Public Communities, Private Rules

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Abstract: As the American population grows, communities are seeking creative property tools to control individual land uses and create defined community aesthetics. In the past, private covenants were the sole mechanism to address this sort of need. Public communities, however, have begun to implement covenant-type or “private” rules, through zoning overlays, which place unusually detailed restrictions on individual property uses and, in so doing, creating new forms of “rule-bound” communities. While these communities are important, as they respond to consumers’ demand for a community aesthetic, this article will also highlight their unique problems. Many community consumers are marginally familiar with private covenants and traditional zoning, but they are largely unaware of the relatively new zoning overlays used to create public rule-bound communities. Yet the rules in overlays are extensive, are applied retroactively to existing landowners, and are not easily modified. Furthermore, governments have failed to fully recognize the consequences of these property tools. This article compares the problems within each community, focusing on the rules’ likely mismatch with consumer demands for a community aesthetic as a result of insufficient notice of rules, as well as a lack of responsiveness to ongoing consumer demands for the maintenance of desired rules and the amendment of unneeded or unwanted rules. Communities should provide better visual notice of rules and should implement processes that allow for meaningful influence by residents in decisions about rule enforcement and modification.

Introduction

The aesthetics and atmosphere of the places where we spend the many moments of our lives matter: in addition to their ability to raise or lower property values, they affect the ways we think and interact with each other,[1] how our children play,[2] how we choose to travel,[3] and even crime rates.[4] They affect our psychology: a gutted, broken factory invokes different...
emotions than does a row of small, colorful old townhouses, or large, uniform-looking single family homes. None of these built environments—the “community aesthetic,” or the collective spaces, structures, and uses created by the activities that occur on individual properties (what Lee Anne Fennell has described as “premium ambience”)—will invoke wholly predictable emotions, moods, or longer-term levels of satisfaction. An artist may see a broken factory and envision a perfect studio. A resident of modest means may despise the large, expensive home next to her property. And those who prefer order and predictability may thrive in a row of identical homes. Although individuals’ preferences for various types of built environments are difficult to foresee, the fact that individuals will have a strong preference toward choosing and having some influence over their built environment is a given. In America, this preference will only become stronger as our growing population, moving in droves to the cities and the suburbs surrounding those cities, increasingly must share community space with others.

A new regime has emerged to directly address individuals’ desire for a physically defined community. Rather than simply shopping for a package of public goods provided by a local government—a trend astutely identified by Charles Tiebout in 1956—individuals of a range of income levels now seek out sublocal goods, which pertain to their individual community within a municipality. In this case, the sublocal public goods sought out are specialized rule sets,

officers tend to agree that if a window in a building is broken and is left unrepaired, all the rest of the windows will soon be broken”).

Within this paper “community aesthetic” created by rules refers to the overall appearance of the community: whether the homes look new or old, modest-sized or stately, and whether garages are prominent or hidden, for example. It also, however, refers to driveways (are wide cul-de-sacs allowed, or no?), the placement of objects such as trash cans as visible or not from the street, the landscaping and the accessory structures that are permitted or not, such as fences, small apartments, or sheds. This is similar to Lee Fennell’s “premium ambience” and “neighborhood aesthetics.” See Lee Anne Fennell, Contracting Communities, 2004 U. ILL. L. REV. 829, 843, 847 (2004) (hereinafter “Contracting”).

See, e.g., Grant, supra note 1, at 10-11 (arguing that “globalization requires communities to improve the quality of local places to compete for capital and labour.”).

Between 1976 and 1992, American development grew by 48%, but this new development typically occurred within or near previously developed areas, taking up only 0.6% of previously undeveloped land. Marcy Burchfield & Henry G. Overman, et al., Causes of Sprawl: A Portrait from Space, QUARTERLY J. ECON. 587 (2006); see also Robert E. Lang & Meghan Zimmerman Gough, Growth Counties: Home to America’s New Suburban Metropolis 61, in REDEFINING URBAN & SUBURBAN AMERICA: EVIDENCE FROM CENSUS 2000, VOL. III (Alan Berube & Bruce Katz, et al., eds., 2006) (identifying the fastest growing counties in America, which “which tend to be in “large metropolitan areas” such as Houston and Las Vegas).

See, e.g., Richard A. Epstein, Covenants and Constitutions, 73 CORNELL L. REV. 906, 916 (1988) (arguing that mechanisms such as private covenants “become ever more important today when the high price of land makes the ideal of separate and self-contained ownership a luxury that few people . . . can afford”).


See, e.g., Danielle Arigoni, Affordable Housing and Smart Growth: Making The Connection, available at http://www.smartgrowthamerica.org/affordable_housing.pdf (discussing how rules that allow “accessory units to be created—to serve as the principal residence for aging family members or as an additional source of rental income” helps to make housing more affordable); see also ROBERT H. NELSON, ZONING AND PROPERTY RIGHTS: AN ANALYSIS OF THE AMERICAN SYSTEM OF LAND USE REGULATION 15 (2005) (hereinafter “ZONING”) (discussing how the “less well-off” SoHo artists “persuaded the New York City government” to make artist certification “a zoning requirement for SoHo residency,” and how zoning “has . . . on occasion been employed to protect poorer people against better-off people”).

Other authors have observed that sublocal regimes are increasingly competing for Tieboutian-style community consumers who shop with their feet. See, e.g., Lee Anne Fennell Exclusion’s Attraction: Land Use Controls in Tieboutian Perspective 27 in THE TIEBOUT MODEL AT FIFTY: ESSAYS IN PUBLIC ECONOMICS IN
implemented in addition to the municipality’s base code, which create options for a defined community, including the physical structure of the community and the “character” that it portrays. Because these new communities arise from rules, which, like private covenants, are much more specific and detailed than the traditional zoning codes that have defined American built environments for nearly a century, I call them “rule-bound” communities.

One type of rule-bound community—the private covenanted community—is familiar, and it has been discussed extensively in the legal literature. Because private covenants have historically been the only practical legal tool to define the very specialized preferences for community aesthetic and character that are reflected in rule-bound communities, they are the starting point for this article. While private covenanted communities in suburbs are quickly becoming the norm in housing—partly due to the demand for a physical community—many individuals in existing, public neighborhoods want rules that are similar to private covenants: they desire similar means by which to define their communities. Traditional zoning, however, fails to dictate desired community characteristics such as architectural style, and neighborhoods cannot, practically, impose complex sets of private covenants on existing property owners. Several scholars have accordingly suggested that public communities should be able to form their own private homeowners’ associations and covenants. Under this scenario, the private model would be transferred to the public realm.

HONOR OF WALLACE OATES (William A. Fischel, ed., 2006) (hereinafter “Exclusion’s Attraction” (observing that the “foot-shopper” is “buying a daily living environment in a particular neighborhood and section of the metro area”).

14 The Supreme Court affirmed the constitutionality of zoning in Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926), but many cities already had zoning ordinances, or codes that resembled zoning ordinances. See, e.g., City of Aurora v. Burns, 319 Ill. 84, 85, 96 (1925) (discussing Aurora’s building zone ordinance and affirming its validity); People ex rel. Stevens v. New York, 126 Misc. 549, 549 (1925) (observing that there is “no question about the validity of the zoning ordinance of the City of White Plains”); State ex rel. Morris v. City of East Cleveland, 31 Ohio Dec. 98, 1, 14 (Ohio Com. Pl. 1919) (reversing a lower court’s holding that East Cleveland’s building zones ordinance was unconstitutional).

15 See, e.g., Fennell, Contracting, supra note 6, at 832 (discussing the “burgeoning literature on private developments”).

16 See, e.g., ROBERT H. NELSON, PRIVATE NEIGHBORHOODS AND THE TRANSFORMATION OF LOCAL GOVERNMENT 53 (2005) (hereinafter “PRIVATE NEIGHBORHOODS”) (describing how private restrictions “usually include elements that go well beyond conventional zoning in the public sector”), see also infra note 18.

17 See infra notes 198-205 and accompanying text.

18 See, e.g., 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, 835 (1999) (describing how “except where an historic or other special district can be justified, zoning does not cover the fine details of neighborhood architecture . . . and other aesthetic factors that may have a major impact on the character of the neighborhood”).

19 See, e.g., George W. Liebmann, Devolution of Power to Community and Block Associations, 25 Urb. Law. 335, 368-69 (1993) (discussing the “present unavailability of the association device in already developed areas, where associations cannot be imposed by covenant except by unanimous consent”).

20 See, e.g., id. at 369 (suggesting service-oriented private associations for existing public neighborhoods);

NELSON, PRIVATE NEIGHBORHOODS, supra note 16, at 266 (arguing that “[a] group of individual property owners in an older established neighborhood” should be able to “petition the state to form a private neighborhood association”); Robert Ellickson, New Institutions for Old Neighborhoods, 48 Duke L. J. 75, 99 (1998) (hereinafter “Institutions”) (suggesting that in some urban areas, “extraordinary [private] Regulatory . . . [“Block Level Improvement Districts”] could be formed).

21 There is an ongoing debate as to what constitutes a “public” as opposed to a “private” community. See, e.g., Robert C. Ellickson, Cities and Homeowners Associations, 130 U. Pa. L. Rev. 1519, 1521-23 (1982) (arguing that homeowners associations fit nearly all of the characteristics of a public government as defined by Frank Michelman
The use of private associations to govern existing public neighborhoods is a feasible model for capturing preferences for defined communities, but it has not taken hold. Instead, communities have found other creative ways to implement covenant-type or “private” rules—which are like covenants because of their detailed restrictions on and requirements for property uses—through the public process, forming two types of rule-bound communities that have, to-date, largely failed to capture the attention of the legal literature. In a growing number of old neighborhoods, communities are developing rule sets to preserve existing character. Property owners within these “sublocally zoned” neighborhoods—which are “sublocal” because their rules are more detailed than the local government zoning code—often use rules to protect historic, cultural, environmental, or other community resources, to require certain types of design for newly-constructed or modified buildings, or to preserve building scale, which can, in some cases, combat gentrification. These rules apply in addition to the zoning code, and are thus described as an “overlay.”

The third type of rule-bound community is a hybrid: it often uses both the private covenants that define suburban subdivisions and an overlay to the municipal zoning code to

\(\text{\textsuperscript{22}}\) Others have touched upon the individual facets of this broader trend that I describe. \(\text{\textsuperscript{23}}\) See, e.g., Glen O. Robinson, Communities, 83 VA. L. REV. 269, 286-87 (1997) (“The construction of privately planned and regulated residential neighborhoods has become a ubiquitous feature of modern urban life.”); Marc B. Mihaly, Living in the Past: The Kelo Court and Public-Private Economic Redevelopment, 34 ECOL. L. Q. 1, 36 (2007) (discussing the trend toward the “Planned Unit Development overlay and the Specific Plan” and describing it as a “quiet land use revolution”); RICHARD F. BABCOCK & WENDY U. LARSEN, SPECIAL DISTRICTS: THE ULTIMATE IN NEIGHBORHOOD Zoning 3 (1990) (describing the “special district phenomenon, which is similar to other “discrete regulatory districts targeted to a limited number of parcels”).

\(\text{\textsuperscript{24}}\) See, e.g., Lexington-Fayette Urban County Government, Neighborhood Design (ND-1) Overlay Zoning 2, available at http://www.lexingtonky.gov/Modules/ShowDocument.aspx?documentid=2070 (describing one purpose of neighborhood design overlay zoning as creating “design standards that will protect the character of the neighborhood”).

\(\text{\textsuperscript{25}}\) See, e.g., Lexington-Fayette Urban County Government, supra note 23, at 2 (describing one purpose of the neighborhood design overlay as “discouraging environmental conflicts of new construction”).

\(\text{\textsuperscript{26}}\) See, e.g., supra note 23.

create a unique urban ethos. In what I call “urban redevelopments,” cities raze and rebuild, or substantially modify, entire downtown blocks or old industrial properties in order to construct new urban areas, often including affordable housing, “green housing” for the eco-conscious dweller, stores and businesses that are within walking easy walking distance of residences, a network of sidewalks and bike paths, and parks and other open space. The city government writes and votes on overlay rules directing the use, building, and design for the development. The developer of the project, once several phases of construction are complete, then typically passes ownership of the built area to a property owners’ association, which in turn implements covenants to perpetuate and restrict certain property uses within the development.

Setting aside for now the important concern that all rule-bound communities are exclusionary, in that requiring a certain type of aesthetic can eliminate a large number of community consumers from the potential buyer pool, rule-bound communities are exceedingly important because they allow individuals to better control the community aesthetic surrounding their home, and the need for this sort of control grows as Americans continue to move toward crowded cities and their suburbs, where, as Charles Haar puts it, land is “vulnerable in value to the actions of neighbors.” Although neighboring property uses affect individual land values in terms of tax appraisals and sale prices, “value” is not purely economic: in relatively high density living scenarios, the day-to-day enjoyment of one’s property is strongly influenced by neighbors’ property uses. Rule-bound communities are also important because they allow individuals to control the community aesthetic in an efficient manner by offering a sublocal yet

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28 Such redevelopments are typically called “planned unit developments.” See Daniel R. Mendelker, Legislation for Planned Unit Developments and Master-Planned Communities, 40 URB. L. 419, 420 (2008). However, because planned unit developments are also built in suburbs, to form some of the typical subdivisions that I have described as a “private covenanted community,” see id. at 421, I use the term urban redevelopment in order to differentiate between the two.

29 See infra notes 176-181 and accompanying text.

30 See Mendelker, supra note 28, at 420.

31 See, e.g., City of Ottawa, supra note 30 (describing the Planned Unit Development (PUD) Overlay District, which requires the development to “include . . . such provisions . . . as are reasonably necessary” to “insure . . . [the] continuity, care, conservation, and maintenance” of common areas); see also infra note 172 and accompanying text.

32 See Lior Strahilevitz, Exclusionary Amenities in Residential Communities, 92 VA. L. REV. 437, 470-71 (2006) (discussing how communities may use “exclusionary amenities” such as golf courses and a requirement that homeowners pay fees to maintain the course, to exclude a large segment of the population along racial lines); see also Fennell, Exclusion’s Attraction, supra note 13, at 33 (discussing how zoning policies can “directly affect the consumption and behavior policies of residents”); but see supra note 26, infra note 158 and accompanying text (discussing how some types of rule-bound communities can benefit low-income residents).

33 See, e.g., NELSON, PRIVATE NEIGHBORHOODS, supra note 16, at 6 (arguing that “[z]oning creates new collective property rights that establish positive incentives for building and maintaining attractive neighborhood environments”); see also Fennell, Exclusion’s Attraction, supra note 13, at 31 (arguing, in the context of a typical public neighborhood, that the “aesthetics of the living environment . . . are out of the homeowner’s control”).

34 See, e.g., Liebmann, supra note 19, at 337 (“The increased use of and demand for special zoning districts and historic districts in metropolitan areas provides an indication that existing forms of American local government do not fully meet public needs.”).


centralized mechanism\textsuperscript{37} for rule formation: where neighborhoods become too large for regulation of neighboring property uses through social norms\textsuperscript{38} or individual contracting,\textsuperscript{39} such mechanisms are essential.

The question that follows, however, is whether these three types of rule-bound communities will succeed over time—whether they will offer what they promise in terms of accurately responding to consumer demand for rules and the aesthetic that they create. First and foremost, the communities must adequately inform consumers of the rules: only knowledgeable consumers will find rules that most closely match their preferences. Second, if the rules are implemented, modified, and enforced through processes that violate individual rights, are overly intrusive, or fail to respond to residents’ concerns and desires for rules, the rules will not be successful. Furthermore, even if there are fair processes in place, meaning that they provide residents with an opportunity to influence rule implementation, enforcement, and modification decisions and provide variances where rules interfere profoundly with individual rights or create hardship, if these processes allow for substantial erosion of the rules over time, the purpose of the rule-bound community will be lost.\textsuperscript{40} And finally, the processes, while assuring rule durability,\textsuperscript{41} must also allow for some rule flexibility over time as property needs change, a need that Lee Fennell has emphasized in the context of private covenanted communities.\textsuperscript{42} As such, this article will compare the three communities in their ability to meet these benchmarks for a “successful” rule-bound community.

Part I of this article will describe the trend toward rule-bound communities. Part II will investigate the reasons behind the trend, pointing to consumer- and producer-driven factors. Part III will identify their benefits, and Part IV will discuss the barriers to these benefits, comparing, in the three types of communities, the problems associated with notice of rules and the “governance” processes—both public and private—through which individuals may influence the formation, modification, or enforcement of the rules to achieve their property preferences. Part V will argue that, while rule-bound communities are to a large extent responding to consumer demand, they will need to change if they are to be successful in the long term; accordingly, I will provide preliminary suggestions for the most important improvements to notice and rule modification and enforcement processes.

Ultimately, this article will argue that the expansion of “private rules” to public communities is beneficial, yet the overlay rules used to form these communities lack the protective texture of private covenants, which have evolved over time along with the common

\textsuperscript{37} See, e.g., NELSON, PRIVATE NEIGHBORHOODS, supra note 16, at 6 (discussing how “it would be nearly impossible to establish a collective regime of exclusion in an established neighborhood through voluntary (necessarily unanimous) consent alone,” and how mechanisms like zoning “overcome . . . the transaction-cost obstacles to collective rights”); Fennell, Contracting Communities, supra note 6, at 846 (observing, in the context of private covenanted communities, that “[b]ecause the developer is able to act as the central locus for forming . . . reciprocally binding covenants, transaction costs for bargains . . . are quite low”).

\textsuperscript{38} See, e.g., Ellickson, Institutions, supra note 20, at 79 (explaining that social norms and individual contracting are not ideal for heterogenous inner city blocks).

\textsuperscript{39} See supra note 37.

\textsuperscript{40} See, e.g., Clayton P. Gillette, Courts, Covenants, and Communities, 61 U. Chi. L. Rev. 1375, 1395 (1994) (describing how covenants in private communities provide “a stabilizing precommitment device against changing preferences”).


\textsuperscript{42} See, Fennell, Contracting, supra note 6, at 860, 891.
law principles of privity and “touch and concern,” and which offer mechanisms for notice and the changing of rules over time. And despite covenants’ historic protections, governance processes in covenanted communities do not provide residents with sufficient say in decisions about rule modification and enforcement. As such, safeguards are needed in all three types of rule-bound communities to ensure that unwary consumers are not trapped within rules that they strongly dislike, but also to, over time, protect rules that rule-prefering residents wish to keep. I will accordingly suggest better notice, modification, and enforcement procedures that provide such safeguards, proposing that overlay rules be included within real estate listing documents and contracts for sale and contain sunset provisions (allowing communities to keep preferred rules and extract despised ones), and that all rule-bound communities provide visual cues of rules to incoming consumers and ensure that residents, after purchasing property, have processes through which to meaningfully influence modification and enforcement decisions.

I. Rule-bound communities: covenants, public overlays, and hybrids

Although rule-bound communities have strong historic roots, they have only recently emerged on a broad scale in America, and they continue to grow at a rapid pace. In several states, particularly in the growing Sunbelt areas, the majority of housing stock is within private covenanted subdivisions – the familiar Sunny Buttes and Pine Hollows and Hilltop Mesas that one sees on the near and far fringes of metropolitan areas. And the most interesting recent growth has occurred in the public realm: communities that want the benefit of covenant-type rules are finding ways to implement such rules through the public process, both in existing and newly-developed urban neighborhoods.

These communities, whether public or private, urban or suburban, all exhibit several unique characteristics that make them “rule-bound.” Specifically, rule-bound communities are discrete residential areas within a city, town, or county; they have recognized boundaries, in other words. A rule-bound community is labeled on a map as a “neighborhood” or “district,” for

43 See, e.g., Ralph A. Newman & Frank R. Losey, Covenants Running with the Land, and Equitable Servitudes: Two Concepts, or One?, 21 HASTINGS L.J. 1319, 1323 (1970) (discussing how the purpose of the privity of estate requirement has changed over time); id. at 1332 (discussing how, as early as 1583, covenants were required to “touch or concern the land” in order to run with the land).
44 See infra notes 64-70, 107-115, and 140-157 and accompanying text.
45 See, e.g., Klaus Frantz, Private Gated Neighbourhoods: A Progressive Trend in U.S. Urban Development 68, in PRIVATE CITIES: GLOBAL AND LOCAL PERSPECTIVES (Georg Glasze and Chris Webster, et al., eds., 2006) (describing the large number of private gated communities “in the urban areas of the Sunbelt states”).
46 See Steven Siegel, The Public Role in Establishing Private Residential Communities: Towards a New Formulation of Local Government Land Use Policies that Eliminates the Legal Requirements to Privatize New Communities in the United States, 38 URB. LAW 859, 867 (2006) (“In the largest metropolitan areas, more than 50 percent of new home sales are connected to a community association.”); Steven J. Eagle, Privatizing Urban Land Regulation: The Problem of Consent, 7 GEO. MASON L. REV. 905, 906 (1999) (“In some metropolitan areas, such as Los Angeles and San Diego, . . . [the percentage of housing units in private covenanted communities] exceeds seventy percent.”); Paula A. Franzese & Steven Siegel, Trust and Community: The Common Interest Community as Metaphor and Paradox, 72 Mo. L. REV. 1111, 1125 (2007) (describing how “nearly all new residential development in many quick growth regions is within the province of a homeowners association”).
47 See supra note 26.
48 75 percent of 51 neighborhood planning groups surveyed in the 1980s indicated that they used physical boundaries as one factor when defining their neighborhood. WILLIAM H. ROHE AND LAUREN B. GATES, PLANNING WITH NEIGHBORHOODS 8, 75 (1985). See also John J. Fahsbender, An Analytical Approach to Defining the Affected Neighborhood in the Environmental Justice Context, 5 N.Y.U. ENV’T’L. J. 120, 123 (1996)
example, or it is recognized by residents within and outside of the community as geographically distinct\(^{49}\); it has a name, for instance, or a sign that alerts visitors to the fact that they are entering a delineated area. Most importantly, a rule-bound community is governed by a specific set of rules about property uses. These rules are distinct from and more detailed than the broader, “base” municipal rules typically found in the zoning and building codes.

The owners of properties within rule-bound communities are still bound by traditional zoning regulations, such as code governing the minimum number of feet that must exist between the lot line and structures on the lot (setbacks), the maximum height and total bulk of buildings, and the types of property uses, which disallow industrial or commercial uses on a single family residential lot, for example.\(^{50}\) The rules that form these communities, however, whether comprising an overlay to a code or a declaration of covenants, conditions, and restrictions, add stricter limitations to this base code. This article focuses on those limitations which aim to create a consistent community aesthetic. They are very specific as to the uses that may occur on individual properties, from requirements for planting certain types of grass to adding a particular type of door to one’s house.\(^{51}\) The rules dictate the type and size of exterior structures that may be built as lots, such as accessory buildings and fences,\(^{52}\) and limit the visibility of objects such as trash cans and dumpsters.\(^{53}\) Further, they provide guidelines that structure the designs for homes and businesses in some cases—requiring, for example, a certain number of windows on walls\(^{54}\) or specified architectural features of structures.\(^{55}\) The rules may also prevent the demolition or modification of the exterior of structures absent prior approval from a committee,\(^{56}\)

(“At a minimum . . . the concept of neighborhood always includes the notion of an area that can be physically defined, if only in general terms.”).

\(^{49}\) See, e.g., GERALD SUTTLES, THE DEFENDED NEIGHBORHOOD 242, 250 (1972) (defining “neighborhood” partially by “name and identity”).

\(^{50}\) See, e.g., Nelson, supra note 18, at 835 (describing zoning’s typical provisions, such as setbacks and lot size); Alejandro Esteban Camacho, Mustering the Missing Voices: A Collaborative Model for Fostering Quality, Community Involvement, and Adaptive Planning in Land Use Decisions Installment One, 24 STAN. ENVTL. L.J. 3, 10 (2005) (describing bulk controls, “height and mass limits,” and the separation of “incompatible uses” as elements of the traditional zoning model).

\(^{51}\) See, e.g., Paula A. Franzese, Does it Take a Village? Privatization, Patterns of Restrictiveness and the Demise of Community, 47 VILL. L. REV. 553, 556 (2002) (describing how covenants dictate “the ratio of grass, trees and shrubs allowed on one’s property” as well as the type of screen door permitted).


\(^{53}\) See, e.g., id. (stipulating that new construction and exterior changes “should make provisions for all carts and dumpsters to be screened from street view”).

\(^{54}\) Newton County Zoning Ordinance, Division 435, Rural Village Zoning Overlay 4-39, available at http://co.newton.ga.us/dmdocuments/Article_4_435-Part_I_NC_ZO_06-20-06.pdf (requiring “20% of the wall space facing the street . . . [to] consist of windows or doors).

\(^{55}\) See, e.g., Greenwood/Phinney Neighborhood Design Guidelines III, 8 (Arp. 7, 2006), available at http://www.seattle.gov/dpd/static/greenwood2006_LatestReleased_DDPD_015964.pdf (describing criteria considered by a design review board, which include roof pitch and facade features).

\(^{56}\) See, e.g., Uriel Reichman, Residential Private Governments: An Introductory Survey, 43 U. CHI. L. REV. 253, 269 (1976) (describing the “architectural control committee”); see also, Development and Design Standards for the [Milwaukee] East Village Neighborhood Conservation Overlay District, supra note 52 (“Permits for new construction or exterior alternations will not be issued unless the construction or alterations meet the design
or limit the type of driveways permitted or the location of parking.\textsuperscript{57} No matter their exact wording, they are unified in their limitation of the individual right to make desired physical alterations and improvements to property. Although in private covenanted communities, the rules also define the community by limiting the human activities that may or may not occur there—owning a pet, for example, or playing drums late in the evening—\textsuperscript{58}—this article will focus on the physical rules, as these play a large part in defining community character and are a common thread connecting the three communities.\textsuperscript{59}

A. Private covenanted subdivisions

The most common form of rule-bound community in the United States is the private covenanted subdivision,\textsuperscript{60} which is both praised and maligned\textsuperscript{61} for its unusually stringent rules. Although these developments include cooperatives and condominiums in addition to private subdivisions,\textsuperscript{62} this article will focus on the subdivisions. They are uniquely important, in that,
consisting of stand-alone homes on individual lots, they invoke some of the most deeply-held beliefs about individual rights.  

The private covenanted community is by no means a new phenomenon. In England in the 1800s, well-to-do property owners used covenants to ensure that a park surrounded by other homes would be preserved in perpetuity for the use and enjoyment of the tenants. A similar model moved to the United States, where wealthy developments such as Gramercy Park in New York and Louisburg Square in Boston, built in the 1830s and 40s, offered common ownership of attractive space such as parks or lakes and protected this space in perpetuity by attaching private covenants to homeowners’ deeds. Urban enclaves, however, were not enough for planners and developers who envisioned satellite towns away from the hubbub of the city. Private suburban subdivisions such as New Brighton on Long Island, “[t]he earliest developer-planned suburb,” began to emerge, and covenants were popular means of creating the hoped-for peaceful and rural atmosphere in these developments.

Despite its long history, the private covenanted community has only recently grown to nationwide dominance. In 1962, there were approximately 500 private covenanted communities; in 1975, the number had risen to 20,000. And by 2008, there were 24.1 million housing units in 300,800 private covenanted communities across America, housing nearly one in every five Americans. As such, private covenanted communities are increasingly the status quo in housing for middle- and even lower-middle class residents.

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63 See, e.g., Fennell, Contracting, supra note 6, at 878 (arguing that the “detached single-family dwelling . . . for many U.S. homeowners . . . has come to epitomize the idea of private property”).
64 See, e.g., Reichman, supra note 56, at 257 (observing that “the homeowners’ association is by no means a new invention”).
68 As the garden city enthusiasts envisioned these towns, they were to be self-contained and self-sufficient. Yet they became suburbs, not garden cities, in the American context, due to the automobile. See WALTER S. CRESEE, THE SEARCH FOR ENVIRONMENT: THE GARDEN CITY BEFORE AND AFTER 6 (1966).
70 See id. at 19 (describing the development of the “master-planned suburb of Radburn, New Jersey, in 1928” and the use of restrictive covenants in that suburb).
71 MCKENZIE, supra note 67, at 82.
72 Community Associations Institute, Industry Data, available at http://www.caoineonline.org/info/research/Pages/default.aspx (last visited Jan. 16, 2009). The institute refers to these communities as “association-governed communities.” Id.
74 BLAKELY & SNYDER, supra note 69, at 6 (observing that the “majority of the newer [gated community] settlements of the 1970s to 1990s are middle to upper-middle class” and how “there are a growing number of working-class gated communities”).
“executive” subdivisions still make up a strong component of the private subdivision market, but in many suburbs—which are now the more affordable places to live for many homebuyers—almost all new development occurs within private subdivisions. The first-time homebuyer seeking a $150,000 or $200,000 home will often find herself within a private covenanted community.

The homeowners moving to these communities, if seeking only an affordable home and not the rules that accompany the home, may be surprised by the detailed set of rules that they encounter. A developer drafts the rules, most of which are contained within the declaration of covenants, conditions, and restrictions. The declaration, along with a subdivision plat setting forth the location of lots and common property, is recorded prior to the sale of the first lot and binding upon all current and future property owners as well as the property owners’ or homeowners’ association, which is the community’s governing body. In addition to placing detailed limitations on property use—the type of “rules” that are the focus of this article—the declaration sets out the composition of the association and its powers; procedures for modifying the declaration, and provisions authorizing the association’s assessment of mandatory fees from individual unit owners.

Accompanying the covenants are the architectural guidelines, which are typically adopted by the developer and later modified, if at all, by the property owners’ association. The guidelines are central to the governance of individual property uses within the subdivision, as

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76 Todd Swanstrom & Peter Dreier et al., Economic Segregation in Suburbs and Central Cities, in REDEFINING URBAN & SUBURBAN AMERICA: EVIDENCE FROM CENSUS 2000 VOL. II 144 (Alan Berube & Bruce Katz et al., eds., 2006) (discussing how “[b]y 2002 . . . there were almost as many poor people living in suburbs (13.3 million) as in central cities (13.8 million),” whereas previously “most poor people lived in central cities”); but see William H. Frey, Melting Pot Suburbs, in REDEFINING URBAN & SUBURBAN AMERICA: EVIDENCE FROM CENSUS 2000 VOL. I 167 (Bruce Katz & Robert e. Lang, eds. 2003) (discussing varying “city-suburb disparities in housing availability [and] costs”).
77 See Siegel, supra note 46, at 867 (“Most new residential development in the fastest growing southern and western states is subject to governance by a community association.”).
78 See, e.g., LOW, supra note 75, at 44, 50 (discussing “The Lakes,” a “gated community in northwestern San Antonio,” where overall house prices range from $150,000 to $300,000, and how beyond “the loop,” in San Antonio, “homes in newly constructed gated communities average $200,000”); Franzese & Siegel, supra note 46, at 1125 (describing how private covenanted communities “can be the most affordable housing available in certain housing markets”).
79 See, e.g., Franzese & Siegel, supra note 46, at 1127 (describing how covenanted communities “are created by developers who plan, design, and construct them”); see also URBAN LAND INSTITUTE, THE HOMES ASSOCIATION HANDBOOK 199 (1964) (explaining that the developer “prepare[s] and record[s]” the declaration).
80 URBAN LAND INSTITUTE, supra note 79, at 197-98.
81 See id. at 199.
83 See, e.g., Franzese, supra note 51, at 556-57 (describing the association’s duties).
84 See Hyatt, supra note 82, at 183-197.
85 Id. at 224-26.
86 See, id. at 197 (authorizing the association to levy “Base Assessment” “to fund the Common Expenses”); Franzese & Siegel, supra note 46, at 1117 (describing how covenanted communities are “financed by mandatory assessments,” which are used, for “maintenance of open space,” among other things).
87 See Hyatt, supra note 82, 177-178.
they dictate, along with the covenants, how individual property owners may develop or modify their land and the structures on their land. Any owner wishing to install a satellite dish, outdoor clothesline, exterior lights, or solar panel, for example, or to make an addition or alteration to the exterior of her house, must follow these guidelines, and an architectural review committee must approve the proposed change or installation. Finally, a set of by-laws forms the third component of the governing documents for the private covenanted subdivision. These are adopted by the Board of Directors for the association and substantially affect residents' rights—particularly in setting some of the rules that the board must follow in modifying or enforcing rules.

Combined, the architectural review guidelines, covenants, and by-laws form a complex set of limitations on individual uses of property and define the framework within which homeowners may influence those rules. At Hilton Lake, a private subdivision near Everett, Washington, for example, “[n]o building, fence, wall or other structure shall be commenced, erected or maintained . . . nor shall any exterior addition to or change or alteration therein be made until the plans . . . have been submitted to and approved in writing” either by the property owners’ association’s board of directors or a designated architectural control committee. At Howard Ranch in Hays County, Texas, “flat roofs are allowed only if they are enclosed with an architectural parapet wall with a minimum height of three feet,” “[n]o garage doors shall face the street front” (with certain exceptions), “[n]o accessory structure [such as a cottage] shall exceed the height of the main residence, with a maximum height of 28’ feet,” “all exterior colors must be submitted [to] and approved by the . . . [Architectural Review Board],” gravel is prohibited in front yards, and “all . . . garbage containers or other equipment” must be screened.” And in Reston, Virginia, one of the largest private covenanted subdivisions with approximately 60,000 residents, the original covenants provide that “no individual air-conditioning units of any type” are permitted where central air-conditioning is available, “[n]o antenna shall be located in any area exposed to view, unless approved by the . . . [Design Review Board],” and no “alteration, addition, or repair, including change in exterior color, shall be undertaken which affects the external appearance of any improvements to the Property” until a “plan of alteration” has been approved by the board.

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88 See id. at 175-177; see also Joe Cantlupe, Going Green, COMMON GROUND (Jan./Feb. 2008) (describing how many private covenanted communities restrict clotheslines); Garden Lakes Community Ass’n, Inc. v. Madigan, 204 Ariz. 238, 239 (2003) (describing covenants, which provided, “[a]ll solar energy devices Visible from Neighboring Property or public view must be approved by the Architectural Review Committee prior to installation”).
89 Hyatt, supra note 82, at 235-253.
95 Id. at 29.
96 Id.
Property owners’ associations, with the sometimes unlucky task of enforcing these numerous rules, have become somewhat infamous for their role as the “property police”:

one envisions the board president measuring each blade of grass in residents’ lawns with a ruler, or surveying each home with a magnifying glass in search of chipped paint. Yet the two other types of rule-bound communities have their fair share of specific guidelines which, if enforced, allow for similarly detailed controls over property use.

B. Public sublocally zoned neighborhoods

Zoning is in many ways a child of the covenants that are central to private communities, but only recently has it more fully embraced the specificity that is typical of covenants. Zoning, as it is traditionally conceived, separates and sorts different types of land uses in order to ensure that activities on land, including the type of structure and the uses that occur on the property and within the structure, are compatible.

Although increasingly detailed—many codes now include at least forty different types of zones—traditional zoning does not delve into nuanced aesthetic strictures. Instead, it imposes over the city map a set of “zones” or “districts” where certain broad types of uses may occur: commercial, heavy industrial, light industrial, single-family residential, or multi-family residential, for example. Within each of these areas, the code then dictates the individual uses that may occur, including permitted uses (videotape rental, grocery store, and retail establishment in a neighborhood commercial district, for example) and “conditional” uses, which require individual approval by the municipality before they may occur. The zoning ordinance also sets out basic restrictions on how structures are to be built and situated within those zones, such as setbacks and bulk limitations.

97 Franzese & Siegel, supra note 46, at 1132-33 (describing homeowners’ associations’ enforcement activities as involving “miscommunication, acrimony, and an abuse of power”).


99 See supra note 50 and accompanying text.


101 The aesthetics regulated by traditional zoning are typically broader-brush than those that arise in the new zoning overlays. See, e.g., Kenneth Pearlman & Elizabeth Linville et al., Beyond the Eye of the Beholder Once Again: A New Review of Aesthetic Regulation, 38 URB. L. WASH. 861, 870 (2000) (discussing state courts’ upholding zoning regulations of pure aesthetics, such as billboards and mobile homes).


105 See supra note 50 and accompanying text.
Cities have had rules that govern the lay-out streets and lots and the structures on those lots for several millennia. In the Indus Valley, for example, religious writings—believed by some scholars to be 4,000 years old—provided that “the height of buildings in the same street should correspond”; “[a]ll houses should face the royal roads and at their back there should be . . . narrow lands”; “[t]he imperial palaces should be raised to eleven stories,” while buildings for lower-ranked royalty should be seven or nine stories; “[b]etween any two houses . . . the intervening space shall be four . . . (feet)”; and that trees should be planted before buildings are constructed. They also contained penalties for violation of certain rules.

In America, early city codes were not as detailed; instead, they were limited to creating large districts wherein certain incompatible property uses were prohibited. Los Angeles’ 1909 ordinance, for example, created one “residence district” (with “industrial exceptions” for certain areas within that district), and seven industrial districts. In the residence district, the ordinance prohibited “any stone crusher, rolling-mill, carpet-beating establishment, fireworks factory, [or] soap factory.” New York had one of the earliest ordinances that would now be described as a “zoning” code, which it enacted in 1916, and following its passage, America’s growing cities quickly embraced zoning. In 1923, the Department of Commerce responded to the rising tide by publishing “A Standard State Zoning Enabling Act,” which aimed “to lessen congestion in the streets; . . . to provide adequate light and air; [and] to prevent the overcrowding of land.” All states have since adopted portions of the act or provisions substantially similar to its model language. Whatever the exact language of a state’s “enabling” legislation, it gives municipalities—cities, towns, and sometimes counties—the power to zone.

Armed with this tool, municipalities have gradually and continuously expanded zoning to ever more specific land use goals. One of the earlier uses of zoning to control the “look” of a place—to govern the aesthetic created by the design and composition of buildings, for example—was the ordinance aimed at preserving historic structures. These ordinances were originally enacted for the purpose preserving individual buildings deemed as important historic

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107 Id. at 7.
108 Id.
109 See Ex parte Quong Wo, 161 Cal. 220, 222 (1911) (describing Ordinance No. 19,563).
110 Id. (quoting Ordinance No. 21,996 (new series), approved March 8, 1911, which amended Ordinance No. 19,563).
112 Developments in the Law—Zoning, 91 HARV. L. REV. 1427, 1433-34 (1978) (hereinafter “Zoning”) (discussing how, “zoning as it is currently conceived became prominent when large urban centers began to develop,” and discussing how the number of city zoning codes increased from five in 1915 to “nearly 500” in 1925).
113 ADVISORY COMM. ON ZONING, U.S. DEPARTMENT OF COMMERCE, A STANDARD STATE ZONING ENABLING ACT (1926).
114 Francesca Ortiz, Zoning the Voyeur Dorm: Regulating the Home-Based Voyeur Web Sites Through Land Use Laws, 34 U.C. DAVIS L. REV. 929, 939 n.44 (2001) (“All states have adopted enabling acts modeled after the Standard State Zoning Enabling Act, delegating the state’s police power to local governmental subdivisions.”).
116 CHRISTOPHER J. DUERKSEN, ED., A HANDBOOK ON HISTORIC PRESERVATION LAW 374 (1983) (discussing how “[m]any cities and towns already have adopted . . . preservation programs”).
structures. The ordinance addressed by the Supreme Court in *Penn Central Transportation Co. v. City of New York*, for example, was New York’s Landmarks Preservation Law, which allowed the Landmarks Preservation Commission to designate a building as a ‘landmark’ on a particular ‘landmark site.’

Over time, municipalities expanded their historic zoning restrictions. Even as early as 1973, New York—in addition to preserving individual landmarks in the law at issue in *Penn Central*—allowed areas to be designated as an “historic district.” In 1976, a town in Colorado attempted to draw a Historic Preservation District that “encompassed all real property within the municipal limits” and “overlaid all existing zoning districts.” The proposed district, although rejected by the Colorado Supreme Court for its overly vague guidelines, hinted at the substantial expansions that would soon emerge; no longer would zoning apply to the generalizable characteristics of buildings, but also to the individual characteristics of those buildings and owners’ ability to modify them. Indeed, municipalities have moved far beyond the preservation of individual structures to the designation of large historic districts.

Municipalities no longer focus only on the historic aesthetic, however. Increasingly, municipalities allow neighborhoods to preserve other types of physical amenities, such as small, affordable structures, attractive landscape features, or commercial or industrial areas deemed to be important to a neighborhood. Some have even banned clotheslines—an issue of great

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117 See RICHARD C. COLLINS & ELIZABETH B. WATERS, ET AL., AMERICA’S DOWNTOWNS: PROSPECTS FOR HISTORIC PRESERVATION 16 (1991) (“Early historic preservation efforts in this country focused initially on the preservation of individual buildings for their historical value and architectural merit.”).


119 *Penn Central*, 438 U.S. at 104.

120 *Penn Central*, 438 U.S. at 104.


122 South of Second, 196 Colo. at 94.

123 See, e.g., Sherry Hutt & Caroline M. Blanco, et al., Heritage Resources Law: Protecting the Archeological and Cultural Environment 25 (1999) (discussing how “an estimated 2,000 historic preservation ordinances have been enacted across the country” and how these laws “generally empower historic preservation commissions to review and deny requests to alter, demolish, or remove property designated as a historic landmark or included in historic districts”).

124 See, e.g., SHERRY HUTT & CAROLINE M. BLANCO ET AL., HERITAGE RESOURCES LAW 26 (1999) (describing how under local preservation laws, “most jurisdictions regulate both proposed alterations and demolitions of historic structures and new construction within a historic district”).

contention in both public and private communities. As such, sublocally zoned communities, which are established to protect neighborhood “character” more generally, such as environmental and cultural resources, have rules that are equally as detailed as covenants. In certain Boston subdistricts oriented toward industry and neighborhood businesses, for example, anyone proposing to build or add on to a building abutting a residential subdistrict must construct a chain link fence, “with or without redwood strips woven through it,” that is between six and eight feet high or a buffer with a “stockade or board-type wooden fence,” among other options. In Milwaukee, Wisconsin, property owners in the East Village neighborhood may not obtain a permit for “new construction or exterior alterations” unless such construction or alteration complies with the design standards of the village’s overlay district. The design standards require that fences be “50 percent transparent,” that new construction or renovation screen garbage and recycling “carts and dumpsters” from street view, and that “all front porches . . . remain open” (with the exception of “3-season screened porches”). In Queen Village, Philadelphia, where permit requests must similarly be reviewed in light of design guidelines prior to approval, “[n]ew utility meters shall be hidden from view from the street frontage,” “[n]o vinyl, stucco or cement board siding can be used on the front facade of a building,” “[n]ew open-air parking spaces and lots shall not be constructed of asphalt or slab concrete,” and “[f]or all newly constructed front facades, a light illuminating the sidewalk shall be installed adjacent to the front door.”

(Describing Boston’s complex system of neighborhood districts and neighborhood zoning); Dallas Development Services, supra note 26 (listing Dallas’ ten “[a]dopted Neighborhood Stabilization Overlay District Ordinances”).

See, e.g., People v. Stover, 12 N.Y.2d 462, 464-65 (1963) (validating Rye, New York’s ordinance prohibiting the erection and maintenance of clotheslines.”)


See, e.g., SEATTLE MUNICIPAL CODE 23.59.010, available at http://clerk.ci.seattle.wa.us/~public/toc/t23.htm (follow “23.59” hyperlink; then follow “23.59.010” hyperlink) (last visited Feb. 14, 2009) (“Overlay districts are established to conserve and enhance . . . the city’s unique natural . . . setting and its environmental . . . features . . . [and] to preserve areas of historical note or architectural merit”);

Dallas City Code § 51A-4.507(a)(2), (4), available at http://www.amlegal.com/nxt/gateway.dll/Texas/dallas/volumeiii/chapter51apartiiofthedallasdevelopmentco?f=templates$fn=altmain-nf.htm$3.0#JD_51a-4.507 (last visited Feb. 14, 2009) (describing Dallas’ several neighborhood overlay districts, which “preserve historic residential of commercial places” and “conserve a residential or commercial area’s distinctive atmosphere or character by protecting or enhancing its significant architectural or cultural attributes”).


Development and Design Standards for the East Village Neighborhood Conservation Overlay District, supra note 130.

Knolls, a neighborhood in Chapel Hill, North Carolina, accessory structures to single family homes may not be taller than 35 feet. In Dallas, the Cedar Oaks Neighborhood Conservation Overlay provides that “[g]arages must be to the rear of the single family structure,” and the Vanderbilt/Marquita area requires the same, while also mandating that garage access “be front entry (from the front lot line).”

Despite these rules’ strong resemblance to covenants, they differ markedly from private covenanted communities in the way that they are formed, largely because they are public and therefore are part of a zoning code, not a deed, and are created within old, well-established communities. The rules that make up this special overlay zoning are typically achieved only after a great deal of deliberation by residents within neighborhood. Furthermore, unlike covenants drawn up unilaterally by a developer, the rules in sublocally zoned communities are then vetted through a strict process of public political review.

C. Public-private urban redevelopments

Following the trend toward neighborhood-specific zoning, a third type of rule-bound community—what I call the “urban redevelopment”—also uses a zoning overlay with highly-specific guidelines for uses and building design, but in this case it applies the overlay to create a new community, rather than to add rules to an existing one. Increasingly, cities that endeavor to revitalize downtown areas—often former industrial or commercial urban sites that the city wishes to transform to residential and business-oriented areas—hire an architect and developer to design and build a new community with residences, commercial areas, and sometimes workplaces.

The urban redevelopment is perhaps the newest form of rule-bound community although, like sublocal zoning and private covenanted zoning, it has precedents. In England, at the “advent of the industrial revolution,” visionary figures created “model villages,” which met with varying success. This movement built upon even earlier, similar attempts at this form of development. In an area covering the cities of Halifax, Leeds, and Bradford in England, for example, individual visionaries began designing community spaces for cityfolk as early as the mid-seventeenth century: near Halifax, Nathaniel Waterhouse “built numerous workhouses, almshouses, and orphans’ schools.” In this same area, a factory owner, Colonel Akroyd, later built two mills in 1844 and 1846, and soon thereafter constructed small villages of “model houses” for the workers, with the purpose or preventing “the sudden withdrawal or workpeople.” The houses consisted of “three long rows, together with four shops,” and they

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136 See infra note 311, and accompanying text.
137 See infra note 313, and accompanying text.
138 See infra notes 169, 181 and accompanying text.
140 CREESE, supra note 44, at 13.
141 Id.
142 Id. at 22-23.
were “backed against the railroad embankment” (forming an early “mixed-use” development, if you will). The company paid the expense of maintaining the homes’ small “garden allotments,” and the homes were carefully designed in a neo-Gothic style, attempting to create “[a]n attractive community harmonizing with tradition and providing all the institutional needs.” Similarly, another mill owner named Titus Salt designed an even grander urban factory-village combination at Saltaire. Planning commenced in 1850, and Salt completed construction of the houses by 1863. The mill village provided “forty-five almshouses for the aged and retired,” a church, a fourteen-acre park, a school, and . . . cottages.

The concept of creating contained urban or near-urban villages also moved to America, where George Pullman, the famous industrialist, designed and built Pullman, Illinois in the late 1800s. The town of Pullman boasted an “integrated landscape design,” with lots aligned in a grid pattern, and offered a hotel, a hospital, an arcade, an administration building, a marketplace, a bank, and later an “industrial school.” Pullman’s architects designed the buildings hierarchically: foremen and company officials lived in identical, side-by-side row homes, while Pullman executives had larger, showier homes.

In a way, this early concept of the industrial village is mirrored in modern urban redevelopments, which create an urban village of mixed uses as well as mixed incomes. These types of communities first emerged in the 1950s and 1960s, when states began to allow developers to group together a large number of adjacent land lots and build unified “communities” of residential homes and commercial businesses on this cluster of lots. The developer could, in this newly-created area, ignore the pre-existing lot lines, creating a denser

143 Id. at 23.
144 Id. at 24-25.
145 Id. at 27.
146 Id. at 30.
147 Id. at 30-31.
158 See, e.g., Parlow, Greenwashed, supra note 139, at 527 n. 84, 528 (describing mixed use development and the promise of 15% affordable housing at the Playa Vista redevelopment).
159 See Mendelker, supra note 28, at 420.
160 See id. at 421-22.
and more diverse pattern of development than was permitted within the existing zoning district.\textsuperscript{161} 

Just as a developer buys a piece of land in a suburb, lays out a subdivision, and writes rules to govern that subdivision, in an urban redevelopment a developer purchases land and begins the same process, although often in an urban “infill” area that encourages central city living.\textsuperscript{162} The city council, as occurs for suburban subdivisions, must approve the specific lay-out of the redevelopment, which is typically encompassed within a “master plan” for the community.\textsuperscript{163} The master plan, in addition to delineating the community’s streets, sidewalks, public transportation stops, open space, and housing and/or commercial lots, also describes the types of uses within the planned community and where they will occur.\textsuperscript{164} The difference between suburban covenanted subdivisions and urban redevelopments, however, arises in the formation of the rule set. The rules for the urban redevelopment community are, first and foremost, created by city planners. A city revitalization commission or a similar public organization typically confers with planners, architects, the developer, and city residents\textsuperscript{165} and sketches a vision for the area, detailing the designs of the proposed structures and the priorities to be encompassed within those designs, such as green building standards and renewable energy.\textsuperscript{166} The city draws up a zoning overlay to cement the vision,\textsuperscript{167} and once the city council has approved the overlay it is typical for the developer to then write and record a declaration of covenants, conditions, and restrictions and to create a property owners’ association to enforce the rules and to maintain the common areas within the development.\textsuperscript{168} The urban redevelopments,

\textsuperscript{161} See, e.g., Lenard L. Wolfe, New Zoning Landmarks in Planned Unit Developments, The Urban Land Institute Technical Bulletin 62 at 5 (1968) (discussing “recent break-throughs with relation to the soundness of the concept [of the Planned Unit Development] and its implementation in terms of public officialdom and legal opinion”); id. at 7, 8, 10 (describing the New Jersey Municipal Planned Unit Development Act of 1967 and a Planned Unit Development Ordinance in Pennsylvania that was passed under that state’s Standard Zoning Enabling Act).

\textsuperscript{162} See, e.g., Mendelker, supra note 28, at 419 (describing these communities as “a major component of suburban and infill development in many metropolitan areas”).

\textsuperscript{163} See, e.g., John R. Nolon & Jessica A. Bacher, 26 REAL ESTATE L. J. 211 (2007) (describing the urban redevelopment of two sites in Yonkers, New York, wherein the city adopted design standards in a master plan); Mendelker, supra note 28, at 448 n.128 (describing Mississippi’s statute for master-planned communities, which consist of “a development . . . consisting of residential, commercial, educational, health care, open space and recreational components that is development pursuant to a long range, multi-phase master plan providing comprehensive land use planning” (quoting MISS. CODE. ANN. § 19-5-10 (2003))).


\textsuperscript{165} See, e.g., GGP Ward Neighborhood Master Plan Application, supra note 164 (discussing the public hearing on the Ward Neighborhood Master Plan application, where more than 200 residents spoke).


\textsuperscript{167} The government of Yonkers, New York, for example used a “Master Plan Zone” to define “the types of development the city wanted on available vacant land in the area,” to revitalize its industrial waterfront area. John R. Nolon and Jessica A. Bacher, Zoning and Land Use Planning, 36 REAL ESTATE L. J. (2007).

\textsuperscript{168} See, e.g., City of Ottawa, Kansas, Zoning Regulations Art. 18 (describing the Planned Unit Development (PUD) Overlay District, which requires the development to “include . . . such provisions . . . as are reasonably necessary” to “insure . . . [the] continuity, care, conservation, and maintenance” of common areas); see also McKenzie, supra note 67, at 89 (discussing at 1963 policy of the Federal Housing Administration, which required homeowners associations in planned unit developments if the residents were to receive mortgage insurance (citing FEDERAL
then, with their publicly-implemented overlays and privately-written covenants, are a “hybrid” of the two other rule-bound communities.

There are numerous examples of these trendy urban communities. At the Lowry Redevelopment near Denver, the neighboring cities of Denver and Aurora endeavored to make productive use of an abandoned, 1,866-acre Air Force base. The Lowry Redevelopment Authority, a non-profit, quasi-public organization, drew up a master plan, which the City Councils of Aurora and Denver approved. The councils also approved zoning to “accommodate new residential and commercial development.” The Lowry Community Master Association, a private property owners’ association, was then formed to govern the community, along with a set of covenants. The covenants are typical of those found in a private suburban subdivision: homeowners wishing to change the color of their fence, for example, must submit a “request for painting or staining fences” to the design review committee, and fence colors must “harmonize with surroundings.” “[D]og houses must be reasonably isolated and adequately screened from adjacent properties, and located in the rear or side yard,” and their design must first be approved by the committee. All new trees that are planted must be at least 2.5 inches in circumference, and willows, poplars, box elders, Siberian elms, and silver maple are prohibited.

At Playa Vista in Los Angeles, the “largest urban infill project in the country,” developers worked with community stakeholders for many years to create a community with bicycle trails, energy efficient residential living, solar-heated swimming pools, and open space. And in Las Vegas, the city government has adopted a master plan for “Union Park,” “a 61-acre mixed-use urban community located in the heart of downtown,” which will include districts to accommodate residences, hospitals, retail, and a performing arts center, all with “pedestrian-friendly accessibility.” The developer hired by the city has commenced construction on the site, which is a brownfield, and the project has already been certified as “green” by the U.S. Green Building Council.

Urban redevelopments, then, as a hybrid of the previously described private covenanted and sublocally zoned communities, operate under an intriguing mix of private and public rules. While the covenants are identical to those within a typical suburban subdivision and are written

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Housing Administration, Planned-Unit Development with a Homes Association (1963).


171 Id.

172 Lowry Property Owner Rules and Regulations, available at http://api.ning.com/files/V3ri3ykXuD47qQWk3xAs*bhDNQlxuui-QN6xtHRsdk7cOt5mSDvbC*UP7s7l97Kd3gOUBR*1j9d6bWqw2QzfyHuK0Sn34t/designguidelines9.2008.pdf.

173 Id. at 8, § 2.8.2 (describing fence requirements), 6; § 1.1 (describing the Lowry Design Review Committee).

174 Id. at 6, § 2.6.

175 Id. at 10, § 2.11.2.

176 Parlow, Greenwashed, supra note 139, at 523.

177 Id. at 524-527.

178 Id. at 528-530.


181 City of Las Vegas, supra note 179.
by one developer, residents, as a result of the public overlay process, may ultimately have more
say in the content of the rules and their ability to change over time than in a private community.

II. Why rules? Choice, confusion, and politics

Rule-bound communities, whether an urban villages in downtown Las Vegas or a large,
private suburban “city” of Reston, Virginia, are increasingly the norm in housing
development: many new homebuyers have little choice but to join such a community. There are
several factors driving this trend. Although the most obvious reason for the rise of rule-bound
communities lies in consumer demand, there are also production-side forces driving the trend.

A. Community by choice: a preference for a community to call one’s own

One market-based explanation for the trend toward rule-bound communities is simply that
consumers prefer them. And the steady progression, over nearly a century, toward detailed
zoning overlays and toward privately governed communities with complex sets of covenants
seems to support this view. If each American could afford to live on a several-acre lot,
neighboring land uses might not matter much. The value of the property, aside from
considerations such as nearby schools, job availability, and commuting costs, would largely
depend on the upkeep of the property itself and the structures on that property, provided there
were not neighboring uses that spewed noxious pollution onto the property or that encouraged
hoards of trespassers to cross the property. But most Americans can no longer afford to live in
isolation. As our population grows and looks for jobs in a service-oriented economy, people
are moving in droves to cities and the suburbs surrounding those cities. The American dream
is, as a result, inherently tied up in our neighbors’ dreams. The rules in rule-bound communities,
because of their unusual specificity, create more of a guarantee that homeowners will be able to
predict and control their neighbors’ land uses, and, as such, enjoy a defined community
aesthetic surrounding their property. Rule-bound communities reduce the transaction costs of
obtaining such controls, allowing a homeowner to shop for a community with a pre-existing set
of neighborhood rules or private covenants that best matches her preferences rather than having
to bargain individually with prospective neighbors.

The rule sets that define rule-bound communities, in other words, provide an option for
creating a community aesthetic that did not previously exist. They allow the creator of

182 See supra note 93 and accompanying text.
183 See, e.g., FISCHEL, supra note 36, at 111 (arguing that declining school funding should correlate with lower
property values).
184 See, e.g., WILLIAM A. FISCHEL, THE ECONOMICS OF ZONING LAWS: A PROPERTY RIGHTS
APPROACH TO AMERICAN LAND USE CONTROLS 257, 260 (1985) (arguing that the large lots in suburbs
offer a lower price per acre as compensation for the longer commute to one’s job).
185 See supra note 185 and accompanying text.
186 See supra note 9 and accompanying text.
187 See, e.g., NELSON, PRIVATE NEIGHBORHOODS, supra note 16, at 7 (arguing that private neighborhood
associations are on the rise because Americans “may be seeking greater control over their neighbors’ actions”).
188 For discussions of the efficiencies of group covenants, see Ellickson, Institutions, supra note 20, at 107; Epstein,
supra note 10, at 915-16; Fennell, Contracting, supra note 6, at 846-47.
189 See, e.g., NELSON, PRIVATE NEIGHBORHOODS, supra note 16, at 37 (observing that “[z]oning has always
been a crude device for maintaining neighborhood quality” but has not “traditionally . . . regulated such aesthetic
matters as the details of neighborhood landscaping and architecture”).

community rules to specify how individual buildings and properties should look and to create common community spaces. Alex Krieger, a well-known architect, perhaps best describes how traditional zoning fails to respond to consumer demand for such an aesthetic:

Our predicament is this: we admire one kind of place – Marblehead, Massachusetts, for example – but we consistently build something very different. . . . Our planning tools—notably our zoning ordinances—facilitate segmented, decentralized suburban growth while actually making it impossible to incorporate qualities that we associate with towns such as Marblehead. Few ordinances tolerate (much less encourage) the concentration of uses, the multiplicity of scales, the redundancy of streets, and the hierarchical fabric of public spaces which characterize the towns of our memory and our travels. 190

Charles Tiebout would suggest that prospective homebuyers are indeed driving the trend toward rule-bound communities as they search for defined communities to call home—whether those are the towns of their memory or a community that they envision as a better, more hopeful place. 191 In 1956, Tiebout observed that it is difficult to capture the true preferences of residents, who consume public goods provided by local governments—goods such as parks, regulations, or public housing, for which individual customers are not easily identified or charged. 192 Tiebout pointed out, however, that intentionally or not, consumers do express their preferences for public goods, and they do so by moving. If a local government provides a sub-optimal package of public goods, consumers move to a municipality with a preferred level of goods, 193 thus inadvertently “voting with their feet.” 194 Although local governments do not respond directly to consumer preferences, consumers’ moves into and out of communities eventually cause each local government to provide a unique level of public goods, thus creating a variety of public goods packages from which the community shopper may choose. 195

Much has changed since Tiebout published this theory. Many “public” goods are now provided by private entities such as developers. In other cases, public goods are provided at the sublocal level in the form of a neighborhood-specific rule set, and are sometimes enforced by a sublocal institution. As such, there is a new layer of entities competing for community consumers, and consumers may now choose among various levels of sublocal public goods, as well as among the local governments that enable the provision of public goods: in this case, they vote for rule sets that offer varying controls over neighbors’ land uses, and, as a result, a variety of community aesthetics. 196

Consumers, first and foremost, want to limit neighbors’ land uses in order to improve their own property values (or, in the case of gentrification, to keep their property values from rising in the near-term), as well as to ensure that they can enjoy their property while they are living on

191 See Tiebout, supra note 11, at 418, 420 (arguing that consumers express preferences for public goods through their movements; while governments do not respond directly to preference, they ultimately offer various levels and types of goods as suboptimal levels and types are rejected).
192 Id. at 416-17.
193 Id. at 418, 420.
194 See, e.g., FISCHEL, HOMEVOTER, supra note 183, at 39 (describing the Tiebout hypothesis as involving residents who “vote with their feet”).
195 Tiebout, supra note 11, at 418, 420.
196 See, e.g., Frantz, supra note 45, at 73 (explaining that covenanted communities are “each distinguished by a certain architectural style and by a package of . . . amenities designed to appeal to a certain niche and to compare favourably with other communities in the vicinity”).
As mentioned above, “value” thus has two distinct features in this case: there is the daily “emotional” value of the property, in terms of its ability to satisfy the preferences of those who live on it, and the long-term financial value that the property will generate if sold. Each factor has important differences: individuals may be more likely to gain strong emotional satisfaction from building a house in a strange and unusually modern shape, for example, but they might forego this home style if they believed that no one would later want to purchase such a home. But the two different types of value also matter when it comes to neighbors’ activities: my neighbor’s decision to build a large modern “McMansion,” to construct a bright blue fence, to plant a garden or trees, to install a wind turbine, to run a wide, asphalt driveway through her front yard and park boats in it, or to construct a children’s tree house close to the property line, will all affect the short and long-term emotional and financial values of my property.

The empirical literature provides support for the theory that consumers seek out rule-bound communities for their effect on the present emotional and long-term financial value of property. One set of community consumers demands the rules themselves—or at least the aesthetics created by the rules—offered by rule-bound communities. These consumers want more control over property to limit nuisances or to ensure a “pleasant” community aesthetic, and localized rules provide some guarantee of this. As one resident of a private covenanted subdivision explained in an interview with Setha Low, “[t]he rules protect you from the crazy neighbor who wants to paint the house red. . . . I chose the neighborhood because I like the style of the homes.”

Another resident of a suburban private covenanted subdivision in Arizona explained to Gregory Alexander, in an interview conducted in 1991, “I wanted the community to stay the way it looked when I bought my home. A homeowners’ association was the only way I could control my neighbors over time.”

Financial value considerations appear to have equal or greater weight in driving individuals’ selection of rule-bound communities. Gregory Alexander described the “nearly universal emphasis that residents gave to maintaining property value.” Constance Perin conducted interviews in public neighborhoods in the 1980s and similarly concluded that neighbors were most worried about property values. One woman in a Minneapolis suburb, for example, lived near a neighbor who, in her estimation, failed to live up to the block’s standards. “I’ve been putting up with it,” she explained, “but if ever I go to sell my house, I’ll report him. I’ll get him cleaned up before I advertise it—no doubt about it.” A property inspector further revealed property values’ motivating complaints about neighboring property uses, explaining:

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197 See infra notes 198-205 and accompanying text.
198 See, e.g., Fennell, Contracting, supra note 6, at 870-71 (discussing risk aversion in the home ownership and home buying process).
199 See, e.g., Gillette, supra note 40, at 1405 (arguing that “those drawn to [homeowners’] associations may be those least confident that they will succeed in political disputes that affect the character of their neighborhood” and prefer the “permanence” of covenants).
202 Id. at 157.
203 CONSTANCE PERIN, BELONGING IN AMERICA: READING BETWEEN THE LINES 66 (1988) (describing how “[i]n homeowners’ calculus, the physical appearance of their block matters the most”).
204 Id.
A] lady that complained on . . . [a neighboring] fellow . . . [who had] seven cars in his yard, the lady next door to her has her house up for sale. And that motivated part of the complaint, although they’ve complained lots in the past. The real estate agent told her that she would have to decrease what they could ask for her house by about $5,000 just because of the neighbors. And that hurts.205

In addition to the physical attributes created by the rules, many people have social reasons for selecting rule-bound communities—assuming that they have the financial means to “choose” among various housing options, which many do not. Many people seek out security: gated communities, a popular form of private subdivision, and occasionally appearing in public neighborhoods, reassure residents that the public’s access to their neighborhood will be limited.206 Other community consumers want neighbors of similar interests or age, and public or private community that closely governs certain activities or uses—disallowing bulky mansion-type structures, requiring rainwater collection systems, or mandating perfectly landscaped lawns, for example—will tend to attract a predictable type of desired neighbor.207 Other communities provide amenities, such as explicit social grouping functions, which are sometimes unrelated to the aesthetic rules but provide an additional incentive to move to such a community. Many retirement communities in Florida and other sunny southern areas are now age restricted,208 for example. Yet another consumer group demands the location, liveliness, diversity,209 and green living options offered by mixed-use downtown living within urban redevelopments.210

Although many of these desired community characteristics do not relate directly to the aesthetic rules, a good number of residents appear to choose the communities specifically for the rules, or at least the aesthetic results of the rules.211

B. Community by mistake: rule blindness

Despite the apparent demand for rule-bound communities, those who doubt that these communities are the result of consumer demand also have some support in the empirical literature: a substantial number of people buy a house without the accompanying awareness that they are joining a rule-bound community.212 They are either not notified of the rules before they buy, fail to become aware of the rules despite constructive notice of their existence, or fail to

205 Id.
206 See, e.g., BLAKELEY & SNYDER, supra note 69, at 18 (arguing that “[t]he gates provide sheltered common space not penetrable by outsiders” and that the “drive for security is . . . reflected in the housing market”).
207 See, e.g., Telephone Interview with anonymous resident (Dec. 19, 2008) (notes on file with author) (discussing how approximately half of his community is populated by retired “snowbirds” who wished to live amongst other residents their age).
208 See, e.g., BLAKELEY & SNYDER, supra note 206, at 39 (describing “lifestyle” retirement communities in the Sunbelt).
209 See, e.g., Gillette, supra note 40, at 1398 (explaining how “some neighborhoods invite sorting into diverse groups by offering a mix of housing alternatives within a relatively small geographical area”).
210 See, e.g., Eugenie L. Birch, Who Lives Downtown?, in REDEFINING URBAN & SUBURBAN AMERICA: EVIDENCE FROM CENSUS 2000 (Vol. 3) 32, 38 (Alan Berube & Bruce Katz et al., eds., 2006) (discussing cities’ downtown mixed-use residential projects as “something of a renaissance” and observing that the population in more than 70 percent of 32 city downtowns sampled grew in the 1990s).
211 Setha Low, after conducting “eight years of ethnographic research” in gated covenanted communities in several U.S. cities, concluded that “[o]ne explanation for the gated community’s popularity is that it materially and metaphorically incorporates otherwise conflicting . . . social values.” LOW, supra note 75, at 10 (emphasis added).
212 See infra notes 348-350 and accompanying text.
read or understand the fine print in the piles of papers presented at closing. As such, their “votes” for communities are not fully accurate; nor are communities’ responses to those votes accurate. Paula Franzese, for example, argues that there is a widespread “absence of understanding” of rules, in the context of private covenanted communities, and that “privatization of communities is occurring even when the market would not otherwise have chosen the privatization . . . let alone the establishment of a . . . [covenanted community] in the first place.”

This absence of understanding is an important sub-component of notice: even where consumers are directly notified of the language of rules, they may simply make persistent mistakes in interpreting the rules, causing a “systematic misperception” of the product that they are purchasing.

Tiebout, like many authors since, views homebuyers as informed individuals who are aware of the local public goods in the community and who have preferences for community type, not just the individual home, when buying. These scholars recognize that the decision to buy a home involves all sorts of diverse considerations. William Fischel, for example, describes consumers who shop “for a community and a school district as well as for homes with larger lots or more bathrooms.” But these scholars also have some faith in consumers’ specific knowledge of the community and preferences for it, whether direct or indirect. Tiebout conceded that “[c]onsumer-voters do not have perfect knowledge and set preferences,” but he observed that several studies “seem to indicate a surprising awareness of differing revenue and expenditure patterns” within the community. Similarly, Fischel believes that “there is an active market in communities as well as in homes,” pointing to several studies with evidence “that homebuyers are aware of fiscal and public service differences among communities.”

Although it is likely that many homebuyers do not directly consider these differences, he argues, homebuyers use proxies or “heuristics” to understand the communities in which they consider purchasing a home. Kenneth Bickers and Robert Stein, for example, found that prospective residents might determine the quality of schools offered by a community not by comparing test scores but by looking for the presence of residents who would likely demand better schools.

Many consumers lack actual notice of rules, however, and sublocally zoned communities may fail to provide sufficient heuristics to imply the existence of rules. This does not mean, of course, that residents do not vote for community rules with their feet. Assuming that residents at

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213 Franzese & Siegel, supra note 46, at 1126-27.
215 Tiebout, supra note 11, at 423.
216 FISCHEL, HOMENVOTER, supra note 183, at 59-60.
217 Ibid.
218 Ibid.
219 Id. (citing Wallace Oates (1969); Teske, Schneider, Mintrom, and Best (1993); Schneider, Teske, Maschall, and Roch (1998)).
220 Id. at 59 (arguing that “people move for reasons that typically have little to do with local government”).
221 Id. at 61.
222 Id. (citing Kenneth N. Bickers and Robert M. Stein, The Microfoundations of the Tiebout Model, 34 URB. AFF. QU. 76 (1998)).
223 See infra notes 348-350 and accompanying text.
224 See infra note 359 and accompanying text.
least consider the type of community they are buying into, rather than simply falling for the home itself, residents—even if inadvertently—select communities shaped by different rule sets.

C. Community by incentive: economic benefits for governments and developers

Rule-bound communities are also increasingly prevalent not only because some consumers demand them but because governments independently incentivize developers—in the case of private covenanted communities and urban redevelopments225—or neighbors—in the case of sublocally zoned communities226—to produce them. This is in large part because rule-bound communities can be very lucrative for cash-strapped local governments.227 In both urban redevelopments and private subdivisions, the developer often provides infrastructure, such as roads and sidewalks, which the municipality would otherwise have to fund.228 Similarly, the property owners’ association created to maintain the public spaces and infrastructure hires private entities to collect the trash, clear and repair the streets, and sometimes even to police the community, providing services that would otherwise be demanded of the city.229 Residents fund these services by paying mandatory fees set forth in their covenants.230 In most cases, residents in these developments pay the same tax rate as the other citizens within the municipality, despite the reduced quantity of public services that they receive.231 This is a budgetary boon for local governments. Indeed, Evan McKenzie found in a regression analysis that two variables explained “two-thirds of the variation” in private covenanted community construction, one of

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225 See, e.g., Telephone Interview with anonymous resident (Dec. 19, 2008) (notes on file with author) (arguing that municipalities “mandated . . . [private communities’] use through public policy”); J. Craig Anderson, Unfinished subdivisions stuck with underfunded HOAs, THE ARIZ. REPUBLIC (Dec. 21, 2008) (arguing that “[h]omeowners associations have become ubiquitous in recent decades, as local governments have sought to limit the impact of population growth on the demand for municipal services”); see also James L. Winokur, Choice, Consent, and Citizenship 89, in COMMON INTEREST COMMUNITIES: PRIVATE GOVERNMENTS AND THE PUBLIC INTEREST (Stephen E. Barton & Carol J. Silverman, eds., 1994) (hereinafter “Choice”) (“An often underrated factor influencing the increase in CICs [common interest communities] . . . [is] the preference of both local land-use regulators and residential developers for structuring their developments as planned unit developments (PUDs).”).

226 See infra note 311 and accompanying text.

227 See, e.g., Winokur, Choice, supra note 225, at 89 (describing how planned unit developments “have allowed local governments to save themselves money by requiring that streets and other infrastructure be created by the developer and held in private rather than government ownership”).

228 See, e.g., LOW, supra note 75, at 20 (“California and other states that have experienced a property tax revolt find common interest development housing particularly attractive because it transfers the debt liability, building of infrastructure, and provisions of services to private corporations, while at the same time the municipality collects property taxes from residents.”).

229 Id.

230 See, e.g., Nelson, supra note 18, at 831 (describing how the “typical neighborhood association” covers the cost of services such as “garbage collection, street maintenance . . . and maintenance of recreational facilities and the common areas” through an “assessment on each member”).

231 See, e.g., Paula A. Franzese & Steven Siegel, Trust and Community: The Common Interest Community as Metaphor and Paradox, 72 Mo. L. Rev. 1111, 1121 (2007) (“CIC residents seldom receive a local tax credit to offset association fees for private services provided); but see Robert E. Lang & Patrick A. Simmons, “Boomburbs: Fast-Growing Suburban Cities, in REDEFINING URBAN AND SUBURBAN AMERICA: EVIDENCE FROM CENSUS 2000 Vol. I 113 (Bruce Katz & Robert E. Lang, et. al, eds. 2003) (discussing how “[h]omeowner associations press city hall to reduce the cost and reach of most municipal services . . . that the master-planned communities are providing to residents”).
which was “the relative level of county indebtedness.”232 “Where counties are heavily indebted,” he concluded, “there was more recourse to . . . [private covenanted communities] in order to minimise the public costs of new development. . . . I interpret these findings to mean that local government fiscal constraints and developers’ desire to maintain profit levels leads to a public-private convergence that drives the rise of common-interest housing.”233

Local governments may also prefer rule-bound communities out of a basic concern for residents’ well-being, and based on the belief that these communities can raise and stabilize property values and simultaneously bolster the tax base. It is increasingly common for local governments to require that communities with commonly-owned space establish some entity (typically a property owners’ association) to maintain that space in perpetuity,234 and this reflects both concerns for individual welfare and property (read: tax) values. Assuming that governments do care about their constituents’ welfare, they want to ensure that residents will not live near rundown, dangerous parks. A property owners’ association, tasked with maintaining the park in perpetuity, may prevent this. And just as run-down parks will negatively affect individuals’ lives, the government is likely to be equally concerned with their ability to increase crime rates and decrease surrounding property values, both of which burden the municipal budget.

Under the more cynical model, local governments may also encourage the formation of rule-bound communities primarily as a result of lobbying by strong interest groups, which in this case largely consist of developers.235 Public choice theory argues that governments are not primarily influenced by considerations of individual welfare but rather by powerful special interest groups; they listen to the views of the most vocal groups or lobbyists and broker deals among them.236 Indeed, developers are notoriously influential in city politics,237 and developers support policies that give them more flexibility to build:238 provisions within the municipal code that provide for site plan approval of large, privately-planned communities, which are to be governed by property owners’ associations, do just this.239 Rather than having to obtain the city’s blessing for each and every house, the developer’s entire subdivision can be approved at one sweep of the pen. A developer would be quick to point out that this is an oversimplification. Municipalities often use the site plan approval process as a deal-making opportunity, wherein they obtain concessions

233 Id.
234 See supra note 21.
235 See infra note 245.
236 See, e.g., RANDALL BARTLETT, ECONOMIC FOUNDATIONS OF POLITICAL POWER 155 (1973); SUSAN ROSE-ACKERMAN, RETHINKING THE PROGRESSIVE AGENDA 15 (1992) (describing public choice scholars’ view of “legislation as the outcome of political dealmaking” that benefited “existing producers”).
238 See, e.g., id. (describing developers who seek “valuable zoning changes that allow them to build bigger and taller projects”).
239 See, e.g., LOW, BEHIND THE GATES, supra note 75, at 20 (describing how “[d]evelopers want to maximize their profits by building more houses on less land” and how zoning allows this); Setha Low, Unlocking the Gated Community 56, in PRIVATE CITIES: GLOBAL AND LOCAL PERSPECTIVES (George Glasze & Chris Webster, et al., eds., 2006) (hereinafter “Unlocking”) (describing how “[d]evelopers usually approach the village board saying, ‘We need more flexibility in designing our subdivisions’” (citing fieldnotes of Jörg Plöger)).
from the developer, such as a promise to buy additional park land or pay into a school fund, in exchange for approval.\textsuperscript{240} But the process is still simpler than lot-by-lot approval.

Neighborhoods are also, in some municipalities, a powerful and vocal special interest group.\textsuperscript{251} Neighborhood groups who wish to accomplish traditional NIMBYist goals or to preserve what they view as important characteristics of their neighborhood, may successfully push for municipalities to enable neighborhood-specific overlay zoning.\textsuperscript{242} Municipal officials will, in turn, expect high voting percentages from residents within these neighborhoods in the election following the passage of a rule that enables neighborhood-specific zoning.

Tiebout’s model would seem to suggest, however, that local governments’ policies to encourage private covenanted developments or public locally-zoned communities are not merely top down, special interest-focused policies but instead largely respond to broad-based consumer preferences.\textsuperscript{243} Consumers in a “new” Tieboutian world, by moving to and from various municipalities, have expressed a preference for local government systems that leave most rulemaking and enforcement, and sometimes service provision, to sub-entities such as property owners’ associations and neighborhood groups.\textsuperscript{244} Critics argue, on the other hand, that consumer preferences are not reflected in local government policy or the developer decisions that capitalize on such policy.\textsuperscript{245}

III. Purchasing communities: the benefits of rule sets

Rule-bound communities, although not always representative of consumer demand, are an important development, which in many ways may respond to consumer preferences. In a world where the space surrounding homes matters, rule-bound communities offer important options for a chosen aesthetic. They also expand covenant-type controls, which create this aesthetic, to existing, public communities.

A. Capturing the preference for aesthetic

Covenanted communities, because they are typically created at one “moment” on an empty piece of land, often display the most dazzling array of options for community aesthetics as well

\textsuperscript{240} Nicole Stell Garnett, \textit{Unsubsidiizing Suburbia}, 90 MINN. L. REV. 459, 481 (2005) (“[M]any local governments have required developers to construct and dedicate facilities to the community. Over time, communities increased their demand for such dedications from basic infrastructure . . . to property for public facilities such as schools, fire and police stations, and parks.”); \textit{see also} Low, supra note 239, at 56 (describing how after developers approach the village board wanting subdivision flexibility, “[t]he village is willing to allow some relief, but wants to receive some benefit in exchange”).

\textsuperscript{241} \textit{See}, e.g., Eagle, supra note 46, at 911 (explaining that “existing homeowners . . . constituted the key [special interest] groups behind zoning in the suburbs).

\textsuperscript{242} \textit{See}, e.g. Chalon Drive, L.L.C. v. Town of Chevy Chase, Circuit Court for Montgomery County, Maryland, No. 263808-V (2005) (residents attempted, unsuccessfully, to have their town designated as a historic district and then sought other methods to prevent tear-downs of old structures).

\textsuperscript{243} \textit{See supra} note 193 and accompanying text.

\textsuperscript{244} \textit{See}, e.g., Lee Anne Fennell, \textit{Exclusion’s Attraction}, supra note 13, at 23 (discussing how entry and exit can change the composition of local government voters and hence, local government policies).

\textsuperscript{245} \textit{See}, e.g., supra note 213 and accompanying text; MCKENZIE, supra note 67, at 104 (arguing that “[g]overnment policies [during the 1960s and 70s, when private covenanted communities began to boom] on housing and urban planning seemed largely limited to ratification of decisions made by real estate developers and driven by considerations of profit”).
as the human activities permitted within the community. There are “health” communities with hiking trails and spas, “green communities,” “recreation” and “retirement” communities, “family-friendly” communities and “no pet” communities. Increasingly, however, individuals who have strong preferences for a certain type of built environment are also finding ways to create their ideal environment in an existing neighborhood. If the state, and in turn the city, allows for neighborhoods to develop their own rules, and a sufficient number of property owners and residents within the neighborhood can agree upon a new set of rules and obtain municipal approval of those rules, a rule-bound community is formed. These communities are somewhat more limited in the types of restrictions they may impose than are private covenanted subdivisions, and hence the focus of this article on aesthetic rules: bans on pets and minimum age restrictions in public neighborhoods are likely to fail, if only due to a strong smell of intrusiveness and not a failure of a rational basis test. Although courts typically give deference to these types of rules in private covenanted communities, as individuals willfully “contracted” for such rules, they are highly suspect in the public context. That said, courts have even allowed age restriction through zoning in some circumstances, thus leading zoning even closer to the realm of private covenants.

In contrast to the current political and judicial barriers to the implementation of rules addressing very personal, human uses of property such as pet ownership and age limits, sublocally zoned neighborhoods face fewer impediments to placing strict limits on the built environment. Residents within the communities who work to create the rules, or those who move in after the rules are formed, can choose an historic community, a community that

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246 See, e.g., Lyttle, supra note 61 (describing a private covenanted community in California that offers “miles of trails,” an organic garden, a spa, and “lots of organized outdoor activities that minister to body and soul”).
247 See, e.g., Cantlupe, supra note 247 (discussing a private covenanted “conservation community” in Illinois);
NELSON, PRIVATE NEIGHBORHOODS, supra note 16, at 67 (describing a Virginia “EcoVillage”).
248 See, e.g., Frantz, supra note 45, at 66 (describing “Leisure World Laguna Hills in Orange Country,” a “retirement community with over 22,000 residents); id. at 67-68 (describing communities with polo courts, bridle paths, and golf courses).
249 See, e.g., Robert Schwarting, Guided By Voices, COMMON GROUND (July/Aug. 2002) (describing how the Radisson Community Association interviewed “parents and teenagers” within the community to determine what types of foods they wanted to be available near the swimming pool, and settled on “nachos, pizzas, and hot dogs”).
251 See supra note 257.
252 See infra note 257.
253 See supra note 195, infra note 294 and accompanying text (describing consumers voting to form new rules).
254 See Ellickson, Cities, supra note 21, at 1528 (explaining that “lower courts perceive municipal zoning by age as posing serious constitutional questions”).
255 See infra note 257.
256 But see O’Connor v. Village Green Owners Association, 33 Cal.3d 790, 797 (1983) (invalidating a private community’s “restrictive covenant against children”).
257 See Ellickson, Cities, supra note 21, at 1528; see also Haar, supra note 35, at 1016-17 (arguing that courts now review public land use regulations with a closer eye, leaving behind “[t]he benevolent standard of reasonableness”).
258 See, e.g., Taxpayers Ass’n of Weymouth Tp., Inc. v. Weymouth Tp., 80 N.J. 6, 15, 44-45 (1976) (affirming a zoning ordinance’s creation of a district for an elderly mobile home park); Maldini v. Amrbo, 36 N.Y. 481, 483, 488 (1975) (affirming a town’s powers to amend a zoning ordinance to allow for a “Retirement Community District”)
259 See supra note 251 and accompanying text.
260 See supra note 26.
prevents the replacement of modest homes with large structures, or a tree-loving community. Downtown, they may also find or mixed use communities that offer living options, work places, and shops all within a walkable area.

In creating these types of options for built environments, rules better respond to individual choices for such environments. A resident seeking a healthful, environmental, or recreational community has a broad set of community types, and, rules, from which to choose. The dilemma, of course, arises in the packaging: how can individual preferences for the built environment ever be captured within a large set of rules, and within a rule set that applies to, and is sometimes formed by, many other individuals with strongly divergent preferences? The individual’s preferences may be captured in some of the rules, but not all, and her individual preferences are likely to be obscured by group preferences. As Glen Robinson argues, “[t]here is something artificially reductionist about the pretense that communities are merely the product of the individual choices of their members.” Yet there is a good deal to be said for the group rights formed by rule sets, which, in this case, consist of the right to determine and to protect the community aesthetic, and the ability for this collective right to reflect and affirm, at least to some degree, individual preferences. This is particularly so where the members of the community have a say in writing the rules.

Clayton Gillette provides an illuminating explanation of how rule-bound communities fulfill individual preferences and, in turn, group these preferences into a relatively unified collective. He argues, in the context of covenants, that the rules “permit individuals whose preferences to encourage or discourage discrete activities are sufficiently common to serve as a coordination point . . . to enact regulations that supplement those of the state.” Robert Ellickson has a similar view, recognizing the ability of covenants, which create a “public”-type good through the implementation of private restrictions, to capture “unanimous wishes” of a community’s members.

B. Expanding property options for existing neighborhoods

In creating new options for defined community aesthetics, public rule-bound communities, which implement covenant-type rules in the form of public overlay zoning laws, offer what traditional zoning, and public neighborhoods typically do not. Applying new rules to old

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260 See supra note 26.
262 See supra note 158.
263 Robinson, supra note 22, at 337.
264 See, e.g., NELSON, ZONING, supra note 12, at 16 (arguing that the “fundamental significance of neighborhood zoning is that it creates a collective property right to the neighborhood environment that is . . . held and exercised by its residents” and that private “collective property rights,” such as condominium ownership, can do the same).
265 This view that combined individual autonomies create a collective autonomy is “liberal” and contractarian in nature. See Richard C. Schragger, The Limits of Localism, 100 Mich. L. Rev. 371, 387 (2001) (describing the liberal, contractarian theory wherein “[g]roup autonomy is an instrument of individual autonomy”).
266 See, e.g., JOHN A. HALL AND CHARLES LINDHOLM, IS AMERICA BREAKING APART? 104 (1999) (“Community, for Americans, is a moral good, but it can never be dictated, and can be arrived at only through the voluntary cooperation of equals.”).
267 Gillette, supra note 40, at 1395.
268 Ellickson, Cities, supra note 21, at 1528.
communities, before the advent of such innovative zoning, was not a practically achievable endeavor. Communities with homes, or combinations of shops, industry, workplaces, and homes that were built at some earlier point in time, serve a diverse population of individual property owners. The owners have a wide variety of expectations about the purpose of the neighborhood, the proper direction of its future growth, the nature of individual property rights, and the extent to which property uses within the neighborhood should be limited. The prospect of gathering all of these property owners together and persuading them to agree to a complex set of covenants, which they would then record with their deed, is grim. This is why Robert Nelson proposes that “[a] group of individual property owners in an older established neighborhood” should be able to “petition the state to form a private neighborhood association.” Robert Ellickson, although wary of land use regulation, similarly suggests that in some urban areas, “extraordinary Regulatory . . . [‘Block Level Improvement Districts’] could be formed, provided they obtained approval from a large percentage of owners on the block.” And George Liebmann proposes that existing neighborhoods should be allowed to implement private associations without requirements of unanimous consent although, like Ellickson, he proposes that they should have only limited regulatory powers.

This article argues, however, that neighborhoods have recently found ways to implement covenant-type rules within existing governance structures. Specifically, local governments have allowed old neighborhoods to implement new rules on top of the zoning code and, in some cases, to form local institutions to enforce those rules. The overlay zone provides existing communities with a new way to achieve what homeowners in newly-developed private covenanted communities nearly effortlessly achieve: the simultaneous application of one set of new rules to each individual property owner. Although some bargaining is required, as the city government must approve this new set of rules and in some cases a portion of the existing residents must first vote to initiate these rules, the amount of time and resources that must be invested in the bargaining process is negligible compared to what would be required to persuade a community to unanimously agree to covenants. The question remains, of course, whether these overlays, when the processes for their enforcement and modification are considered, offer a hollow promise of a community aesthetic or whether they are likely to provide durable yet flexible rules—a question that will be addressed in Part IV.

C. Enforcement: sublocal institutions for sublocal rules

269 This phrase builds off of Ellickson’s suggestion of “New Institutions for Old Neighborhoods.” See Ellickson, Institutions, supra note 20.
270 See supra note 19 and accompanying text.
271 See, e.g., supra note 20, at 369 (suggesting service-oriented private associations for existing public neighborhoods), NELSON, PRIVATE NEIGHBORHOODS, supra note 16, at 266 (that “[a] group of individual property owners in an older established neighborhood” should be able to “petition the state to form a private neighborhood association”); Ellickson, Institutions, supra note 20, at 99 (suggesting that in some urban areas, “extraordinary [private] Regulatory . . . [‘Block Level Improvement Districts’] could be formed).
272 Ellickson, Institutions, supra note 20, at 99.
273 Liebmann, supra note 19, at 369.
274 See infra note 313 and accompanying text.
275 See infra note 314 and accompanying text.
276 See supra note 19.
Once the rules are implemented, rule-bound communities also offer opportunities for better enforcement of rules than occurs in traditional public communities, meaning that there is an opportunity—although certainly not always realized—277—for the rules to be enforced more frequently, more accurately, and, perhaps, more fairly than the enforcement of rules by a municipal government. The potential enforcement benefits of rule-bound communities largely arise because the institution enforcing the rules has more interest in the rules being enforced, as it is geographically closer to the community. Specifically, the sublocal rule set—particularly in private covenanted communities—is nearly always accompanied by a sublocal institution tasked with enforcing the rules. In the case of private covenanted communities, the homeowners’ association board, with the help of neighbors, does most of the enforcement.278 The board members are residents of the community,279 and when the rule enforcers are physically present, as they are in these communities, violations tend to be noticed and dealt with. The board members are likely to frequently drive or walk by homes while going about their daily affairs, to notice rule violations, and to run into neighbors who may also report enforcements. And if the board members do not do a good job of enforcement—either by failing to enforce rules that are important to the community, or enforcing rules where the community deems enforcement to be unfair—they may be brought to task by their neighbors. Further, regular board meetings may allow neighbors to voice their objections to or support for various enforcement decisions. The same holds true for the urban redevelopments with homeowners associations, although the enforcement of half of the rule set (contained within the overlay) is typically left to a more distant municipal body.

Sublocally zoned communities do not typically have a sublocal institution for enforcement, but they feasibly could, and sometimes do. In Cambridge, Massachusetts, for example, which enables existing communities to implement Neighborhood Conservation Districts,280 the city appoints a Neighborhood Conservation District (NCD) commission once a district is established. The commission must consist of at least two homeowners from the district; one district resident, and one property owner from the district—all of whom must represent “diverse viewpoints expressed in the creation of the district”—and a member of the city’s Historical Commission.281 The NCD commission annually elects a Chairman and Vice Chairman, and its members serve three-year terms.282 It has relatively broad enforcement powers, as it may approve all proposals

278 See, e.g., FRED FOLDVARY, PUBLIC GOODS & PRIVATE COMMUNITIES: THE MARKET PROVISION OF SOCIAL SERVICES 176 (1994) (explaining that in Reston, two of the main functions of the association are “the administration of the covenants” and “the preservation of the architecture through its appointed Design Review Board”); Susan F. French, Making Common Interest Communities Work: The Next Step, 37 URB. LAW. 359, 367 (2005) (describing how “[i]n every state, the basic law governing an association provides for enforcement of the association’s governing documents”).
279 Id. (all residents are members of the association).
280 CAMBRIDGE MUNICIPAL CODE Art. III § 2.78.180 C, available at http://bpc.iserver.net/codes/cbridge/index.htm (follow “Title 2 ADMINISTRATION AND PERSONNEL” hyperlink; then follow “Chapter 2.78 HISTORICAL BUILDINGS AND LANDMARKS” hyperlink; then follow “2.78.180 Designation procedures” hyperlink).
281 CAMBRIDGE MUNICIPAL CODE Art. III § 2.78.160, available at http://bpc.iserver.net/codes/cbridge/index.htm (follow “Title 2 ADMINISTRATION AND PERSONNEL” hyperlink; then follow “Chapter 2.78 HISTORICAL BUILDINGS AND LANDMARKS” hyperlink; then follow “2.78.160 Neighborhood conservation district commission—Established—Membership requirements” hyperlink).
282 Id.
for “new construction, demolition, and alteration” of buildings within the district, and owners must obtain this approval before any work is commenced.\textsuperscript{283} Where rules will create an undue hardship for an individual owner and the owner requests a variance from the rules, the commission “may issue a Certificate of Hardship” permitting non-compliance, after holding a public hearing.\textsuperscript{284} Thus, as occurs in private covenanted communities, public neighborhoods, through creative zoning overlays, now have opportunities to implement both sublocal rules and sublocal institutions to enforce those rules. In many cases, however, overlays in public neighborhoods are enforced by the more distant municipal government, and thus fail to offer the enforcement benefits provided by a sublocal institution.

Rule-bound communities, then, offer individuals more options for community aesthetic, and where they have a sublocal institution to enforce the rules, they may also offer relatively durable rules. This assumes, of course, that the rules are not substantially modified without prior residential input. Furthermore, this assumes that the enforcers act fairly and evenly in applying the rules. The following subpart discusses how rule-bound communities do not always match such assumptions and, as a result, risk failure in the long term absent changes to the processes that are in place for modification and enforcement of the rules, as well as for notifying incoming consumers of the existence of relatively complex rules.

IV. Dashed expectations? Whether rule-bound communities offer adequate tools for the vindication of consumer preferences

As we have seen, rule-bound communities have much to offer to consumers. They allow consumers to achieve a desired community aesthetic by controlling individual property uses and, where sublocal institutions exist, to assure that the continued existence of this aesthetic is not a hollow promise. Furthermore, although such communities historically have been available only in the private sector, public communities have found ways to implement rules that are unusually detailed and, as such, are similar to private covenants. Zoning overlays have thus expanded consumers’ ability to define the community aesthetic to old, public neighborhoods, which formerly lacked such tools. This expansion is likely to continue, as there appears to be a high demand for rules in both existing and newly-created communities.

Despite the apparent popularity of rule-bound communities in the public and private realm, there are several concerns related to their long term success. Indeed, the rule-bound communities with which we are most familiar have created a lively debate in the scholarly literature. While some argue that they are ideal, offering more opportunities for residents to participate in community decisions,\textsuperscript{285} as well as ways to meet unique consumer preferences for communities,\textsuperscript{286} others insist that little democratic participation in fact occurs,\textsuperscript{287} and that many

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\textsuperscript{283} Neighborhood Conservation Districts in Cambridge, available at http://www.cambridgema.gov/historic/ncd_brochure.pdf; see also CAMBRIDGE MUNICIPAL CODE Art. III § 2.78.170, available at http://bpc.iserver.net/codes/cbridge/index.htm (follow “Title 2 ADMINISTRATION AND PERSONNEL” hyperlink; then follow “Chapter 2.78 HISTORICAL BUILDINGS AND LANDMARKS” hyperlink; then follow “2.78.170 Powers and duties” hyperlink).

\textsuperscript{284} See supra note 173.

\textsuperscript{285} See, e.g., Reichman, supra note 56, at 263 (arguing that the private community encourages participation and “reverses . . . anti-community trends”).

\textsuperscript{286} See supra notes 267-268 and accompanying text.

\textsuperscript{287} See, e.g., Alexander, Passivity, supra note 201, at 162 (concluding, after studying several private developments, that “apathy and frustration coexisted on a fairly widespread basis”).
consumers lack adequate notice of the many rights that they give up in exchange for achieving community preferences through rules. Furthermore, a more general literature on rules—particularly those instituted through zoning—has criticized the ability of rule changes, whether accomplished through individual variances from enforcement of the rules or formal changes to the rule text through modification—to undermine their entire purpose.

Beyond the literature, many former and current residents of private covenanted communities have voiced strong complaints against homeowners’ associations’ heightened use of enforcement powers, which can result in foreclosures when residents violate a covenant and fail to pay the fees. These residents believe that homeowners’ association boards often use enforcement powers overzealously and unfairly, targeting individuals who have crossed a board member, or whom the board member happens to dislike. While overlays are a more recent trend and have not yet generated much of a critical literature, the same could hold true where public neighborhoods create local enforcement institutions. While such institutions can better ensure rule durability than can a distant local government, there is always a risk that those with enforcement powers will use them indiscriminately.

As a result of such concerns, this section compares the three types of communities and their problems, discussing three distinct processes within each community. First, it compares the rule-bound communities in terms of opportunities for consumers to influence the rule implementation process. Second, it looks to the communities’ ability to notify incoming consumers of the available rule-set. And finally, it discusses the durability and flexibility of the rules in the three communities, asking whether there is some guarantee that they will not be abruptly modified through variations in enforcement or modification of the rules, while also investigating whether the modification and enforcement processes permit some flexibility where community preferences change.

A. Rule formation and implementation

Private covenanted communities offer few practical opportunities for consumer input in the rule writing and rule implementation process. Because developers are the sole authors of the rules, potential consumers of these communities have little say in the process. Consumers may theoretically have abundant opportunities to influence the rule content by voting with their feet—by purchasing a home within a covenanted communities: developers, like local governments in Tiebout’s world, respond to varying preferences by offering different types of rule sets. Lee Fennell, however, explains that developers may not accurately respond to actual preferences.

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288 See infra notes 348-350 and accompanying text.
289 See infra note 393 and accompanying text.
290 Fennell, Contracting, supra note 6, at 557.
291 See, e.g., Telephone Interview (Jan. 8, 2009) (notes on file with author) (stating that architectural committee signed off on homeowners requests to dig residential wells and recorded this new covenant, but that the board then declared the covenant revoked); Telephone Interview (Dec. 19, 2009) (notes on file with author) (arguing that “there’s really no democracy associated with HOA [homeowners’ association] governance”).
292 See supra note 277 and accompanying text.
293 See, e.g., Fennell, Contracting, supra note 6, at 896 (suggesting that developers should possibly be required to “offer an a la carte menu of use restrictions” to “would-be residents in a given community” or to incorporate input from buyers into the CC&Rs); Franzese, supra note 51, at 581 (discussing “[r]esidents’ lack of perceived and actual influence”).
294 See, e.g., Fennell, Contracting, supra note 6, at 857-58 (applying Tiebout’s theory to private covenanted communities).
Rules are bound up in packages, and consumers who strongly prefer one rule may sign on to a rule set despite strongly disliking a good number of the other rules. As such, their full preferences are not reflected in their decision to move. Furthermore, developers often use boilerplate language and may not, in fact, create a healthy variety of rule sets from which consumers may choose. And if developers have monopoly powers within one area, consumers may have only one product from which to choose. All of these concerns are, to a limited extent, alleviated by the element of choice. Assuming that consumers are able to choose among different types of rule sets—and may even reject private covenanted communities altogether—their choice to move in or not gives them a strong say in the content of rules offered. This is an oversimplification: due to income, job constraints, school district boundaries, and personal circumstances, many people have little choice when it comes to moving to a house or a community. Leaving that serious concern aside, the element of choice does offer some protection.

The same is true for the hybrid urban redevelopment. Because these redevelopments, like the private covenanted subdivisions of the suburbs, are created anew, they offer all consumers an opportunity to choose or reject the rules. As more and more urban developments sprout up in downtowns across America, consumers’ feet voting patterns will ideally cause a wide variety of rule sets to simultaneously sprout within urban redevelopments. Furthermore, these communities will provide realistic options for some individuals who typically lack the luxury of choice, as many of them require some of the units to be affordable.

In addition to offering consumers an opportunity to influence the rules by voting with their feet, urban redevelopments offer a public democratic process through which potential residents may voice their preferences for rules. If the city proposes an entire package of rules, the potential residents need not give an all-or-nothing vote for these rules by moving in or not, as they are forced to do in private covenanted communities. Rather, they can object to specific pieces of the package during the public process, asking that those be modified or thrown out before they become official. This adds a layer of consumer influence in the rule formation and implementation process that is currently unavailable in private covenanted communities.

Unlike in private covenanted communities and urban redevelopments, a select group of citizens in sublocally zoned communities ultimately has no say in the rule formation and implementation process. This is because the rules are imposed upon an existing community, thus erasing the element of choice. Although consumers have an opportunity—typically through a series of mandatory public hearings that are held prior to the implementation of the rules—to voice their objections to the rules, their objections may not be reflected in the ultimate vote to implement the rules. This is of particular concern because many of the rules in sublocally zoned
communities are truly retroactive and do not allow for “grandfathering” of existing uses, meaning that they do not accommodate property uses that were conforming prior to the rules but become non-conforming (or simply “illegal”) upon the enactment of the rules. Some of the new rules apply immediately, and they apply to everyone. In Cambridge, Massachusetts, for example, as soon as the historical commission determines that an area may merit historic protection and begins a year-long study of that area, the city implements a moratorium upon demolition or exterior modification of buildings within that potential district.\(^\text{303}\) Atlanta similarly implemented “interim zoning protection” for more than 150 historic structures and 120 buildings “nominated” for historic protection while it was completing its preservation ordinance.\(^\text{304}\)

Serious property rights concerns emerge when rules are imposed retroactively,\(^\text{305}\) particularly because the local government has the power to tax and sanction individuals. Individual expectations in property are severely diminished, yet there is typically little recourse, as property owners will only receive compensation for a taking where a regulation diminishes nearly all of the property value, or where the rule fails to pass the “ad hoc,”\(^\text{306}\) and thus unpredictable, balancing test set forth in *Penn Central Transportation Co. v. New York City*.\(^\text{307}\) The loss of several sticks in the property bundle, however, is not merely a financial concern. A government’s retroactive imposition of detailed rules has strong and often negative emotional effects on the objecting landowner\(^\text{308}\) and possibly on neighbors, who fear that the pattern of imposition will continue. Moreover, a retroactive regulation, particularly one that forces the individual to do something for the benefit of the larger community—to install a particular type of light, for example, or ensure that any new construction matches a certain architectural design—has the potential to interfere with individuals’ core liberty interests.\(^\text{309}\)

Where municipalities enable sublocal zoning,\(^\text{310}\) most at least partially consider these serious retroactivity concerns, requiring a good deal of notification and community deliberation prior to enacting the rules. Residents in a neighborhood gather and attempt to find common goals for their community—addressing its future growth and devising controls to prevent degradation of the existing community aesthetic.\(^\text{311}\) After many deliberative meetings, the

\(^{303}\) CAMBRIDGE CITY ORDINANCE § 2.278.180 (I) (2009).

\(^{304}\) COLLINS & WATERS, supra note 116, at 33-34.

\(^{305}\) See, e.g., Ellickson, *Institutions*, supra note 20, at 103 (arguing that “a rule of creation by the owners of a simple majority of property value poses risks of majoritarian oppression”).


\(^{307}\) 438 U.S. 104, 124 (1978) (specifying as the three factors the “economic impact of the regulation on the claimant,” the regulation’s interference with the claimant’s investment-backed expectations, and the “character of the governmental action”).


\(^{309}\) See, e.g., Jed Rubenfeld, *Usings*, 102 YALE L.J. 1077, 1033-34 (1993). The requirement that an individual use a certain architectural design for any new construction might not rise to the level of state “conscript[ion]” described by Rubenfeld, but it has trappings of his concerns over requiring affirmative action on the part of individuals. *Id.* at 1080.

\(^{310}\) See, e.g., supra note 280 and accompanying text.

residents who worked to create the rules must, in some municipalities, then spend months convincing their neighborhood and ultimately the municipality, that the new rules should be adopted. In certain cases, 50 or 60% of the property owners within the community must vote to recommend the initiation of a neighborhood overlay. The city then provides written notice to all owners of property who will be affected by the new rules and votes on the rules at a public hearing, where citizens may voice their opposition and support prior to the vote.

In other municipalities, no neighborhood vote is needed to initiate an overlay rezing. In Cambridge, for example, where several communities have established sublocal Neighborhood Conservation Districts, the Historical Commission may itself propose the formation of a district. A good deal of residential involvement still ensues, however. The city appoints a Study Committee, of which several members must be residents of the proposed district, and the committee canvases neighbors and holds neighborhood meetings about the district. After the Historical Commission, having provided formal notice through newspaper publication and individual mailings, holds a public hearing on the proposed district, the City Council votes to approve the district and records a map of the new district with the registry of deeds. Other cities have similar processes for the implementation of overlays in sublocally zoned neighborhoods, which do not mandate that the rules be initiated by a vote of the neighborhood residents but do require a good deal of deliberation prior to rule implementation.

Public Information Meeting to commence the overlay process); City of Dallas, Overlay Process Checklist, available at http://www.dallascityhall.com/pdf/DevSvcs/NSO_Checklist.pdf (requiring a “neighborhood meeting” as part of establishing a Neighborhood Stabilization Overlay); Nancy DeVille, Whitland Avenue Neighbors Reach Compromise on Historic Zoning, THE TENNESSEAN (Feb. 25, 2009), available at http://www.tennessean.com/article/20090225/MICRO021301/902250360/1534 (last visited Mar. 4, 2009) (describing the issues, such as design guidelines, permitted additions to homes, and restrictiveness, discussed at meetings prior to reaching a compromise on an historic zoning overlay). See, e.g., Lexington-Fayette Urban County Government, supra note 23, at 2 (describing how the [neighborhood overlay] initiation process requires significant neighborhood support (usually in the form of a petition with a minimum of 51% of owners’ signatures”). See, e.g., Town of Chapel Hill, supra note 311 (requiring a Planning Board Recommendation and then a Town Council endorsement in order for a Neighborhood Conservation District to be approved); City of Dallas, supra note 311 (requiring Planning Commission and then City Council approval for a Neighborhood Stabilization Overlay). See, e.g., Austin City Code § 25-2-242 (5) (requiring “petition of the owners of at least 60 percent of the land in the proposed district” for the initiation of historic zoning); City of Greensboro Planning Department, Neighborhood Conservation Overlays 2, available at http://www.greensboro-nc.gov/NR/rdonlyres/B1A22D97-4EA4-4C60-8D4D-F47006E34D5A/0/packet_7_5_07_wo_emb_ord.pdf (requiring 51% of “land and parcel owners” within a proposed Neighborhood Conservation district “to approve drafted development standards and to proceed to public hearing”). See, e.g., Lexington-Fayette Urban County Government, supra note 23, at 2 (“With the initiation petition approved, the city’s Planning staff, with some neighborhood assistance, would then prepare and process the actual application through the required public hearings.”).


Id. at 2.78.180 C.

Id. at 2.78.180 D (for hyperlinks, see supra note 317).

Id. at Art. III § 2.78.180 F, G (for hyperlinks, see supra note 317).
In Durham, North Carolina, for example, the city considers designating a neighborhood as a historic district after newspaper notice and mailed notice of the proposed designation has been provided to all property owners who may be affected by the district.\textsuperscript{323} The city prepares an Historic District Preservation Plan,\textsuperscript{324} after which the historic commission provides notice of and conducts a public hearing,\textsuperscript{325} and then recommends denial or approval of the historic designation.\textsuperscript{326} The planning commission also provides the requisite notice, conducts a public hearing,\textsuperscript{327} reviews the designation, and recommends for or against denial.\textsuperscript{328} And finally, the city provides notice of and holds yet another public hearing,\textsuperscript{329} after which that city determines whether to approve or deny the designation.\textsuperscript{330} If approved, the designation finally becomes part of the city code.\textsuperscript{331} Thus, even where municipalities do not have to obtain signatures from a large percentage of property owners in order to initiate the overlay process, the municipality in some way ensures that the property owners who will face new rules are notified of those rules and have a chance to voice their opinion in support or opposition.

Notice may not be an adequate solution, however, to the problems with retroactive rule formation and implementation in sublocally zoned neighborhoods. If a sufficient number of residents support the rules, even the most notified, knowledgeable, and organized neighbors will be unable to successfully fight them. In this case, rules are forced upon unwilling residents.

**B. Notice: matching community goods with preferences**

Once the rules that form a rule-bound community are in place, whether in the form of covenants, an overlay, or both, it is important that consumers moving into the communities are notified of the existence of rules and of their content. This applies equally to all rule-bound communities, and it applies at the moment in time when the rules have already been formed, thus ignoring, for the moment, the retroactivity concerns that arise when rules are imposed upon existing residents. In the case of private covenanted communities, the developer has recorded the declaration of covenants, conditions, and restrictions ("CC&Rs"); in sublocally zoned neighborhoods, the residents have proposed and obtained approval of the overlay, and the municipality has enacted the overlay within the code; and for urban redevelopments, the city has approved and enacted the overlay, and the developer has recorded the declaration of CC&Rs.

When consumers are not adequately notified in advance of these existing rule sets, several problems arise. Individuals' preferences for rules may conflict directly with the rules that are in place, and exit is not easy.\textsuperscript{332} As such, consumers will feel that the rules intrude upon their individual right to do what they please with their property, and they may consistently push back.

\textsuperscript{323} DURHAM CITY-COUNTY UNIFIED DEVELOPMENT ORD. §3.17.3(A); 3.2.5 (A., B.1, B.2.a) available at http://www.ci.durham.nc.us/departments/planning/udo/pdf/udo_03.pdf.
\textsuperscript{324} Id. at §3.17.3 (A.3).
\textsuperscript{325} Id. at §3.17.3 (D.1).
\textsuperscript{326} Id. at §3.17.3 (D.2, D.3).
\textsuperscript{327} Id. at §3.17.3 (E.1).
\textsuperscript{328} Id. at §3.17.3 (E.2).
\textsuperscript{329} Id. at §3.17.3 (F.1).
\textsuperscript{330} Id. at §3.17.3 (F.2).
\textsuperscript{331} Id. at §3.17.3 (F.4).
\textsuperscript{332} See, e.g., ALBERT O. HIRSCHMAN, EXIT, VOICE, AND LOYALTY: RESPONSES TO DECLINE IN FIRMS, ORGANIZATIONS, AND STATES 33 (1970) (describing theoretical situations where the exit option is not available); Alexander, Passivity, supra note 201, at 154 (arguing that in private covenanted communities, “transaction and other costs . . . constrain disappointed owners from choosing . . . [the exit] option”).
against the rules, either ignoring them completely or attempting to change them. Private covenanted communities theoretically provide the best form of notice of rules, although many consumers still indicate that they were not informed of the rules prior to purchase. On paper, however, this type of community offers three distinct forms of notice to the incoming consumer, through the common law, statutory disclosure requirements, and heuristics.

1. Private covenanted communities: strong theoretical notice and (some) actual notice

The common law of covenants evolved in large part in direct response to notice concerns. English courts were wary of allowing what were once “personal” covenants—which bound only the original parties to the deed—to bind future successors to the deed and thus run with the land, particularly where covenants required some affirmative duty.\(^{333}\) In order for restrictions on property use to run with the land, the courts have traditionally required that the covenants “touch and concern” the land, meaning that performance of the covenant must physically affect the land in terms of the land’s value, one’s enjoyment of the land, or its quality.\(^{334}\) Requiring this connection to the land may place buyers on notice that title is not perfect and also protects against unreasonable, unpredictable constraints on property.\(^{335}\) Although both English and American courts have since loosened the touch and concern requirement,\(^{336}\) they still require that the covenant somehow affect the value of the land.\(^{337}\)

English courts, from which American courts have borrowed and adapted many common law principles for covenants, have also consistently required horizontal privity for covenants to run with the land, and the privity requirement, like touch and concern, has important undertones of notice.\(^{338}\) In England, horizontal privity means that the parties must be in a landlord-tenant relationship: this requirement provides the tenant with notice of covenants in the lease.\(^{339}\) In America, horizontal privity often is interpreted only to require that the original covenantee parties shared an interest in the land other than the covenant alone, or simply that a real covenant

\(^{333}\) See, e.g., Olin R. Browder, Running Covenants and Public Policy, 77 Mich. L. Rev. 12, 18 (1978) (explaining that under English law, “affirmative burdens will not run either at law or in equity”).

\(^{334}\) See, e.g., id. at 33 (explaining how a covenant’s burden may not run “unless its performance will physically benefit” the land); RESTATEMENT (THIRD) OF PROPERTY: SERVITUDES § 537 (requiring, for a burden to run, that the “performance of a promise . . . [to] benefit . . . the physical use or enjoyment of the land”).

\(^{335}\) See, e.g., French, supra note 278, at 1290 (arguing that “[t]he touch and concern requirement tends to assure that parties will be bound only to the obligations which a reasonable purchaser would expect to have incurred, and will acquire only the benefits which a reasonable purchaser would expect to have gotten” and “advances . . . fairness and marketability concerns”).

\(^{336}\) See Newman & Loosey, supra note 65, at 1332; see also REST. (THIRD) OF PROPERTY: SERVITUDES (2000) §3.2 (eliminating the touch and concern requirement); but see Harvard Law Review Association, Notes: Touch and Concern, the Restatement (Third) of Property: Servitudes, and a Proposal, 122 Harv. L. Rev. 938, 938 (2009) (discussing how only “one line of cases” has adopted the test that replaces touch and concern in the Restatement).

\(^{337}\) See Newman & Loosey, supra note 65, at 1332 (discussing how in the United States, “touch and concern” has sometimes been construed to mean that “the promisor’s legal interest as owner is rendered less valuable, or the promisee’s legal interest as owner rendered more valuable, because of the promise”).

\(^{338}\) See, e.g., Browder, supra note 333, at 16 (discussing how the English court in *Keppel v. Bailey*, 2 My. & K. 517, 39 Eng. Rep. 1042 (Ch. 1834), in requiring horizontal privity for covenants to run, “seemed primarily concerned . . . that purchasers should not be bound by a variety of covenants of which they had no knowledge”).

\(^{339}\) See, e.g., Newman & Loosey, supra note 65, at 1322 (discussing how English courts require a “relationship of lessor and lessee” for covenants to run).
was part of the original conveyance. Even this loosened privity requirement ensures that an owner obtains notice of the covenant, as the covenant will have been passed down, as part of the deed, from the original covenantor and covenantee to subsequent ones. America’s strict recording requirements further ensure notice, and in many cases are viewed as eliminating the need for privity altogether.

In addition to the common law requirements associated with covenants, many state legislatures have created further notice protections in the form of statutes that mandate formal disclosure of the community’s CC&Rs and governing documents. In Minnesota, for example, “before the execution of any purchase agreement,” a seller of property within a community with a private property owners’ association must first provide the buyer with “copies of the declaration, . . . the articles of incorporation and bylaws, any rules and regulations, and any amendments or supplemental declarations,” as well as the “organizational and operating documents relating to the master association,” and the buyer must acknowledge receipt of these documents in a signed form. In Virginia, the seller also is required to provide a “disclosure packet” to the prospective buyer, which must include “[a] copy of the current declaration, the associations’ articles of incorporation and bylaws, and any rules and regulations or architectural guidelines adopted by the association.” Further, the property owners’ association board must “[d]evelop and disseminate a one-page form,” which accompanies the disclosure packet and “which . . . shall summarize the unique characteristics of property owners’ associations generally and shall make known to prospective purchasers the unusual and material circumstances affecting a lot owner in a property owners’ association.” Similarly, in California, owners must “as soon as practicable before transfer of title,” provide to prospective purchasers “[a] copy of the governing documents of the common interest development, including any operating rules . . . .”

If consumers somehow miss the notice provided by recorded covenants, as well as the disclosure of the covenants that is often required by state law, heuristics in private covenanted communities might allow them to determine the type and quality of the rules that form the community. A neatly-groomed subdivision with orderly houses in rows and cars hidden within garages—the aesthetic that tends to exist in private covenanted subdivisions—should suggest to the buyer that a set of strict rules is in place.

Despite the several layers of notice protections in private covenanted communities, many indicate that they were unaware of the covenants when purchasing a home within such communities. In a 2007 Zogby survey commissioned by the Community Associations Institute, 86 percent of the 709 residents interviewed “were told that . . . [their home] was in a community association” when they “were considering the purchase or rental of . . . [their] current home.”

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340 See, e.g., id. at 1324 (discussing one interpretation, which requires only a “succession in interest . . . between the covenantee and the covenantor, a succession created by the conveyance of the property to which the burden is to attach”); see also id. at 1327 (“In several states’ decisions upholding the running of covenants merely refer to the fact that the restriction was in a deed of conveyance.”).
341 See, e.g., Browder, supra note 333, at 16 (arguing that recording eliminates the privity requirement).
342 MINN. STAT. § 515B.4-107 (2008).
343 CODE OF VA. § 55-509.4 (2008).
344 Id. at § 55-509.5 (2008).
345 Id. at § 54.1-2350 (2008).
346 CAL. CIV. CODE. § 1368(a)(1).
347 See supra note 221 and accompanying text.
This means, of course, that 14 percent claimed that they were not informed. Gregory Alexander interviewed only 21 residents in private covenanted communities, offering too small of a sample size from which to draw sound quantitative conclusions, but he found that “[l]ess than 10 percent of the residents interviewed has read the rules before closing on the home.”349 And one resident of a private covenanted community in Minnesota, who also manages homeowner associations, believes that “95 percent of the people don’t even bother to read through the documents.”350

No matter the actual numbers of residents who are not fully informed of the rules in private covenanted communities, there are several reasons for the failure of notice protections. One may be the daunting stack of papers presented to the buyer at closing. Some buyers claim to not have received the covenants until closing—or even at closing—and argue that they did not have the time or patience to read or understand them in full, given the many other pages that they had to sort through and sign. The Minnesota resident, for example, believes that people “look through [the CC&Rs only] as far as [is necessary] to see if they can keep Fluffy or Rufus.”351 An attorney who lives in a private covenanted community in Texas, and has lived in similar communities in the past, explained, “In the properties we [he and his wife] had owned before, we never saw the CC&Rs. In this one, we did see them,” but generally, “you take a general view on it [the set of CC&Rs], and you wouldn’t have ever thought they could be enforced.”352 Residents in other interviews have described similar scenarios of late notice and incomplete comprehension of the rules and their consequences. One homeowner explained to Gregory Alexander, for example, “I only learned about the homeowners’ association during the closing just before I signed on the dotted line.”353

In addition to homeowners’ receiving late notice of the rules, if at all, or not fully understanding or reading the rules, agents may be reluctant to disclose the rules, even where they are required to, for fear that they will scare off buyers. As Gregory Alexander explains:

Real estate agents appear not to have to have emphasized the . . . [homeowners’ association] and in some cases not to have mentioned its existence at all. A typical response was: “I wasn’t aware that the house was in a homeowners’ association until I was doing the paperwork. But the fee was only $21 a month, due twice a year, so I figured it was nothing to be concerned about.”354

Similarly, one homeowner in a private covenanted community in Oregon stated that he “had to walk out of the sale before closing in order to get the covenants; they didn’t want to share them.”355 Another homeowner, who previously lived in a private covenanted community in Arizona, says that he performed a sort of “disclosure” test in Ohio. “I went to three developments in Ohio and asked if they had covenants or an association. In all three, none had covenants or HOA agreements there for viewing. They told me they could get them, or once I signed the sales agreement, I’d see them.”356 Similarly, a homeowner in a private covenanted community near Indianapolis believes that “real estate agents are out to sell homes . . . most

349 Alexander, supra note 201, at 155.
350 Telephone Interview (Jan. 28, 2009) (notes on file with author).
351 Id.
352 Telephone Interview with anonymous resident (Jan. 8, 2009) (notes on file with author).
353 Alexander, supra note 201, at 156.
354 Id.
355 Telephone Interview with anonymous resident (Jan. 29, 2009) (notes on file with author).
356 Telephone Interview with anonymous resident (Dec. 19, 2008) (notes on file with author).
purchasers are not really informed or understand what they are getting into until they get to the closing meeting.\textsuperscript{357}

Finally, the common law protections associated with covenants may simply have not sufficiently evolved to address the complex sets of CC&Rs that now accompany subdivisions. While a restriction requiring maintenance of yards, for example, touches and concerns that land, and the unusually well-kempt yard may alert the prospective buyer to the existence of one restriction, it may fail to call her attention to the seventy other restrictions only remotely relating to the land, ranging from parking locations to acceptable types of roofing material.

In the end, despite consumers’ many theoretical opportunities to learn of the content of CC&Rs before buying a home within a covenanted community, many fail to do so. As such, individual preferences for rules may fail to match the rules that exist within the community.

2. Sublocally zoned communities: a failure of notice

Sublocally zoned communities, which implement covenant-type rules through a public and non-contractual process, offer none of the three notice protections associated with private communities. There is no formal recording requirement for the rules contained within the overlay zone. Nor must the seller provide formal disclosure of the rules to the buyer at or before closing. Even those who actively attempt to learn of community rules before purchasing a home in sublocally zoned communities will have trouble identifying them. A quick visit to the city code will not reveal the neighborhood-specific zoning overlay, absent vigilant research.\textsuperscript{358}

Complicating the problem of imposing covenant by zoning is the lack of heuristic clues to the unwary prospective buyer.\textsuperscript{359} Because the rules in sublocally zoned communities aim to preserve existing character, they often are implemented when that character has started to fade,\textsuperscript{360} and residents are concerned about losing it altogether. As a result, in communities struggling to maintain small, modest homes, for example, several “McMansions” might already have been built, creating incompatible development. And in historic neighborhoods, a number of old structures may already have been demolished and replaced with modern homes by the time the historic preservation rules are implemented. As a result, the prospective buyer is likely to notice some sort of theme—small or old houses, for example—but will also notice quite a bit of variation from that theme. In many such communities—with the exception of clearly “character-filled” neighborhoods such as old town Alexandria, Virginia—there is nothing that shouts “strict rules” to the casual viewer of a sublocally zoned community.

Given the multiple notice requirements in private covenanted communities, and buyers’ lack of awareness of rules despite those requirements, actual notice is likely to occur even more infrequently in public, sublocally zoned communities, which lack any formal or heuristic notice mechanisms. One mitigating factor, however, may be the presence of neighborhood associations in many public, sublocally zoned neighborhoods. These associations may be eager to advertise the rules to encourage compliance, and to ensure that incoming homeowners do not assume that

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\item \textsuperscript{357} Telephone Interview with anonymous resident (Dec. 15, 2008) (notes on file with author).
\item \textsuperscript{358} Anthony J. Samson, Comment: A Proposal to Implement Mandatory Training Requirements for Home Rule Zoning Officials, 2008 Mich. St. L. Rev. 879, 891-93 (2008) (describing new zoning tools as “complex” and explaining land use officials’ lack of understanding or awareness of them).
\item \textsuperscript{359} As discussed below, the lack of heuristics arises from previously-legal property uses that occur prior to the designation of a district. See, e.g., COLLINS & WATERS, supra note 116, at 33 (discussing the “rate at which historic buildings were being lost” prior to the implementation of Atlanta’s preservation ordinance).
\item \textsuperscript{360} See id.
\end{enumerate}
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they can do whatever they please with their property. As such, they often advertise the rules, or at least the community aesthetic that the community strives to preserve, in free newsletters—which prospective homeowners may pick up when they stop for a sandwich at the corner grocery store—and on their neighborhood association websites.  

Another potential mechanism for notice of public rules is the realtor database, which alerts homebuyers to the presence of a “neighborhood.” Because public rule-bound communities tend to exist within distinct neighborhoods, which have formal or even informal names, the name of the neighborhood will appear in the database search. While the rules associated with that neighborhood will not appear, an inquisitive homebuyer may be inspired to investigate the neighborhood association’s website once alerted to the existence of a distinct neighborhood.

That said, all of these mechanisms are informal and fail to provide notice of rules to the average homebuyer with limited investigation time. Many individuals buying property within a sublocally zoned community are not likely to be aware of the community’s specific aesthetic rules. As such, their preferences may not be well reflected in that community’s rules.

3. Urban redevelopments: notice through heuristics and city advertising

Urban redevelopments, like sublocally zoned neighborhoods with overlay zoning rules, lack the common law and statutory-based notice provisions of private covenanted developments, yet they have several unique characteristics that strengthen prospective buyers’ awareness of the rules. First, these communities are typically heavily advertised by the cities promoting them, and the city attempts to involve its citizens in their formation process. Thus, unlike the formation of a private covenanted subdivision, where a developer designs the community and its rules and then sells lots, a municipality typically holds multiple public hearings when planning and designing an urban redevelopment. This alerts potential community residents to the uniqueness of the community and the fact that it is likely to have special rules. And as the development nears the final stages of planning and the initial construction phases, the city often publicizes both the amenities of the development and its unique restrictions. A new downtown neighborhood in Honolulu, for example, advertises that its “Area Plan and Rules were developed to assure that future development in [the neighborhood] . . . will be implemented in a manner that protects the public’s best interests-socially, economically and environmentally.”

Although the buyers in these urban redevelopments lack formal notice of the portion of the rule set formed by the overlay (as opposed to the covenants, which provide the other half of the rule set), urban redevelopments, like private subdivisions, also provide strong heuristic hints of the rules. Because they are built on a vacant piece of land, or many of the pre-existing structures on the land are razed or substantially renovated as part of the redevelopment, the organized

362 See infra note 363 and accompanying text.
lay-out of the community and the consistent design and aesthetic are more likely to alert buyers to the existence of rules. Assuming that the rules are enforced as time passes, the lack of formal notice will be substantially alleviated by this constructive notice.

C. Modification and enforcement: changes to rules in the near and far future

Assuming that consumers are notified of the rules and thus find the rule set that best matches their preferences for a defined, controlled community aesthetic, rule-bound communities will only be successful in the long term if they ensure that the rules are durable yet flexible. If consumers are to ultimately achieve their preferences for rules, there must be mechanisms in place to ensure that the rules do not abruptly or substantially change—as this would stymie the rules’ original purpose of providing a community aesthetic—yet also to ensure the rules are responsive to the community’s changing needs over time. This is important in three respects: for one, even those who were notified of the rules may have purchased a rule package, which contained some rules that they disliked and wished to change. Second, even if incoming consumers preferred the entire rule package, the enforcement of certain rules may create serious rights-based concerns where enforcement causes unique hardships for certain individuals.365 And finally, even where a community prefers all of the rules in the package, its collective property needs are likely to evolve over time.366 While residents may still argue for the continuance of some rules, others may be viewed as unnecessary. The community may eventually wish to convert its common golf course, which the covenants require to be maintained in perpetuity as a recreational area,367 to a community garden, for example. This part examines the extent to which rule modification and enforcement processes guarantee some rule durability as well as flexibility where necessary, and whether the processes respond to the will of the community at large.

1. Private covenanted communities: “democratic” processes overshadowed by discretionary mechanisms for modification and enforcement

Private covenanted communities may offer the least assurance that rules, once implemented, will remain in place, or, for that matter, that rules will be flexible where necessary. This is because if the property owners’ association fails to enforce a rule, the rule is waived or abandoned and is thus permanently modified through lack of enforcement.368 And although this common law rule causes some boards to carefully enforce each and every rule, others are too busy,369 or simply not sufficiently committed to the rules, to consistently enforce them. The level

365 See, e.g., Ann Martindale, Comment: Replacing the Hardship Doctrine: A Workable, Equitable Test for Zoning Variances, 20 CONN. L. REV. 669, 669 (1998) (explaining the “hardship” test for granting variances to land use regulations, which is intended “as a safeguard against the unconstitutional ‘taking’”).
366 See supra note 42 and accompanying text.
368 See, e.g., Vernon Tp. Volunteer Fire Dept., Inc. v. Connor, 579 Pa. 364, 376 (2004) (“As a general rule, a restrictive covenant may be discharged if there has been acquiescence in its breach by others, or an abandonment of the restriction.”).
369 See, e.g., NELSON, PRIVATE NEIGHBORHOODS, supra note 16, at 78 (discussing how board members face “high demands on their time”).
of modification, in other words, depends entirely on the actions of a small group of people, and this small group of people typically has broad discretion to act without the official vote of community members. If a board fails to consistently enforce a requirement that fences be made of wood, for example, or if it grants several official “variances” to landowners—approving, through letters or architectural review committee decisions, landowners’ requests to install metal fences—a court is likely to strike down the board’s later attempt to enforce the wooden fence requirement on a landowner’s property. The court will find that due to the board’s failure to consistently enforce the wooden fence rule, it has waived or abandoned it. This can lead to the steady and consistent erosion of a number of rules that were originally intended to form a unified community aesthetic.

In the long term, as individual rules slowly erode, the community may change so much that it becomes physically distinct from the original plat recorded by the developer. If a board allows homeowners to construct large additions to their homes or accessory structures on their lot, for example, or to carve up a common area into private lots, the community will change so substantially as to make the original rules inapplicable. In this case, a court is likely to apply the “changed conditions” doctrine, wherein it holds that a covenant, condition, or restriction is no longer enforceable because it no longer accords with its original purposes.

With waiver and abandonment in the near term, then, and changed conditions in the long term, there are many opportunities for substantial modification of the rules, all without formal input from the community residents, aside from residents’ ability to complain at monthly board meetings, to appeal a decision to a committee of the homeowners’ association board, and, in rare circumstances, to appeal an enforcement decision to a referendum vote of all of the community’s homeowners. Thus, where a board goes against the will of the community by failing to enforce the rules, the original purpose of the rules is frustrated—assuming, that is, that the community wants the rules to remain in place. On the other hand, where a community wants flexibility—where it wishes, for example, to abandon select rules that it deems unnecessary to protect the community aesthetic, the discretionary process also creates obstacles. The community could indicate to the board that it did not believe that enforcement of prohibitions on sand boxes and swings for children, for example, was necessary. But citizens

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370 See, e.g., Franzese, Village, supra note 51, at 556 (“The typical declaration vests governing bodies with broad authority to establish and impose penalties for infractions of the rules.”); see also Reichman, supra note 64, at 269 (“The modern attitude is to vest an almost unlimited discretion in an architectural control committee to pass upon building plans.”).

371 See supra note 368.

372 See, e.g., Vernon Tp., 579 Pa. at 376 (“Where changed or altered conditions in a neighborhood render the strict adherence to the terms of a restrictive covenant useless to the dominant lots, we will refrain from enforcing such restrictions.”).

373 See, e.g., Rules and Regulations, Saddlebrooke Homeowners Association #2 at 2, 4 (Sep. 2008), available at http://www.sbhoa2.org/picture/rules___regulations_sept_08.pdf (describing the Rules Compliance Committee and providing for appeal of an enforcement decision to the committee, through the community’s General Manager).

374 Nelson, supra note 12, at 84 (describing how, for appeals from architectural review committee decisions, a “unit owner in some cases may be able to obtain a referendum vote among the association’s full membership,” but conceding that “most standard neighborhood constitutions written by real estate developers do not provide for an internal appeals process”).

375 See, e.g., Topanga Assn. for a Scenic Community v. County of Los Angeles, 11 Cal.3d 506, 518 (1974) (“If the interest of . . . parties in preventing unjustified variance awards for neighboring land is not sufficiently protected, the consequence will be subversion of the critical reciprocity upon which zoning regulation rests.”).
often have little formal say in the board’s decisions to grant variances or turn a blind eye.\textsuperscript{376} As such, and because of the strong discretion vested in the board, the board could insist upon enforcing rules that the community believed to be unnecessary, causing the flexibility of rules to be unpredictable. Although the community can voice its input by voting out the board if it disagrees with its actions, the vote may come too late: the rules could already be abandoned or waived by the time of the election.

There is also a formal “democratic” yet private mechanism for modifying community rules in private covenanted communities, which has the potential to ensure that residents’ preferences for keeping certain rules and relaxing others are accounted for.\textsuperscript{377} A private subdivision’s declaration of covenants, conditions, and restrictions typically allows a community to amend its CC&Rs through a vote of a large percentage of owners within the subdivision.\textsuperscript{378} In this case, a group of landowners who strongly objects to the continued application of certain rules could go door-to-door within the community, persuading other residents to come out and vote to modify the rules. Because rules may be modified in other, more informal ways, however, through lack of enforcement, the board can easily modify rules without going through the formal modification process. And the board cannot, of course, enforce rules that have been eliminated through prior waiver or abandonment.

Just as the discretion of the board in a private covenanted community to enforce rules or not, and thus to modify them, prevents the community at large from having a powerful voice in durability or flexibility of rules, the process for granting individual variances from rules in private covenanted communities often prevents full participation by the community. As mentioned briefly above, individual homeowners may request a variance from a rule where it presents a particular problem on their property. The board, typically through a letter responding to the request, then grants or rejects the request.\textsuperscript{379} If the board recommends the granting of a variance, some declarations provide homeowners with an opportunity to support or reject that recommendation. A declaration for a covenanted community in Wyoming, for example, provides that “a variance shall be allowed from the conditions and restrictions of any of these Covenants upon the written approval of the Members of the Association owning two-thirds of

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\item The only recourse for an association’s failure to enforce might be to sue. “[A]t least one court” has found potential liability. Gillette, supra note 40, at 1401 (citing Cohen v. Kite Hill Community Ass’n, 142 Cal. App. 3d 642 (1983)).
\item I view the amendment process as allowing for residential control over keeping the covenants or modifying them. Others, however, reasonably see the process as a threat to rule durability. See, e.g., Terrell R. Lee, In Search of the Middle-Ground: Protecting the Existing Rights of Prior Purchasers in Common Interest Communities, 111 PENN ST. L. REV. 759, 775 (2007) (arguing that “the adoption of new affirmative covenants in a common interest community can substantially alter a prior purchaser’s existing rights”).
\item See, e.g., 36-DEC. REAL EST. REP. 5 (2006) (“Because covenants are intended to govern communities over long periods of time, most declarations provide for amendments.”); Lee, supra note 377 at 774 (describing a private community’s original declaration included a modification clause which permitted amendments by a majority vote’’); Brockway v. Harkleroad, 273 615 S.E.2d 182, 184 (Ga. App. 2005) (describing a declaration in a private covenanted community that permitted covenants and restrictions to “be amended during the first twenty (20) years [from the declaration date] by an instrument signed by not less than ninety percent (90%) of the Lot Owners and thereafter by an instrument signed by not less than seventy-five percent (75%) of the Lot Owners’’); NELSON, PRIVATE NEIGHBORHOODS, supra note 16, at 94 (explaining that amendment to private covenanted communities’ “constitution” (the declaration) “generally requires a vote of the full membership”).
\item See, e.g., Dwan v. Indian Springs Ranch Homeowners Ass’n, Inc., 186 P.3d 1199, 1203 (Wyo. 2008) (describing a letter from a homeowners’ association board to a resident, confirming her request to “obtain a variance . . . in order to build a guest house/garage” above the height limit, and approving her variance”).
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the Sites after recommendation of approval by the Board.” But if a homeowners’ association board makes clear that it will not recommend a variance, the homeowner can go straight to court. The ability for residents to participate in the variance process is only triggered if the board takes certain discretionary actions.

2. Sublocally zoned communities: democratic rule modification constrained by problems of governance structure and capture

As we have seen, although private covenanted communities provide a “democratic” method of selecting appropriate modification of rules, the doctrines of waiver, abandonment, and changed circumstances substantially undermine residents’ ability to formally influence the level of rule enforcement and, as a result, the degree of rule modification that occurs within their community. This is not the case in sublocally zoned communities, where the procedures for repealing the rules are similar to those required for forming the rules in the first place. Changes to the rules occur through the public rezoning process, wherein citizens of a community must persuade the municipal body that rule modifications are desired or not, and they must often obtain a majority or supermajority vote from that body in order for modification to occur. Unlike in private subdivisions, there is no way to circumvent this modification process. Even if flagrant violations of the rules have occurred over time as a result of sloppy enforcement, or otherwise, the rules remain in place in perpetuity, until a strong contingent within the community persuades the local government to change them. This allows the community to hold on to the rules that they view as important to maintaining the community aesthetic. It also allows for them to vote the rules out where the community wants more flexibility. And the procedure is relatively predictable, as it is not left to the discretionary actions of a small group of enforcers.

Although this process offers a more democratic and less discretionary procedure through which a community’s citizens may modify rules than does the discretionary modification through non-enforcement pattern in private covenanted communities, the process is not ideal in terms of accurately capturing citizens’ preferences for rules and rule enforcement. For those who prefer rule flexibility—who would prefer waiver or abandonment of certain rules in a private covenanted community, for example—frequent violations of the rules in a sublocally zoned community do not provide much recourse. One neighbor’s violation, which goes unenforced, does not reassure another neighbor that she may violate the same rule and not face enforcement, as the rule is still on the books. Waiver will not be a valid argument.

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380 See Dwan, 186 P.3d at 1201 (quoting the community’s declaration).
381 Dwan, 186 P.3d at 1201-02.
382 See, e.g., City of Greensboro Planning Department, supra note 408, at 4 (explaining that boundaries of Neighborhood Conservation Districts “may be altered in the same manner as they are created”).
383 See Mendelker, supra note 28, at 425-26 (describing how rezonings require a majority vote of the local government body, and a supermajority vote if 20% of interested property owners object to the rezoning).
384 Eagle, Delegation, supra note 41, at 858 (describing zoning rules as “difficult to alter”).
385 But see Craig A. Peterson and Claire McCarthy, Small-Tract Rezonings: Toward Expanded Procedural Safeguards 188, in LAND USE LAW: ISSUES FOR THE 80s (Edith Netter, ed., 1981) (discussing how instead of official, legislative rezonings, local governments increasingly favor discretionary reviews of proposed development’ and how often, “the rezoning process does not operate in the manner outlined in the treatise”).
386 See, e.g., Nelson, supra note 18, at 835 (arguing that “under zoning the substantial influence on . . . [“matters such as the control of fine details of neighborhood architecture”] by outsiders leaves the neighborhood exposed to regulatory actions that it does not want”).
For residents who wish to maintain rules, although a failure to enforce the rules does not lead to their abandonment or waiver as it does in a private covenanted community, a failure to enforce still leaves the community with many violations in the meantime, which detract from a consistent aesthetic. And where a community relies upon the city—a governance structure very distant from the individual neighborhood—to enforce its rules, such violations may be frequent. Cities are often too busy or overstaffed to enforce the rules to the degree that the community would prefer.\(^{387}\) It takes New York City 366 days to change a streetlight bulb\(^{388}\); rule enforcement, a more complicated task wherein the staff must first decide whether there is even a problem to be addressed, is likely to be an even longer process.\(^{389}\) By the time a neighbor calls 311, a code officer comes out to investigate the problem, and the officer decides whether there has been a violation or not, a structure may already have been irreversibly demolished or modified contrary to the community’s sublocal zoning rules.

Second, a city’s governmental body makes the ultimate decision to modify sublocal zoning rules or not, which contributes to the larger problem of capture. Through rezoning, the rules may be modified, or their modification may be denied, through a process where individual voices are overwhelmed by strong, self-interested groups with high stakes in the outcome of a vote.\(^{390}\) Indeed, some writers have gone so far as to characterize zoning as “corrupt . . . and usually subject to derision,” as well as “unfair . . . self-serving . . . [and poorly administered].”\(^{391}\) Adding to the potential for capture is the inability to vote out “captured” public officials in time: just as in private covenanted communities, citizens in sublocally zoned communities could vote out city council members who made controversial rezoning decisions, but the vote may come too late. The historic homes, formerly protected under an overlay, may already have been demolished.

In addition to a municipality’s ability to modify a sublocal community rule by voting in favor of rezoning, a municipality has the power, like a private property owners’ association board, to grant individual variances from rules where landowners would experience hardship if the rules were applied.\(^{392}\) In some cases, cities may grant so many variances from the rules—

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\(^{389}\) See, e.g., BABCOCK & LARSEN, supra note 22, at 140 (arguing that if “neighborhood vigilantes” do not enforce the regulations in a public neighborhood with localized zoning, there will likely be underenforcement, as city administrators will not fill in).

\(^{390}\) See, e.g., Peterson & McCarthy, supra note 385, at 19 (discussing the “lobbying or informal advocacy which often precedes rezoning hearings . . . and . . . undermines public confidence in the rezoning process”).


\(^{392}\) See, e.g., ARIZ. REV. STAT. § 11-807 (2009) (“The board of adjustment may . . . [a]llow a variance from the terms of the ordinance when, owing to peculiar conditions, a strict interpretation would work an unnecessary hardship. . . .”); CAL. GOV. CODE § 65906 (2009) (permitting “[v]ariances from the terms of the zoning code . . . only when, because of special circumstances applicable to the property . . ., the strict application of the zoning ordinance deprives such property of privileges enjoyed by other property”); CONN. GEN. STATUTES § 8-6 (2009) (granting the zoning board of appeals the power “to determine and vary the application of the zoning . . . ordinances. . . . a literal enforcement of such bylaws, ordinances or regulations would result in exceptional difficulty or unusual hardship”); MASS. GEN. LAWS 40A § 10 (2009) (giving the “permit granting authority” “the power after public hearing . . . to grant . . . a variance from the terms of the applicable zoning ordinance . . . where . . . a literal enforcement of the provisions of the ordinance or by-law would involve substantial hardship”); 53 PA. STATUTES § 10910.2 (2009) (“The [zoning hearing] board may grant a variance, provided that . . . (1) . . . there are unique
where they broadly interpret “hardship,” for example—that the rules become meaningless. Although the rules are not officially waived or abandoned, as they would be in a private covenanted community, the rules are substantially weakened. In this case, the residents who desire that rules be perpetuated, not consistently ignored, have some recourse. Neighbors may appear before the board of adjustment or a similar board, which is a quasi-judicial body, to protest against each variance request. They may also appeal the board’s decision to a local court. This gives them some ability to prevent large numbers of variances from overwhelming the rule. But it requires a good deal of effort and participation, and many individuals will not have the time or patience to engage in the process.

3. Urban redevelopments: an interaction between two rule sets

In urban redevelopments, which often have both a zoning overlay and private covenants to govern the community aesthetic, property owners have more venues through which to express their preferences for the continuance or modification of rules. First, they may go to the association board, arguing that they should be able to plant trees that are not on the list of permitted landscaping features, for example, or arguing in favor of allowances for swingsets and sandboxes. As in a private covenanted subdivision, if the board chooses to turn a blind eye or to officially allow the deviation, the rules will be waived or abandoned. The property owner who wishes to preserve or modify rules has another set of rules to work through, however. The zoning overlay that created the subdivision often requires a certain design for homes—a minimum “green building” certification, for example, to ensure environmentally responsible urban living. A homeowner who wishes to change these rules, on the other hand, could attempt to persuade the city to amend the overlay, through the same rezoning process that applies in sublocally zoned communities. Through a majority or supermajority vote, the city council or similar governing body could agree to rewrite parts of the overlay. In this case, however, the city likely has more stake in the rules than it has in a sublocally zoned neighborhood’s overlay. Because the city government was involved in the initiation of the development and participated in its formation process, including the rule formation process, it may be more attached to the rules, viewing them as essential to the continued success of the development and its ability to attract downtown dwellers. As such, the city may resist modification more strongly, thus creating more durable rules.
The two sets of rules in urban redevelopments create an interesting procedural interplay, however. While a rule within the zoning overlay for the redevelopment requires green building, and the city is unwilling to modify that rule, a homeowner could potentially get around it by violating a more specific private covenant that related to green building. If the covenant required that any windows replaced within the home have a minimum energy efficiency rating, for example, and the board failed to prevent the homeowner from installing an inefficient window, the homeowner could frustrate the intent of the city’s overlay rules. While the democratic process would allow for the larger principles within the overlay to remain in place—or be modified as a result of lobbying by interested community members—there are means to individually circumvent them and to cause abandonment and waiver of the rules that implement these broader principles.

Compared side-by-side, then, all three types of rule-bound communities an ongoing dynamic formed by individuals who wish to change the rules, groups of residents who wish to keep them in place, boards with the discretion to enforce the rules or not, and city governments who may or may not care about preserving the rules. In private subdivisions, modification is left almost entirely to a private body—401—the association board that chooses to enforce the rules or not—and residents have only limited say in the board’s discretion to enforce or not. While residents in sublocally zoned communities do not lose rules simply through non-enforcement, their voices in support of modification or perpetuation of the rules may not be heard if a distant city government without much stake in the rules votes in favor of a powerful yet non-representative interest group. And in urban redevelopments, the democratic process permitted by rezoning of overlay rules may be undermined by the more specific rules within the covenants, conditions, and restrictions, which can be waived or abandoned at a private board’s discretion. While sublocally zoned communities may offer the best rule durability, as well as formal and predictable processes for flexibility, then, they may not accurately and fully reflect consumer preferences for rules.

V. Solutions: providing better notice and ensuring a rule durability-flexibility balance

Public and private rule-bound communities already have taken great strides toward responding to homeowners’ desires for defined aesthetics. The rules have created problems, however, that should not be ignored. This Part discusses how rule implementation in sublocally zoned neighborhoods, and notice mechanisms and better processes for modifying and varying enforcement of rules in all three types of rule-bound communities, should create a better fit between consumers’ preferences for rules and the rules implemented within their community, ensuring a balance between rule durability and flexibility.

A. Rule formation and implementation in existing neighborhoods: voting safeguards

Because of the strong retroactivity concerns when overlays are implemented in existing neighborhoods, from interference with liberty interests to more standard concerns about the loss of what one may do with property and resulting value diminution, 402 governments implementing sublocally zoned communities must carefully consider the implications of retroactive rule formation and implementation and enact further safeguards. One necessary safeguard is to

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401 See supra note 278 and accompanying text.
402 See supra notes 306-309 and accompanying text.
require property owners to vote on the new rules, rather than allowing a city commission to initiate them. But even a vote may not be sufficient because it can leave a large minority trapped within unwanted rules. Robert Ellickson, for example, has suggested that a majority vote, such as the 60% of owners required for some historic districts,403 “poses risks of majoritarian oppression.”404 He suggests that a supermajority vote should be required in order to retroactively impose rules.405 In some cases, city politicians have implemented similar requirements despite their not being on the rulebooks. In Dallas, for example, where a neighborhood had the requisite majority vote in favor of overlay rules, a council member “persuaded the council to reject the overlay,” explaining, “When you’re changing someone’s property rights, you’re going to have to have more of a majority than 50-plus percent.”406

Local governments, as Ellickson has suggested, should require at least 60% of owners within the neighborhood, as well as a similar percentage of residents, to vote in favor of new overlay zoning prior to government approval of the zoning. To address concerns surrounding “trapped” consumers, however, local governments should additionally create a mechanism whereby the community’s residents, in voting for the new rules, agree to exclude certain properties from the overlay, based on the community’s understanding that several property owners strongly object to the proposed rules.407 This type of mechanism is already available, to some degree, where cities allow communities to create overlay zones on single blocks. In Greensboro, North Carolina, for example, neighborhood conservation overlays “can be as small as one block face.”408

Most importantly, regardless of the measures implemented to mitigate or avoid altogether the negative effects of retroactive imposition of undesired rules, local governments must remember that the protective element of choice—the defense that the consumer knowingly chose the rules and “contracted” for them by purchasing a deed with covenants attached409—does not exist in sublocally zoned communities.

B. Notice: providing visual cues of rules and formal notice of overlays

In private covenanted communities, where prospective homeowners have multiple opportunities for notice as a result of the common law, disclosure requirements, and heuristics, many consumers still fail to read the rules. While the detail and specificity of these rules is beneficial, as consumers who do read them will have a very clear idea, in advance, of the limitations on their property, something is needed to alert consumers to the rules in the first place, and to persuade them to read beyond the first page. Better visual cues are necessary, which will quickly alert prospective buyers through signals even more obvious than the

403 See supra note 314 and accompanying text.
404 See, e.g., Ellickson, Institutions, supra note 20, at 103.
405 Id.
407 Voters may legally approve zoning that might otherwise be considered spot zoning. See, e.g., City of Eastlake v. Forest City Enterprises, 426 U.S. 668, 680 (1976) (Powell, J., dissenting) (describing the majority’s decision, which allowed voters, by referendum, to make zoning decision about the “status of a single small parcel owned by a single ‘person,’” as a “ ‘spot’ referendum”); City of Eastlake, 426 U.S. at 670, 679 (affirming a procedure by which voters, by referendum, rejected a “zoning change to permit construction of a multi-family, high-rise apartment building”).
409 Epstein, supra note 10, at 914 (discussing the “voluntary decision to purchase” and how that decision, combined with notice, creates consent in private covenanted communities).
heuristics of an organized subdivision. In public rule-bound communities, local governments should require the installation of signs that alert homeowners to the fact that they are entering an historic or environmental resource overlay district, for example. In private covenanted communities, the sign at the entrance should advertise that the subdivision is governed by an association. Some signs will not even require textual changes to provide notice of the community’s uniqueness. If street signs in rule-bound communities are required to be a different color than those in traditional communities, for example, this will alert consumers to the fact that something is different about this community, leading them to further inquire about these differences, to read the rules, and to find the rules that best match their preferences.

In addition to visual cues, state governments should, at minimum, require realtors to add a symbol to property search databases, which indicates whether a property is within a rule-bound community. State governments should also consider contracting with a private dot.com to expand upon the existing Zillow.com concept. This website allows a home shopper to click on an aerial picture of the home (thus providing a view of the surrounding property uses) and to pull up readily accessible information on the nearby schools and limited data on the neighborhood (by zip code) in which the property is located. A more complex website would reveal the relevant community rules when the homebuyer clicked on the photo and would allow the homebuyer to type in the physical uses that she desired for her properties. The website, for certain trigger words such as “garage,” “porch,” “accessory apartment,” or “fence,” would then layer the relevant regulations atop the property, providing a visual regulatory map.

Symbols in search databases and signs alerting potential consumers to the existing rules are insufficient, however, in sublocally zoned neighborhoods and urban redevelopments, which have covenant-type rules—in the form of a zoning overlay—but have no formal disclosure requirement for those rules. Just as many states require paper disclosure of covenants prior to or at closing, overlay rules should appear in title searches and contracts for sale. While paper notice has failed to alert many incoming homeowners in covenanted communities to the rules, it is still an important first step, which is lacking in public rule-bound communities.

Notice, both visual and formal, in all three forms of rule-bound communities is essential to provide community consumers with better information and thus, to better ensure that their preferences are realized in the community that they ultimately choose.

C. Modification and enforcement: creating sublocal institutions and better input and appeal processes

From Part IV, three distinct problems can be gleaned from the processes for modification and enforcement that exist in rule-bound communities. First, while small, sublocal institutions for enforcement are essential, as those who serve on such institutions are invested in the rules, enforcement bodies that lack formal processes for residential input in enforcement decisions have too much discretion. For those who want rule flexibility, a board’s insistence on enforcing

410 Conversation with Terry Martin, Interim Director of Research, Tarlton Law Library (Feb. 4, 2009).
413 Lee Fennell suggested this notice remedy via e-mail on January 17, 2009 (on file with author).
414 See supra notes 342-346 and accompanying text.
415 See supra notes 348-350 and accompanying text.
each and every rule can be viewed as overzealous and intrusive. For those who strongly prefer that certain rules remain in place, a board’s discretion to avoid enforcing certain rules—by granting individual variances or simply not enforcing them—can lead to unwanted modification of the rules through abandonment and waiver in private communities.

Second, sublocally zoned communities better ensure the durability of rules by requiring public hearings and a vote for rule modification and a public quasi-judicial hearing for granting of variances from the rules, as well as by preventing waiver or abandonment altogether. But those officials voting on modification and granting variances may not in fact respond to residential preferences for rules, as they are often captured by special interest groups. And third, in the “hybrid” urban redevelopments, where there are two sets of rules—one enforced by a distant governmental body and the other by a sublocal property owners’ association—the modifications or abandonment of rules by the association’s failure to enforce can undermine the broader principles within the rules enforced by the governmental body. Despite these problems, effective mechanisms from each can be combined to provide for rules that are perpetuated over time, yet also flexible.

In private covenanted communities, mechanisms similar to public communities’ hearings for variance and modification should be implemented that allow residents to influence board decisions to grant individual variances from rules, to avoid enforcing rules, or to enforce rules zealously. David Kahne, for example, has recommended that homeowners in private covenanted communities have an active say in the association’s “power to change operating rules,” and that homeowners should have an independent ability to vote to “create, amend, or terminate rules.” This type of power is essential. Adding participatory, deliberative processes is not always beneficial. But the existence of some process for participation, coupled with individuals who have knowledge of the issue to be decided—those familiar with the rules and their constraints, for example—is important, in that it helps to ensure that the rules better match individuals’ preferences for the physical community aesthetic. Some state courts already require private covenanted communities to offer some forum for input from neighbors when a board allows a landowner to stray from a rule, and states should consider replicating this common law principle within the state code. In Cohen v. Kite Hill, for example, a property owners’ association allowed a homeowner to construct a fence that was not in conformity with the covenants. California’s appellate court determined that the board had engaged in a zoning-type activity—the board essentially had granted a variance—and allowed the homeowner objecting to the variance to sue the board for failing to consider and protect neighboring property interests.

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416 See, e.g., Alexander, Passivity, supra note 201, at 160 (One homeowner exclaimed in an interview: “I find the rule that you can’t build any structure without the . . . [approval] of the [homeowners’ association] board to be completely unreasonable. The homeowners’ association has got to be kidding; this is my property!”).
417 See supra note 383 and accompanying text.
418 See supra note 394 and accompanying text.
419 See supra note 391 and accompanying text.
421 See, e.g., Matthew D. McCubbins & Daniel B. Rodriguez, When Does Deliberation Improve Decisionmaking?, 15 J. CONTEMP. LEGAL ISSUES 9, 30-34 (2006) (concluding that deliberation, even within a very small group of individuals, can decrease social welfare).
422 See, e.g., id. at 37 (discussing how deliberative processes can be beneficial where there are one or several trusted, knowledgeable speakers who can teach the other participants about the issue).
424 Id. at 652.
Residents will not likely have the time or the will to participate in multiple hearings about decisions to enforce rules or not or to grant variances or not, however.\textsuperscript{425} As such, the board, at its monthly meetings, should instead be required by state statute to provide a list of all pending enforcement decisions and ask citizens for input about those proposed decisions. Although many residents do not attend monthly meetings,\textsuperscript{426} boards should at minimum provide web-based or mailed notice of the list and ask residents to respond with any concerns within a designated number of days.

A second essential mechanism for ensuring that homeowners in private covenanted subdivisions, as well as in urban redevelopments, have a say in the variance process and in the decision to enforce or not (and thus in the modification of rules through abandonment and waiver), is the existence of a local, public appeal process. Rather than a court hearing a direct appeal, which prevents broader public participation in enforcement decisions, this process would provide residents with a public forum in which to influence enforcement of their community rules. In private covenanted communities, it would stymie or encourage waiver, and by doing the same in urban redevelopments, it would, in some cases, prevent changes to the covenants from undermining the rules within the overlay.

Accordingly, local governments should build upon the general institutional structure of the urban redevelopment—the public-private “hybrid”—to create such an appeal process in urban redevelopments and private covenanted communities. In both communities, the sublocal enforcement institution (the private homeowners’ association) should remain. The local municipal government, as discussed above, should require the association to allow residential input in the decision to grant or deny a variance through a public hearing or alternative input mechanism, such as e-mailed lists of enforcement decisions. The municipality should also provide a mechanism through which homeowners can appeal a board’s refusal to enforce a rule, or its insistence on enforcing that rule, to a local, quasi-judicial public body—an enforcement appeals board, as I call it. This board would be similar to the zoning board of adjustment, but would have more limited powers and a more narrow scope of duty, as it would only hear appeals from sublocal enforcement institutions. In the case of an urban redevelopment, if this board found that the enforcement decision conflicted with the principles contained within the zoning overlay, it should, through local code, be required to direct the association to re-consider its enforcement decision. Alternatively, if it found no conflict, and if the interested residents persuaded the board that enforcement was desired or not, the body should be able to affirm the enforcement decision. All interested parties should then be allowed to appeal the decision of the enforcement appeals board to court, as they may now do for zoning board of adjustment decisions.\textsuperscript{427}

For private covenanted subdivisions, the enforcement appeals board should have more limited powers, as there is no “public” overlay governing the subdivision, and residents have contracted for their own private rules. Public interference with those rules would weaken the

\textsuperscript{425} See, e.g., supra note 287 (concluding that many residents in private covenanted communities are apathetic); see also Telephone Interview with anonymous resident (Dec. 15, 2008) (notes on file with author) (describing the prevailing residential attitude within private covenanted subdivisions as “apathy” and arguing that “most people see their homes as a respite from the stresses . . . of the world” and do not want to be involved in community decisionmaking); see also infra note 426.


\textsuperscript{427} See supra note 396 and accompanying text.
force of recorded covenants. But the public board should still provide support for residents of private communities who wish to have a public forum in which to express concerns about enforcement decisions. The enforcement appeals board should thus provide for mediation opportunities between the residents and the board, encouraging them to reach a compromise settlement that would be enforceable by municipal officials. This type of “appeal” from a board’s refusal to enforce would allow residents to prevent abandonment of rules deemed particularly important. While Robert Nelson argues that “in matters such as the control of fine details of neighborhood architecture, there is no need or justification for broader municipal involvement,” the availability of an appeal to a public municipal body, as opposed to requiring a landowner to appeal directly to court for redress, is a central need.

In sublocally zoned communities, where public processes are already in place that allow for public input in variance decisions and rule modification, mechanisms are needed to ensure that enforcement of rules occurs at a level desired by the community, and that the public institutions tasked with making rezoning and variance decisions are not captured by special interests. For the former problem—the lack of rule enforcement by a distant municipal body—local codes should allow sublocally zoned communities to form their own public enforcement associations, which would be similar to private homeowners’ associations but would have more limited enforcement powers. Like Cambridge, Massachusetts’ Neighborhood Conservation District commissions, these associations should review building and construction permit applications, and the municipality should not be able to approve a permit without the go-ahead from the sublocal association. The association, as is required in Cambridge, should consist of residents in addition to a real estate or architectural professional from the city, thus ensuring that those who are closest to the rules have a say in their enforcement.

For the latter problem of capture, citizens within sublocally zoned communities and urban redevelopments should have more say in the rule modification process. Rather than allowing a rezoning to occur through a majority of supermajority vote of the municipality’s legislative body, the residents of a sublocally zoned community also should be required to vote to revoke rules. As such, the municipal rules should allow the city council to approve an overlay rezoning only if an official vote of the community residents and owners affected by the overlay first recommends the rezoning. Furthermore, re-considerations of overlay rezoning should be required every twenty or so years to ensure that the rules continue to meet the community’s needs. Specifically, local governments should insert a sunset provision into the zoning overlay when a community originally votes for the overlay. The sunset provisions should implement a modified form of the waiver and abandonment principles associated with covenants, providing that citizens should consider those rules that have not been consistently enforced and should discuss whether they wish for those rules to be maintained, amended, or stricken. If a citizen presents proof that a community had consistently failed to enforce a rule at a public hearing prior to the rezoning, the code should provide that this type of proof forms a rebuttable presumption that the rule should be stricken from the overlay.

Several writings have recommended a similar type of sunsetting for private communities. Paula Franzese and Steven Siegel recommend “mandatory sunsetting of developer-imposed rule

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428 Epstein, supra note 10, at 925 (arguing against “public intervention” with covenants).
429 Nelson, supra note 18, at 835.
430 See supra note 280 and accompanying text.
431 See supra note 281 and accompanying text.
regimes,” and in 2009, the Harvard Law Review Association proposed that “[a]ll covenants” should “last for thirty years, at which time the parties must negotiate in good faith and decide whether the covenant should continue as is or continue with modifications.” A number of private covenanted subdivisions already have implemented sunset rules providing for the initial covenants to run for fifteen, twenty, or thirty years, followed by ten-year automatic renewals, at which point the lot owners may vote to terminate them. The same principle should apply to overlay rules in sublocally zoned neighborhoods. Sunset provisions, which require a periodic revisitation and renegotiation of the rules, provide those “trapped” within despised rules with an escape mechanism, and they allow those who favor other rules to argue for their retention. As such, they provide an ideal mechanism for balancing rule flexibility and durability.

Conclusion

As community consumers increasingly demand more detailed rules—rules that move far beyond traditional zoning requirements—an array of public and private mechanisms have emerged in response to this demand. While private covenanted communities have been on the rise for several decades, zoning overlays for existing neighborhoods are an increasingly popular method by which to apply covenant-type rules through a public process. None of these mechanisms, public or private, are perfect in their ability to notify consumers of the rules they are purchasing, or to ensure that consumers have meaningful input in the continuity and flexibility of those rules over time, and some create serious problems. One of the gravest concerns, this article has argued, arises where public rules are imposed upon an existing minority of residents who object to the rules but are overridden either by the majority vote of residents within a neighborhood or by the municipal legislative body. Careful safeguards are required, I argue, to ensure that governments recognize that overlays, which retroactively impose these rules, are not covenants, and that governments do not treat them as such. Governments must recognize that overlays are permanent, and are not “contractually” agreed to by individual owners. As such, a vote of owners and residents within a community in favor of an overlay always should be required to create sublocally zoned communities, thus ensuring that a sublocal government does not itself initiate and impose a top down rule set on an objecting community.

432 Franzese & Siegel, supra note 46, at 1140.
434 See, e.g., Illanhee North Associates, Declaration of Protective Covenants, Conditions and Restrictions of the Plat of Illanhee North (Dec. 1994), available at http://inhoa.org/docs/CCRs_WEB_2008.pdf (providing for the initial declaration to be effective through 2010 unless terminated, and then automatically extended at ten-year intervals unless 75% of lot owners voted to terminate the covenants); Advantage Investment, Inc., Declaration of Covenants, Conditions and Restrictions for Lucky Hollow Farms, available at http://www.luckyhollowfarms.com/cov-res.pdf (providing that the covenants and restrictions shall run “for a term of 20 years” and may then be “renewed and extended” for “successive periods . . . if an agreement for renewal and extension is signed by members of the Association then entitled to case at least fifty percent . . . of the votes”); see also Harvard Law Review Association, supra note 336, at 953 (discussing how several handbooks that address private communities recommend similar initial periods of twenty years, or the time required for amortization of initial mortgages, followed by ten-year extensions with options for termination (citing URBAN LAND INST, THE HOMES ASSOCIATION HANDBOOK § 12.81, at 212 (rev. ed. 1966); U.S. Dep’t of Housing & Urban Dev., Land Planning Procedures and Data for Insurance for Home Mortgage Programs, app. 2, at 6 (1973), available at http://www.hud.gov/offices/adm/hudclips/handbooks/hsg/hsg4140.2/index.cfm)).
Further, I have argued that in voting for an overlay, the local government code should allow residents to omit objecting owners from the rules.

For all rule-bound communities, however, problems exist where community consumers move to the rules. If they are not adequately notified, the rules are not likely to match their preferences well, and dissatisfied consumers will likely engage in an all-out battle against the rules, possibly causing their waiver and abandonment in private covenanted communities, or large numbers of variances in public rule-bound communities. Rule-bound communities must therefore provide notice of the rules to the consumer in a meaningful way. Yet they should not require the consumer to read through thick packets of paper at closing in order to be notified. Visual cues such as unusually colored street signs and a new symbol in realtor databases are needed to alert consumers to the existence of a unique set of rules in all rule-bound communities, and formal disclosure of overlay rules should be provided in sublocally zoned communities.

Regardless of whether consumers are notified of the rules, as time passes they will wish to vary the enforcement of those rules to accommodate individual needs. Alternatively, many consumers will prefer consistent and comprehensive enforcement to ensure that the community aesthetic created by the rules is not substantially eroded. Rule-bound communities should thus provide local enforcement institutions but should implement procedures to ensure that the institution’s discretion is bounded by residential input, providing residents meaningful processes through which to object to enforcement or the lack thereof, and to appeal enforcement decisions to a public, local government body. The urban redevelopment, a hybrid public-private regime, offers a useful model for such an appeal process, as it provides a sublocal enforcement institution as well as a higher, public institution that could, theoretically, accept appeals from enforcement decisions.

The ability to keep desired rules is equally as important in the context of rule modification, as is the opportunity to allow rules to disintegrate or morph as property needs change. In private covenanted communities, consumers’ ability to influence enforcement decisions will translate to a voice in the modification process: many modifications occur through abandonment, waiver, or changed conditions, and assiduous or lax enforcement will either avoid or trigger these doctrines. In sublocally zoned communities, as well as urban redevelopments, sunset provisions requiring resident to “reaffirm” or reject the rules every twenty or so years would ensure that publicly-invoked “private” rules are not set in stone, allowing residents and local governments to expand or erase rules as desired. The combination of tools that I have suggested to better alert consumers to the fact that they are moving to a rule-bound community, and to ensure that they have some say over the application and continuance of those rules once they move in, is by no means comprehensive. Public processes, voting requirements, and sunset provisions will only go so far in matching individual preferences for rules with the rules themselves. But they are important interim safeguards to be contemplated and thrown out, modified, or embraced as rule-bound communities continue to grow.

Rule-bound communities represent a significant step toward greater localized control over human environments, further expanding to the public realm a concept originally embodied within the private covenant. The steady march toward rules will only quicken its pace as more neighbors view their neighbors’ land uses as one component of a larger, cohesive community use, to which individuals claim a collective right. Property uses affect values tied up in both the day-to-day enjoyment and long-term financial goals of property ownership, after all, and individuals’ behavior implies a strong preference toward community-wide rules to steady those values. Yet all rules are not equal. Many are hidden, betraying the purchaser and possibly
conflicting directly with her preferences for rules and the community that they create. Others may offer a fleeting promise, only to be abandoned in the long term as residents come and go. Still others may be too rigid, failing to bend with the winds of time. As Paula Franzese and Steven Siegel have observed, “rules can become weapons.”435 Only with a deeper recognition of the procedural frameworks within which rules in the public, private, and public-private context apply will the institutions that write and administer the rules offer what community consumers fully demand. In the meantime, the great experiment continues, and public communities adopt more and more covenant-type strictures through non-contractual processes. This “covenant by public deliberation” process may ultimately offer the preferable route toward aesthetically defined communities, as the process provides a meaningful opportunity for residents to directly convey rule preferences to the rule makers and enforcers. Yet the historic protections softening the sharp edges of detailed property rules, which exist in the private context, have yet to emerge in public neighborhoods. And private rules offer their own sharp edges, allowing private associations to substantially interfere with rights, which non-negligible numbers of unwary purchasers unknowingly sacrificed upon purchasing a home. In the end, institutions that borrow processes and pieces of processes from both public and private rule-bound communities may find the best route toward extending community aesthetics, in a meaningful and responsive way, to future community consumers. Only time, and consumers’ community choices, will tell.

435 Franzese & Siegel, supra note 46, at 1130.