manner in which this mayoral power is to be exercised. One version describes the 1959 organization of the Van Sweringen Foundation, a not-for-profit corporation, to hold substantially all the stock of the Van Sweringen Company. The Foundation's purpose was to operate for the benefit of the three cities. The mayors of the three cities elect the directors of the Company, and the directors pass on modification determinations. The mayors thus control decisions as to modification. *See* Berger v. Van Sweringen Co., 216 N.E.2d 54 (Ohio 1966); Rothchild v. Central Motors Corp., No. 63743, 1993 WL 398553 (Ohio Ct. App. Oct. 7, 1993); *see also* Risman v. Van Sweringen Co., 179 N.E.2d 117 (Ohio Ct. App. 1962). However, it appears that in some cases the three mayors directly execute waiver documents, without use of the Foundation entity. *See, e.g.*, Cancellation of Restrictions, recorded in Cuyahoga County, vol. 93-08859, at 30 (July 22, 1993) (signators for the Van Sweringen Company are the three mayors, who are designated "successor directors" of the Company).

[81] *See* Korngold, *supra* note 9, at 528-529.

In contrast, publicly elected officials are more likely to be experienced in decision-making. Their actions and procedures are circumscribed by an extensive constitutional, statutory, and common-law framework. And the citizenry can vote elected officials out of office when the community loses confidence in their decisions.

2. Limitations on Exercise of Modification Power

Cases involving the Van Sweringen covenants teach an important lesson—even when an entity has legitimate power to modify or release covenants, it cannot exercise that power in a way that destroys the fundamental underpinnings of the subdivision arrangement. In *Berger v. Van Sweringen Co.*,[82] the directors appointed by the three mayors voted to waive the residential restrictions on an eighty-acre tract of the Van Sweringen land to permit the owners to construct a shopping center. The court held that the release power was not unlimited but

> was to provide a means whereby one who bought property in good faith could escape the burden of the restrictions if it was found to be impossible to continue the development as planned, and still provide protection for the property of surrounding owners who had bought on the strength of the restrictions.[83]

The court's decision can be justified on several grounds. First, the intent of the parties is essential in deciding whether a covenant scheme is created and in deciding the meaning and extent of covenants.[84] The *Berger* court apparently felt that the intent of the parties did not include such a fundamental change in the nature of the community and that the proposed change would destroy the goal of a uniform residential area.[85] Other courts have reached similar results.[86]

Second, the release proposed in *Berger* would have unduly burdened some owners (the neighboring residential lots) to the benefit of the defendant-developers (who would have the benefit of valuable commercial land) and non-neighboring residential lots (who would have commercial services nearby, but not in their backyards). As de-

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[82] 216 N.E.2d 54, 56 (Ohio 1966).

[83] *Id.* at 59.

[84] *See* KORNGOLD, *supra* note 6, § 10.04.

[85] *See Berger*, 216 N.E. 2d at 59-60. *Cf.* Montoya v. Barreras, 473 P.2d 363, 365 (N.M. 1970) (considering both the intent and object of the parties in making the restriction).

[86] *See, e.g.*, Riley v. Boyle, 434 P. 2d 525 (Ariz. Ct. App. 1967) (holding that restrictions must be applied to all lots in order to maintain uniformity); Bay Island Towers, Inc. v. Bay Island–Siesta Ass'n, 316 So. 2d 574 (Fla. Dist. Ct. App. 1975) (holding that a high-rise apartment building would be out of place in a neighborhood of garden apartments). *Cf.* Levitt Homes, Inc. v. Old Farm Homeowner's Ass'n, 444 N.E.2d 194 (Ill. Ct. App. 1982) (holding that an amendment allowing smaller houses was consistent with the general scheme).

scribed above, courts have justifiably rejected such results.[87] In *Dixon*, the court upheld the delegation of powers to consent to modifications to the Company but warned that "judgment would have to be exercised reasonably . . . and not in an arbitrary, captious manner, calculated to be obviously injurious to the rights of the lot owners."[88]

One might also understand the key provisions of the original subdivision instruments as comprising a constitutional document, setting out fundamental expectations of the owners that may not be violated. In this way, individual rights are protected against the intrusions of the majority.

IV. LIMITS ON SUBJECT MATTER OF COVENANTS

The Van Sweringen covenants raise another key issue: are there limits to the substantive provisions that may be imposed by private land use controls? Freedom of contract would argue for the enforcement of *any* consensual arrangement, with market forces serving to eliminate inefficient and foolish covenants. Anti-restriction concerns, however, would support judicial invalidation of freely negotiated covenants that create problems of dead hand control.

In other works, I have argued that while covenants should be enforced as a general matter under the principle of freedom of contract, certain covenants offending the personal autonomy of the current owner should be barred.[89] Thus, courts should enforce restrictions that regulate an owner's external behavior (as measured by objective criteria) rather than her status or private conduct.[90] Restrictions controlling harmful spillovers on other subdivision owners (e.g., excessive noise or traffic) should be enforced, while controls on personal choices and behavior within the home (e.g., servitudes limiting occupancy to a "traditional" family) should not.[91] This model would achieve the benefits of subdivision arrangements by preventing behavior destructive to the community, while protecting personal autonomy from the threat of intrusive, perpetual servitudes.

How do the Van Sweringen covenants measure up against these standards? As developed below, while most would be sustainable under my proposed rule, a few troubling provisions would require judicial or legislative responses.

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[87] *See supra* note 79 and accompanying text.

[88] Dixon v. Van Sweingen Co., 166 N.E. 887, 891 (Ohio 1929).

[89] *See* KORNGOLD, *supra* note 6, § 8.02; Gerald Korngold, *For Unifying Servitudes and Defeasible Fees: Property Law's Functional Equivalents*, 66 TEX. L. REV. 533 (1988); Gerald Korngold, *Privately Held Conservation Servitudes: A Policy Analysis in the Context of in Gross Real Covenants and Easements*, 63 TEX. L. REV. 433 (1984); see also *infra* notes 90-91 for additional articles.

[90] *See* Korngold, *supra* note 9, at 526.

[91] *See* Gerald Korngold, *Single Family Use Covenants: For Achieving a Balance Between Traditional Family Life and Individual Autonomy*, 22 U.C. DAVIS L. REV. 951, 967 (1989).

A. Building and Use Restrictions

A large number of the Van Sweringen covenants involve building and use restrictions. Thus, the covenants in the various stages of the Van Sweringen development provide residential-only limitations on the use of the property, setback restrictions, landscaping requirements, and limitations on additional structures.[92] Some later sections of the development also specified the location of driveways, required smoke-free fuel in heating systems,[93] and barred chickens and livestock of any kind.[94]

These types of covenants should be upheld under my suggested approach since they protect neighboring owners from intrusions (e.g., by preventing noise and disruption from commercial activity), enhance value and enjoyment of the owners by controlling the physical environment (e.g., by landscaping, structure, and livestock controls), and improve safety (e.g., by providing sight lines for traffic with setback requirements and benefit health with limitations on smoke). Courts typically enforce such restrictions.[95]

B. Architectural Controls

Architectural and aesthetic covenants and regulations were central to the conceptualization, marketing, and operation of Shaker Heights. The Van Sweringens sought to create a high-quality, harmonious development exemplifying high aesthetic values.[96] *The Shaker Village Standards*, distributed to lot purchasers, declared the virtues of good design and neighborhood consistency:

> Everyone delights in the graceful lines of a beautiful residence.
>
> The well-planned house and garden universally appeal.
>
> Good taste calls for well-designed residences that combine the things that make for comfort and convenience with the things that make for beauty.
>
> The beautiful home is proportioned to both fit site and surroundings.[97]

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[92] *See* Copelin v. Morris, 101 N.E.2d 18, 21-22 (Ohio C.P. Cuyahoga County 1951) (adjudicating a 1920 deed provision); Instrument Imposing Restrictions Upon and Reserving Certain Rights on Property Located in Pepper Pike, Cuyahoga County, Ohio, recorded in Cuyahoga County, No. 072148 (Oct. 4, 1956) [hereinafter Pepper Pike Restrictions].

[93] *See Copelin*, 101 N.E.2d at 31-32; Pepper Pike Restrictions, *supra* note 92, at 4.

[94] *See* Pepper Pike Restrictions, *supra* note 92, at 3.

[95] *See* KORNGOLD, *supra* note 6, § 10.05.

[96] *See* CITY OF SHAKER HEIGHTS LANDMARK COMM'N, *supra* note 23, at 14; STILGOE, *supra* note 24, at 241(describing early sales literature).

[97] SHAKER VILLAGE STANDARDS, *supra* note 47, at 3.

Some early phases of the development sought to achieve this aesthetic control by simply imposing a requirement that no house could be erected without prior approval of the Van Sweringen Company.[98] The *Shaker Village Standards* sets out detailed specific guidelines imposed by the Company in the approval process, covering various aspects of construction: the architect and his qualifications; the types of drawings to be submitted; site layout and setbacks; driveway, roof, and porch rules; size, height, depth, and entranceways to the house; specific materials, exterior trim, permitted paint schemes and color combinations; and other details.[99] These standards had to strike a careful balance. On one hand, they exerted tremendous control (for example, only colonial, English or French style homes were permitted),[100] with great attention to detail (for example, "In all leaded glass work, genuine lead bars should be used instead of zinc. The effect of zinc is flashy and therefore not in good taste."[101]). But while such harmony was essential, uniformity was to be avoided: "Each house should be distinct in design and detail from every other house."[102]

There are conflicting values at stake on the question of whether architectural and aesthetic regulation should be enforced. On one hand, these regulations promote subdivision arrangements and the free choice of owners to buy into such a community. They enhance property values by preventing "eyesores" and create ambience and satisfaction for the owners. The concept of freedom of contract supports the enforcement of aesthetic regulations.

On the other hand, aesthetic controls restrict the nonconforming owner's freedom of expression and aspirations for her property. While not a governmental action subject to constitutional limitations, some of the values of First Amendment freedom of expression—central to our society—may arguably be offended. Moreover, limiting architectural expression for generations into the future raises concerns about the power of the dead hand.

On balance, aesthetic regulations should be, and are, enforced.[103] They serve the fundamental goal of subdivision development, and owners voluntarily purchase with knowledge of these controls. Ohio courts have cited the validation of the Van Sweringen subdivision

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[98] *See Copelin*, 101 N.E.2d at 21.

[99] *See* SHAKER VILLAGE STANDARDS, *supra* note 47. Some later portions of the Van Sweringen development imposed covenants requiring approval before building and also including specifics as to color, roofing, and design, but with far less detail than the SHAKER VILLAGE STANDARDS. *See* Pepper Pike Restrictions, *supra* note 92, at 2.

[100] *See* CITY OF SHAKER HEIGHTS LANDMARK COMM'N, *supra* note 23, at 3.

[101] SHAKER VILLAGE STANDARDS, *supra* note 47, at 17.

[102] *Id.* at 9.

[103] *See* KORNGOLD, *supra* note 6, § 10.07.

covenants in *Dixon* in upholding aesthetic controls.[104] The Ohio courts, however, have sometimes refused to enforce provisions that do not include criteria to guide the approving body.[105] In contrast, courts in other jurisdictions recognize the difficulty in articulating architectural standards. They typically uphold such covenants as long as the standard is applied fairly and reasonably and the particular decision is consistent with other structures and the development plan.[106]

C. Racial and Religious Restrictions: Covenants that Violate Public Policy

The Van Sweringen covenants stated that the property could not be "occupied, leased, rented, conveyed, or otherwise alienated" without the written consent of the Van Sweringen Company or the majority of owners of lots within a defined area.[107] These provisions raise fundamental questions.

First, the language creates a direct restraint on alienation that would likely be voided by the courts as unreasonable.[108] Restraints on alienation are not desirable as they impede the operation of a free market in land, restrain the development and improvement of property, and restrict the freedom of movement of would-be sellers and buyers.[109]

Moreover, this covenant could be used to exclude racial and religious minorities from purchasing within the subdivision. From the turn of the century some large-scale subdividers included deed restrictions barring non-whites, particularly African-Americans and Asians, and religious minorities, particularly Jews.[110] A 1928 study

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[104] *See e.g.*, Fairfax Community Ass'n v. Boughton, 127 N.E.2d 641, 644 (Ohio C.P. Cuyahoga County 1955) (upholding a restriction that homes must meet minimum square footage requirements).

[105] *See, e.g.*, Prestwick Landowners' Ass'n v. Underhill, 429 N.E.2d 1191 (Ohio Ct. App. 1980) (declining to enforce restriction because restriction contained no written or de facto guidelines); D & N Dev., Inc. v. Schrock, No. 89AP080066, 1990 WL 41691 (Ohio Ct. App. Mar. 21, 1990) (voiding architectural approval clause without standards as against public policy).

[106] *See* KORNGOLD, *supra* note 6, § 10.07.

[107] Copelin v. Morris, 101 N.E.2d 18, 31 (Ohio C.P. Cuyahoga County 1951) (quoting the language of the restriction); Pepper Pike Restrictions, *supra* note 92, at 3. The defined area includes lots that adjoin or abut the lot in question, on both sides of the street, and that are five lots from the sidelines of the property in question. *See Copelin*, 101 N.E.2d at 31.

[108] *See* RESTATEMENT (THIRD) OF PROPERTY: SERVITUDES § 3.4 cmt. d (2000) (discussing restraints on transfer without consent); *see also* Tuckerton Beach Club v. Bender, 219 A.2d 529 (N.J. Super. Ct. App. Div. 1966) (voiding covenants requiring property owners to join property owners' associations and pay dues); Mountain Springs Ass'n v. Wilson, 196 A.2d 270 (N.J. Super. Ct. Ch. Div. 1963) (finding a restraint on alienation of property unreasonable).

[109] *See* RESTATEMENT (THIRD) OF PROPERTY: SERVITUDES § 3.4 cmt. c (discussing criteria for determining reasonableness of restraint).

[110] *See* MCKENZIE, *supra* note 12, at 58 (discussing policies of exclusion by homeowner associations); WEISS, *supra* note 13, at 45. *See also* CLIFFORD EDWARD CLARK, JR., THE AMERICAN FAMILY HOME, 1800-1960, at 231 (1984) (explaining the middle class image was

of eighty-four high-end residential subdivisions indicated that nearly one-half had racially restrictive covenants.[111] The practice of racially restrictive covenants was a twentieth-century response by developers to African-American relocation from the South to the North and Asian migration to the West.[112] These covenants were also encouraged by the Federal Housing Administration under a theory that racially restrictive covenants increased property values.[113] It was only in 1948 that such restrictive covenants were held unenforceable in *Shelley v. Kraemer*.[114]

Although the Van Sweringen developments did not contain an express racial or religious covenant, clauses requiring the developer's approval before transfer "implicitly meant racial exclusion."[115] The approval covenants were unfortunately used in Shaker Heights to exclude African-Americans and religious minorities.[116]

It took the Supreme Court and an expansive view of state action in *Shelley* to end racial and religious covenants.[117] It was regrettable that the law of servitudes has not evolved to the point of invalidating these covenants without resort to constitutional theory. Under the approach that I suggested earlier,[118] racial and religious servitudes would be unenforceable as they control the status of individuals and private conduct within the home. Racial and religious covenants are important reminders of the need to closely circumscribe covenants offending personal autonomy.

The need to address covenants offending personal autonomy as an internal matter of covenant law is especially important given its history. It appears that racial covenants spread in the American North and West as a direct response to the invalidation of governmental ra-

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reinforced with restrictive covenants); MARSH, *supra* note 33, at 169-71 (discussing racial covenants in Los Angeles).

[111] *See* MCKENZIE, *supra* note 12, at 44.

[112] *See id.* at 44.

[113] *See id.* at 58, 64. *See also* DOLORES HAYDEN, REDESIGNING THE AMERICAN DREAM 7 (1984).

[114] 334 U.S. 1 (1948).

[115] MCKENZIE, *supra* note 12, at 44 (citing the conclusion of a 1928 study).

[116] *See* HABERMAN, *supra* note 23, at 13-14; *see also* STILGOE, *supra* note 24, at 241.

A committee was formed in Shaker Heights to "prevent occupancy ... of persons who might be deemed by the residents of that neighborhood as undesirable neighbors." REPORT OF THE COMMITTEE OF THE SHAKER HEIGHTS PROTECTIVE ASSOCIATION 1 (1925). Apparently sensitive to claims of religious and racial exclusion, the Report opaquely stated: "When selections are made without prejudice, religious or otherwise, no just criticism can be made or at any rate should not be made by any one who has sufficient pride not to insist upon living in a restricted residential community in which he is not desired." *Id.* at 2.

[117] In 1965, Ohio passed a statute making it unlawful discrimination to include a restrictive covenant in a deed that limits transfer based on race and religion. *See* OHIO REV. CODE ANN. §§ 4112.01(A)(11), 4112.02(H)(9) (West 1994) (declaring it unlawful discrimination to include in a deed a restrictive covenant that limits transfer based on race or religion).

[118] *See supra* text accompanying notes 89-91.

cial zoning by the Supreme Court in 1917.[119] One would have hoped that the law of covenants would have been up to the task of preventing the privatizing of prejudice.[120]

I have asserted in earlier works that courts could limit covenants offending personal autonomy by applying the doctrine that bars enforcement of covenants violating public policy.[121] The *Restatement (Third) of Property: Servitudes*, promulgated in 2000, states that servitudes violating public policy are invalid.[122] The comment specifically indicates that attempts by servitude communities to regulate the exercise of fundamental rights are generally not valid unless the exercise brings an adverse affect on the community.[123] In voiding covenants intruding on personal autonomy, the Ohio courts could rely on the language of *Dixon*, which declared that a covenant violates public policy if it is "injurious to the public or against the public good."[124]

V. THE VAN SWERINGEN COVENANTS MEET *EUCLID*: COVENANTS AND ZONING COMPARED

The triumph of governmental zoning in *Euclid* marked the beginning of the decline of the importance of the Van Sweringen covenants as land use controls in the communities in which the properties were located. In 1925, the Village Council of Beachwood adopted a zoning ordinance implementing many of the same type of building and use restrictions provided in the Van Sweringen covenants and designating zones for particular construction.[125] Shaker Heights followed in 1926,[126] and Pepper Pike also adopted a similar ordinance.[127]

A. From Covenants to Zoning

This chain of events might be understood as part of a larger phenomenon in the United States. It has been asserted that the willing, and even eager, acceptance by purchasers of private deed restrictions

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[119] *See* MCKENZIE, *supra* note 12, at 68 (citing to Buchanan v. Warley, 245 U.S. 60 (1917)) (holding unconstitutional a city ordinance that prevented blacks from occupying homes on blocks where the greater number of houses are occupied by whites).

[120] *See* Re Drummond Wren, [1945] O.R. 778 (Ontario High Court 1945) (voiding covenant barring sale of land to "Jews or persons of objectionable nationality" as a covenant violating public policy), *quoted in* Sipes v. McGhee, 25 N.W.2d 638, 662 (Mich. 1947).

[121] *See* Korngold, *supra* note 91, at 951-952; Korngold, *supra* note 9, at 527; *see generally* KORNGOLD, *supra* note 6, § 10.02 (discussing covenants violating public policy).

[122] *See* RESTATEMENT (THIRD) OF PROPERTY: SERVITUDES § 3.1 (2000).

[123] *See id.* cmt. h.

[124] Dixon v. Van Sweringen Co., 166 N.E. 887, 889 (Ohio 1929).

[125] *See* Willott v. Village of Beachwood, 188 N.E.2d 625, 627 (Ohio Ct. App. 1963) (voiding amended ordinance that rezoned land in Beachwood, Ohio).

[126] *See id.* at 626 (discussing the Shaker Heights zoning ordinance); *see also* Shaker Coventry Corp. v. Shaker Heights Bd. of Zoning Appeals, 180 N.E.2d 27 (Ohio Ct. App. 1967) (holding a zoning ordinance unconstitutional under Ohio law).

[127] *See* Central Motors Corp. v. City of Pepper Pike, 409 N.E.2d 258 (Ohio Ct. App. 1979).

in American subdivisions paved the way to the wide adoption of public land use controls across the country.[128] Covenant schemes "legitimized the idea that private owners should surrender some of their individual property rights for the common good, including their own."[129] Moreover, deed restrictions served as the "physical and political model" for zoning ordinances.[130] Subdividers and their planners tested and refined land use planning through their work on deed restrictions, developing building and use restrictions, architectural standards, and zones for different uses.[131] Large-scale community subdividers supported public land use controls, in contrast to smaller subdividers, and shaped and controlled it.[132]

Public zoning regulations and private covenants are separate and independent restrictions on land and do not supersede each other.[133] As time passed, only zoning has survived in some areas originally covered by the Van Sweringen covenants, since some terms for the covenants have expired.[134] Moreover, zoning ordinances in these communities have developed to a more comprehensive and detailed system of land use regulation than the Van Sweringen covenants provided. This appears consistent with the pattern in other parts of the country, where large-scale subdividers sought public zoning to supplement private covenants and regulate matters not covered by the deeds.[135] These other subdividers believed that the public land planning process would sufficiently represent their interests.[136] There is at least some indication that the Village of Shaker Heights and the Van Sweringen Company acted in concert in land use decisions.[137]

B. Comparison of Zoning and Covenants

Zoning has certain advantages over private land use devices. First, zoning can provide a comprehensive solution for all of the land held by different owners within the governmental unit. Covenants, in contrast, can only be imposed by a subdivider on land that he owns;[138] thus only a smaller area can be subjected to regulation.

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[128] *See* WEISS, *supra* note 13, at 69.

[129] *Id.* at 69.

[130] *See id.* at 4.

[131] *See id.* at 69-70.

[132] *See* MCKENZIE, *supra* note 12, at 38-39.

[133] *See* KORNGOLD, *supra* note 6, § 10.03; *see also* Central Motors Corp. v. City of Pepper Pike, 409 N.E.2d 258, 280 (Ohio Ct. App. 1979) ("[T]he presence of deed restrictions has no effect on zoning . . . .").

[134] *See supra* text accompanying note 69.

[135] *See* WEISS, *supra* note 13, at 11.

[136] *See id.* at 11.

[137] *See* Malacek v. Shaker Heights, 8 Ohio Law Abs. 555 (Ohio Ct. App. 1930) (rejecting plaintiff's allegation as without proof that the Van Sweringen Company exercised undue influence over Shaker Heights).

[138] *See* KORNGOLD, *supra* note 6, § 9.03.

Moreover, zoning provides greater adaptability going forward. Governmental bodies can amend plans, providing flexibility.[139] Additionally, decisions by public officials and bodies are subject to procedural protections, providing due process and preventing bias against individuals.[140] Zoning provides further safeguards since the substance of zoning regulations is controlled by constitutional doctrines and legislative systems. Thus, there are appropriate limits on the degree to which zoning can intrude into the privacy of homes and the personal autonomy of the owners.[141] As described above,[142] the law of covenants unfortunately did not easily provide protections against similar intrusions against personal autonomy created by private land use arrangements.

But the eclipsing of the private covenant schemes comes with not insignificant costs. Covenants provide greater stability than zoning because they are more difficult to amend and modify. Changes in servitudes can be made only by the affected property owners themselves. Zoning, on the other hand, can be modified by the governing political body and does not require the consent of the affected owners.[143] Citizens and interested parties from outside the affected area may exert undue power over the zoning process.[144]

Additionally, private governments are likely to be more efficient in governing than public bodies. They can modify covenants more quickly and cheaply than public government can amend zoning, resulting in lowered transaction costs and efficiencies for the community.[145] Moreover, governing boards of homeowners associations can develop an extensive regulatory scheme and system of rules, providing for a more controlled—and desirable from the owners' perspective—living environment.[146]

This suggests that a combination of public zoning and private covenants may provide the best result. Large scale planning can be accomplished, but, at the same time, control over local decisions

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[139] *See supra* text accompanying notes 80-81.

[140] *See supra* text accompanying notes 81-82.

[141] *See, e.g.*, Moore v. City of East Cleveland, 431 U.S. 494 (1977) (striking down housing code limiting the number of related persons permitted to share residence); Harmon v. Tyler, 273 U.S. 668 (1927) (invalidating ordinance barring African Americans from establishing homes in white communities); Buchanan v. Warley, 245 U.S. 60 (1917) (striking down as unconstitutional an ordinance preventing persons of color from living in certain areas).

[142] *See supra* Part II.

[143] *See* Robert H. Consigny & Zigurds L. Zile, *Use of Restrictive Covenants in a Rapidly Urbanizing Area*, 1958 WIS. L. REV. 612, 614 ("There is never any certitude that a particular scheme of [public] controls will remain unmodified over a period of time.").

[144] *See* A.J. CASNER, W.B. LEACH, SUSAN FRENCH, GERALD KORNGOLD & LEA VANDER VELDE, CASES AND MATERIALS ON PROPERTY 954-955 (4th ed. 2000); *see also* Ellickson, *supra* note 6, at 691-693.

[145] *See* Korngold, *supra* note 9, at 513-16.

[146] *See* CASNER ET AL., *supra* note 144, at 955.

would be exerted by the parties most interested in and affected by the regulations.

CONCLUSION

The dawn of the era of public land use regulation in the United States—launched by the Supreme Court in *Euclid*—took place at the same time that developers were beginning to extensively use private land use controls to create large-scale subdivision and community projects. Over the course of the twentieth century, the use of both the public and private land use systems has grown tremendously. Zoning and related legislation have not dampened the market demand for private servitude regimes, and private land use regulation will continue to significantly affect how communities are created and how Americans live. The experience of the early subdivision schemes, such as the Van Sweringen development located a few miles away from the Village of Euclid, teaches much about the benefits and limits of current day and future private land use arrangements.