Public Communities, Private Rules

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As the American population grows, communities are seeking creative property tools to control individual land uses and create defined community aesthetics, or distinctive "built environments." In the past, private covenants were the primary mechanism to address this sort of need. Public communities, however, have begun to implement covenant-type "private" rules through zoning overlays, which place unusually detailed restrictions on individual property uses and, in so doing, have created new forms of "rule-bound" communities. This Article will argue that all types of rule-bound communities are uniquely important because they respond to resident consumers' heightened demand for a community aesthetic. It will also highlight their problems, however. 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 form public rule-bound communities. Yet the rules in overlays are extensive, are applied to existing landowners, and are not easily modified to meet changing community needs over time. And covenants, despite offering a more traditional tool for aesthetic control, create their own problems of incomplete consumer notice and barriers to effective modification. This Article will analyze the impact of these problems, as well as a lack of responsiveness to ongoing consumer demands for the maintenance of desired rules, on rule-bound communities' ability to meet consumer demands for a community aesthetic. It will conclude that rule-bound communities should provide better visual notice of rules and should implement processes that allow for residents to better influence the initial content of rules and how rules are perpetuated or changed.

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INTRODUCTION

The aesthetics and atmosphere of our neighborhoods and communities 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, single family homes. None of these built environments—the "community aesthetic,"[5] or the collective spaces, structures,

1. *See, e.g.*, JILL GRANT, PLANNING THE GOOD COMMUNITY: NEW URBANISM IN THEORY AND PRACTICE 58 (2006) (explaining that in new urbanist design, which aims to create better communities, "[f]ront porches on the houses . . . enhance social interaction in the neighbourhoods").

2. *See, e.g.*, JANE JACOBS, THE DEATH AND LIFE OF GREAT AMERICAN CITIES 75 (1961) (describing a documentary by Charles Guggenheim which followed children at a day care center in St. Louis and found that those who happily raced home at the end of the day came from a neighborhood that had many streets bordered by shops and homes and provided a safe environment for play); Alex Krieger, *Since (and Before) Seaside*, *in* TOWNS AND TOWN-MAKING PRINCIPLES 9, 11 (Alex Krieger & William Lennertz eds., 1991) (explaining how certain types of communities can provide "a place for nurturing family and for cultivating one's homestead").

3. *See, e.g.*, ANDRES DUANY ET AL., SUBURBAN NATION 80–81 (2000) (arguing that "[f]or people to walk, a neighborhood has to be interesting . . . . [A]rchitecture that fails to express the presence of humans is unsatisfying to the pedestrian.").

4. *See, e.g.*, James Q. Wilson & George L. Kelling, *Broken Windows*, ATLANTIC, Mar. 1982, at 31 (arguing that "at the community level, disorder and crime are usually inextricably linked" and that "[s]ocial psychologists and police 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").

5. Within this Article, "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, for example?), the placement of objects such as trash cans, and the landscaping and accessory structures

and uses created by the activities that occur on individual properties (what Lee Fennell has described as "premium ambience"[6])—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 maintaining some influence over their built environment is a given.[7] In America, this preference will only become stronger as our growing population, with increasingly limited elbow room,[8] must share community space with others.[9]

This Article observes that a new regime has emerged to directly address this 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[10]—individuals of a range of income levels[11] may now seek out what Richard Briffault has called "sublocal"[12] structures of goods and service provision, which exist at the neighborhood or

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that are permitted, such as fences, small apartments, or sheds. This is similar to what Lee Fennell terms "premium ambience" and "neighborhood aesthetics." Lee Anne Fennell, *Contracting Communities*, 2004 U. ILL. L. REV. 829, 843, 847 (2004). Many factors beyond the scope of this Article, such as local environmental quality and law enforcement, will also affect a homeowner's enjoyment of her property.

6. *Id*. at 843.

7. *See* 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").

8. Between 1976 and 1992, American development grew by 48%, but new development typically occurred within or near previously developed areas, taking up only 0.6% of previously undeveloped land. Marcy Burchfield et al., *Causes of Sprawl: A Portrait from Space*, 121 Q.J. ECON. 587, 591 (2006); *see also* Robert E. Lang & Meghan Zimmerman Gough, *Growth Counties: Home to America's New Suburban Metropolis*, *in* 3 REDEFINING URBAN AND SUBURBAN AMERICA: EVIDENCE FROM CENSUS 2000, 61, 61 (Alan Berube et al. eds., 2006) (identifying the fastest growing counties in America, which tend to be in "large metropolitan areas," such as Houston and Las Vegas).

9. *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").

10. Charles M. Tiebout, *A Pure Theory of Local Expenditures*, 64 J. POL. ECON. 416, 418 (1956).

11. *See, e.g.*, DANIELLE ARIGONI, SMART GROWTH NETWORK SUBGROUP ON AFFORDABLE HOUS., AFFORDABLE HOUSING AND SMART GROWTH: MAKING THE CONNECTION 23 (2001), 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 (1977) (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").

12. *See* Richard Briffault, *The Rise of Sublocal Structures in Urban Governance*, 82 MINN. L. REV. 503, 508 (1997) (defining a "sublocal [governmental or quasi-governmental] structure[]" as one that "represents a departure from the traditional centralized 'big city'").

community, as opposed to the municipal, level.[13] In this case, the sublocal public goods are specialized rule-sets implemented in addition to the municipality's base code. These rule-sets 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,[14] I call them "rule-bound" communities.

One type of rule-bound community—the suburban private covenanted community or, more simply, the suburban subdivision—is familiar, and it has been discussed extensively in the legal literature.[15] This type of rule-bound community allows a developer to create a new town, often at the edge of the city limits or in the suburbs, by designing a proposed project, bargaining with the relevant local government (either a county or city) to obtain approval for the project, and then constructing the community and writing private rules to govern the community. These rules take the form of covenants, conditions, or restrictions, more generally referred to here as "covenants." Although a municipal zoning code or county land use regulation also applies to the community, the covenants typically provide the bulk of the rules that residents must follow.[16]

Although private covenanted communities in suburbs are quickly becoming the norm in housing, many individuals in existing, public neighborhoods want rules that are similar to private covenants: they demand similar means by which to structure their communities. Traditional zoning, however, fails to dictate desired community characteristics such as architectural style,[17] and public neighborhoods cannot, practically, impose complex sets of private covenants on

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13. *See* Lee Anne Fennell, *Exclusion's Attraction: Land Use Controls in Tieboutian Perspective*, *in* THE TIEBOUT MODEL AT FIFTY: ESSAYS IN PUBLIC ECONOMICS IN HONOR OF WALLACE OATES 163, 164, 166 (William A. Fischel ed., 2006) (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 what is now known as Euclidean zoning in *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 395–96 (1926), but by then many cities already had zoning ordinances or codes that resembled zoning ordinances. *See, e.g.*, City of Aurora v. Burns, 149 N.E. 784, 785, 788–89 (Ill. 1925) (discussing Aurora's building zone ordinance and affirming its validity); People *ex rel.* Stevens v. Clark, 213 N.Y.S. 350, 350 (Sup. Ct. 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) (holding East Cleveland's building zones ordinance constitutional).

15. *See, e.g.*, Fennell, *supra* note 5, at 832 (discussing the "burgeoning literature on private developments").

16. *See* ROBERT H. NELSON, PRIVATE NEIGHBORHOODS AND THE TRANSFORMATION OF LOCAL GOVERNMENT 53 (2005) (describing how private restrictions "usually include elements that go well beyond conventional zoning in the public sector"); *see also infra* note 17.

17. *See* 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").

existing property owners.[18] Several scholars have accordingly suggested that public communities should be able to form their own private homeowners' associations and covenants.[19] Under this scenario, the private model would be transferred to the public realm.[20]

The use of private covenants and associations to govern existing public neighborhoods has not taken hold, however. Instead, public 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. And they have implemented these rules through the public process, forming, in addition to the private rule-bound subdivision, two types of public rule-bound communities. These communities have largely failed to capture the attention of the legal literature.[21] First, in a growing number of old neighborhoods, communities are developing private-type rule-sets to preserve existing character.[22] These rules often apply in addition to the base rules in the

18. *See* 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").

19. *See, e.g.*, NELSON, *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 C. Ellickson, *New Institutions for Old Neighborhoods*, 48 DUKE L.J. 75, 97–99 (1998) (suggesting that in some urban areas, "extraordinary [private] Regulatory [Block Level Improvement Districts] BLIDs" could be formed but focusing more on the opportunities for nonregulatory BLIDs, which would contract for private provision of "public" goods and services such as tree care and street cleaning and assess those who benefited); Liebmann, *supra* note 18, at 369 (suggesting service-oriented private associations for existing public neighborhoods).

20. 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) (citing Frank Michelman, *States' Rights and States' Roles: Permutations of 'Sovereignty' in* National League of Cities v. Usery, 86 YALE L.J. 1165, 1167 (1977)) (arguing that homeowners' associations fit nearly all of the characteristics of a public government as defined by Frank Michelman). I view public communities as those ultimately governed by a municipal government, which lack an intervening private authority such as a property owners' association. *See, e.g.*, *id.* at 1519 (describing "[t]he association" as "the obvious private alternative to the city"). For a discussion of why private neighborhood associations are distinctly "private," see NELSON, *supra* note 16, at 11–12.

21. Others have touched upon the individual facets of this broader trend that I describe. *See, e.g.*, 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"); 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"); 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."); Robert J. Sitkowski & Brian W. Ohm, *Form-Based Land Development Regulations*, 38 URB. LAW. 163, 163 (2006) (noting that "[t]he form-based approach to new urbanist land use regulation [that creates a certain type of defined community] has, up until recently, been applied mainly in private-covenanted regimes").

22. *See, e.g.*, LEXINGTON-FAYETTE URBAN COUNTY GOVERNMENT, NEIGHBORHOOD DESIGN (ND-1) OVERLAY ZONING 2, http://www.lexingtonky.gov/Modules/ShowDocument.aspx?documentid=2070 (last visited Oct. 5, 2009) (describing one purpose of neighborhood design overlay zoning as creating "design standards to preserve and protect the character of your neighborhood").

city-wide zoning code and are thus typically described as an "overlay."[23] In "overlay communities," the city allows communities to write, as part of the overlay, sublocal rules that apply only to their neighborhood and are more detailed than the local government code. These rules are ultimately approved by the city government and incorporated into the city-wide zoning code, and they often aim for some of the following: to protect historic, cultural, environmental, commercial, or even industrial community resources;[24] to require certain types of design for newly constructed or modified buildings;[25] or to preserve building scale (sometimes in an effort to combat gentrification).[26] As Richard Briffault explains, these types of regimes "impose rules tailored to the concerns of particular neighborhoods."[27]

The second public type of rule-bound community is a hybrid: it uses both the private covenants that define suburban subdivisions and an overlay to the municipal zoning code to create a unique urban or inner-suburban ethos. This community is more traditionally referred to as an urban planned unit development,[28] but this Article will call it a "hybrid community" to highlight its unique rule characteristics. Through hybrid communities, cities—in projects often initiated and led by a city redevelopment agency or a similar organization—work with a developer (or serve as the developer themselves) to raze and rebuild or substantially modify entire downtown blocks or old industrial properties in

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23. *See* Brian W. Ohm & Robert J. Sitkowski, *The Influence of New Urbanism on Local Ordinances: The Twilight of Zoning?*, 35 URB. LAW. 783, 785 n.10 (2003) (describing overlay zones).

24. *See, e.g.*, LEXINGTON-FAYETTE URBAN COUNTY GOVERNMENT, *supra* note 22, at 2 (describing one purpose of the neighborhood design overlay as "discourag[ing] environmental conflicts of new construction"); Briffault, *supra* note 12, at 516 (describing a special manufacturing zoning district in Chicago that "restricts new residential and retail development to assure industrial firms enough space to expand their facilities").

25. *See, e.g.*, LEXINGTON-FAYETTE URBAN COUNTY GOVERNMENT, *supra* note 22.

26. *See, e.g.*, Briffault, *supra* note 12, at 516 (describing New York's "Special Clinton District," which "protects the working-poor residents of an area expected to undergo new development by limiting building heights, imposing tight restrictions on building demolitions," and other measures); Rudolph Bush, *Overlay Zoning Tool Divides Dallas Neighbors Over Property Rights*, DALLAS MORNING NEWS, Mar. 11, 2008 at 6A (describing the purpose of the overlay as a way "to give older, established neighborhoods a way to preserve their scale . . . where . . . giant new houses have sprouted up"); CITY OF SEATTLE, PIKE/PINE URBAN CENTER VILLAGE DESIGN GUIDELINES 2 (2000), http://www.cityofseattle.net/dpd/news/DesignGuide/PikePine2000.PDF (implementing aspects of the neighborhood plan through an official, city-adopted document); City of Dallas Sustainable Dev. & Constr., CURRENT PLANNING – NEIGHBORHOOD STABILIZATION OVERLAY, http://www.dallascityhall.com/development_services/neighborhood_overlay.html (last visited Jan. 5, 2008) (describing the purpose, process, and requirements of the Neighborhood Stabilization Overlay); PIKE/PINE URBAN NEIGHBORHOOD COALITION, PIKE/PINE URBAN CENTER VILLAGE NEIGHBORHOOD PLAN PHASE TWO 16 (1998), http://www.seattle.gov/neighborhoods/npi/plans/ppine/Section3.pdf (aiming to extend a neighborhood overlay in the Pike/Pine neighborhood in Seattle "for the purpose of allowing development of mixed-use structures with housing," which would in turn "[p]reserve and [e]ncourage [a]ffordable and [m]arket-[r]ate [h]ousing").

27. Briffault, *supra* note 12, at 515.

28. *See, e.g.*, Daniel R. Mandelker, *Legislation for Planned Unit Developments and Master-Planned Communities*, 40 URB. LAW. 419, 420 (2008). Planned unit developments are also built in suburbs to form some of the typical subdivisions that I have described as a private covenanted community, *id*. at 421, but this Article will highlight their differences, which arise in the urban context.

order to construct new urban environments. Once it has selected a site and a developer has committed to the project, the city outlines a vision for the community with the help of a long public input process. The city often includes affordable housing, "green housing" for the eco-conscious dweller, stores and businesses that are within easy walking distance of residences, a network of sidewalks and bike paths, and parks and other open space as part of this vision.[29] The city government then writes and votes on overlay rules, which incorporate this vision and dictate the design of the development and uses permitted within it.[30] The developer of the project constructs the community in accordance with the public overlay and passes ownership of the built area to a property owners' association, which in turn implements private covenants for the development. The covenants in a hybrid community are similar to the covenants in a suburban private covenanted subdivision, but they are often influenced by the unique urbanized vision of the public overlay.[31]

Leaving for another article the important broader concerns associated with these communities—the privatization or quasi-privatization of formerly public space and services, for example, and the exclusion of large sets of potential residents[32]—rule-bound communities are exceedingly important because they allow individuals to better control the community aesthetic surrounding their home.[33] The need for this sort of control grows[34] as Americans continue to move toward crowded cities and their suburbs, where, as Charles Haar puts it,

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29. *See infra* notes 183–84 and accompanying text.

30. *See* Mandelker, *supra* note 28, at 420.

31. *See, e.g.*, RICHMOND, MICH., ZONING ORDINANCE art. 20, § 20.05(c)(2) (2008) (describing the Planned Unit Development (PUD) Overlay District, which requires the development to include "[p]rovisions . . . to provide for financing of improvements and maintenance for open spaces and other common areas"); SAN ANTONIO, TEX., UNIFIED DEVELOPMENT CODE art. III, div. 5, § 35-344(i) (2009) (requiring, in the Planned Unit Development District, the developer to make provisions for "a property owners' association that is designated as the representative of the owners of property in a residential subdivision," which "shall have the direct responsibility to provide for the operation and maintenance of all common areas and facilities").

32. Rule-bound communities are exclusionary because requiring a certain type of aesthetic can eliminate a large number of community consumers from the buyer pool. *See* Lior Jacob 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, *supra* note 13, at 173 (discussing how zoning policies can "directly affect the consumption and behavior patterns of residents"). *But see* Briffault, *supra* note 26; *infra* note 159 and accompanying text (discussing how some types of rule-bound communities can benefit low-income residents).

33. *See* NELSON, *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, *supra* note 13, at 171 (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 18, 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.").

land is "vulnerable in value to the actions of neighbors."[35] Although neighboring property uses affect individual land values in terms of tax appraisals and sale prices,[36] "value" is not purely financial. In relatively high density living scenarios, the day-to-day enjoyment of one's property is strongly influenced, in idiosyncratic ways, by neighbors' property uses.

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 resident consumers' demand for rules and the aesthetic created by rules. First and foremost, the communities must 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 tread heavily upon treasured individual expectations, or otherwise appear overly intrusive, the rules will not be successful. Furthermore, there are preferred rules, which consumers will want to hold on to in the long term, and there are rules that will come to be quickly despised. As such, even if there are fair processes in place—meaning, in this Article, that the rules are accompanied by opportunities for residents to influence rule implementation, enforcement, and modification decisions—if these processes allow for substantial erosion of preferred rules over time, the rule-bound community will lose the desired aesthetic.[37] And finally, the processes accompanying rule-bound communities must also allow for some rule flexibility as residents discover the disfavored rules and as property needs naturally change over time, a need that Lee Fennell has emphasized in the context of private covenanted communities.[38] This Article will, accordingly, compare the three types of sublocal regimes in their ability to meet these benchmarks for a successful rule-bound community.

After identifying the trend toward rule-bound communities, this Article will argue that the use of "private rules" to maintain a community aesthetic, and the expansion of these types of rules to public communities, is at least in part a natural and beneficial reaction to consumer demand. Nonetheless, in practice, each type of rule-bound community has core flaws, all of which relate to the inability of the communities' sublocal governance[39] structures to respond accurately to consumer preferences for rules, both in the short and long term. All

35. Charles M. Haar, *The Twilight of Land Use Controls: A Paradigm Shift?*, 30 U. RICH. L. REV. 1011, 1019 (1996).

36. *See* WILLIAM A. FISCHEL, THE HOMEVOTER HYPOTHESIS: HOW LOCAL VALUES INFLUENCE LOCAL GOVERNMENT TAXATION, SCHOOL FINANCE, AND LAND-USE POLICIES 9 (2001) (explaining that homeowners are concerned about neighbors' land uses that might "adversely affect the value" of a home).

37. *See* 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"); *see also* Josh Eagle, *The Practical Effects of Delegation: Agencies and the Zoning of Public Lands and Seas*, 35 PEPP. L. REV. 835, 857 (2008) (arguing that "[i]n order for zoning to produce the benefits it promises, users must perceive zones and zone rules as fairly durable over time").

38. *See* Fennell, *supra* note 5, at 860, 891.

39. The term "governance" is used loosely here to refer to the procedures for implementing, applying, enforcing, and modifying the rules, whether through a planning commission, a city council, a homeowners' association, or otherwise.

three types of rule-bound communities provide inadequate notice of rules to consumers entering these communities, thus weakening the potential match between consumers' preferences for rules and the content of the rules. The under-notified community consumer, in turn, faces a subsequent hurdle. Current governance processes in rule-bound communities fail to allow for adequate consumer input regarding the rules' duration and application over time—how the rules are enforced and modified, in other words. A consumer may unknowingly buy into a community with rules that she strongly dislikes, only to face an all-out battle when she attempts to change the rules. On the other hand, the consumer who was aware of the rules when she purchased property and who actively prefers those rules may face persistent violations of the rules by residents who dislike them. Some balance needs to be struck between individuals' desires for rule perpetuation and modification over time, and current community governance processes do not fully enable this balance.

All three rule-bound communities (private covenanted, overlay, and hybrid communities), respond in some fashion to consumer preferences for rules in the short and long term, but all could substantially improve. Private covenanted communities—though offering moderately effective internal mechanisms for notice through the common law principles of privity and "touch and concern"[40] and for limited modification through waiver, abandonment, and changed circumstances—typically do not provide residents with sufficient, or sufficiently convenient, say in decisions about rule modification and enforcement. Overlay communities and the overlays used to form them, though in some ways more democratic, lack covenants' common law flexibility and can be subservient to the whims of the larger zoning authority. And hybrid communities are subject, in some degree, to the difficulties associated with both covenants and overlays, as well as to unique considerations arising from the interplay between the two. As such, safeguards are needed in all three types of rule-bound communities not only to ensure that unwary consumers are not trapped within rules that they strongly dislike but also, over time, to protect rules that residents wish to keep.

After identifying this sometimes conflicting web of concerns, this Article will suggest potential solutions, proposing that all rule-bound communities should provide visual cues of rules to incoming consumers. It will also argue that all types of rule-bound communities should ensure that residents, after purchasing property, have accessible, nonburdensome processes through which to meaningfully influence rule modification and enforcement decisions. For one, formal variance-style hearings are needed where consumers may object to or support petitions for nonenforcement of rules in individual circumstances. Further, overlay communities, which typically lack a sublocal institution to make basic

40. *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).

enforcement decisions, would benefit from such an institution. This body would be better able to ensure that the enforcement of rules over time is tailored to individuals' rule preferences than would a distant city government. And finally, the rules in all rule-bound communities should endure for a limited period of time in order to allow for periodic, thoughtful revisitation of the rules' purpose and substance.

Before addressing these problems and initial remedies, this Article will describe the trend toward rule-bound communities in Part I. Part II will investigate the reasons behind the trend, pointing to consumer- and producer-driven factors, and it will discuss some of the benefits offered by these communities. Part III will move to the drawbacks, 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 IV will argue that rule-bound communities will need to change if they are to be successful in the long term, and it will provide preliminary suggestions for the most important improvements to be made. Detailed suggestions for rule flexibility, however—which will require systemic changes in land use regulation—are reserved for a second paper.

I. THE CREATION OF RULE-BOUND COMMUNITIES: COVENANTS, PUBLIC OVERLAYS, AND HYBRIDS

Although rule-bound communities have strong historic roots,[41] they have only recently emerged on a broad scale in America, and they continue to expand at a rapid pace. In several states, particularly in the growing Sunbelt areas,[42] 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.[43] And the most interesting 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,

41. *See infra* notes 65, 98–105, 151–58 and accompanying text.

42. *See, e.g.*, Klaus Frantz, *Private Gated Neighbourhoods: A Progressive Trend in U.S. Urban Development*, *in* PRIVATE CITIES: GLOBAL AND LOCAL PERSPECTIVES 64, 68 (Georg Glasze et al. eds., 2006) (describing the large number of private gated communities "in the urban areas of the Sunbelt states").

43. *See* Steven J. Eagle, *Privatizing Urban Land Use 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"); 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.").

both in existing and newly developed urban neighborhoods.

Rule-bound communities, whether public or private, urban or suburban, all exhibit several unique characteristics that make them "rule-bound" and that make them a "community"—not always in the pleasant sense implying happy neighbors sharing common values,[44] but in terms of their size and physical boundaries. Specifically, rule-bound communities are discrete residential areas within a city, town, or county: they have recognized boundaries.[45] A rule-bound community is labeled on a map as a "neighborhood" or "district," for example, or it is recognized by residents within and outside of the community as geographically distinct:[46] it has a name 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. When sublocal rules are applied to existing, public urban areas, thus forming overlay communities, I will typically refer to them as applying to neighborhoods. In so doing, I will follow Robert Ellickson's definition of neighborhood, which is "an area big enough to be known by a name that is meaningful to outsiders."[47]

Before further exploring these communities, some discussion of scope is in order. In 1997, Richard Briffault noted that though the city remains as a strong governmental force, several important "sublocal structures" have emerged.[48] Similarly, Robert Ellickson in 1998 noted the growth and potential benefits of both "block-level"[49] and "neighborhood-level" institutions.[50] Ellickson's and

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44. "Community" is not an ideal term to describe areas defined only by their physical existence, their boundaries, and their unique sets of rules. "Community" implies togetherness, oneness, and agreement. *See, e.g.*, ROBERT D. PUTNAM, BOWLING ALONE: THE COLLAPSE AND REVIVAL OF AMERICAN COMMUNITY 273–74 (2000) (discussing the "sense of belonging" that defines community). But many residents of rule-bound communities do not feel such camaraderie. *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, 575 (2002) (describing "acrimony and conflict" in private covenanted communities). The alternative terms, however, raise similar problems. Rule-bound "zones" would suggest that rules are accomplished only through zoning; to the contrary, a good number of rule-bound communities are defined by covenants. *See supra* note 43 and accompanying text. As such, we are stuck with the term community, for now.

45. More than seventy-five percent of the fifty-one neighborhood planning groups surveyed in the 1980s indicated that they used physical boundaries as one factor when defining their neighborhood. WILLIAM H. ROHE & LAUREN B. GATES, PLANNING WITH NEIGHBORHOODS 8, 73 (1985); *see also* John J. Fahsbender, Student Article, *An Analytical Approach to Defining the Affected Neighborhood in the Environmental Justice Context*, 5 N.Y.U. ENVTL. L.J. 120, 123 (1996) ("At a minimum . . . the concept of neighborhood always includes the notion of an area that can be physically defined, if only in general terms.").

46. *See, e.g.*, GERALD SUTTLES, THE DEFENDED NEIGHBORHOOD 242, 250 (1972) (defining "neighborhood" partially by "name and identity").

47. Ellickson, *supra* note 19, at 80.

48. Briffault, *supra* note 12, at 508. These recent sublocal structures included "enterprise zones, tax increment finance districts, special zoning districts, and business improvement districts." *Id*.

49. Ellickson, *supra* note 19, at 80–85.

50. *Id*. at 85–87. An institution analogous to a block-level institution was, according to Ellickson, the residential community association (what this Article calls a "private covenanted community"). *See id*. at 81. Limited business improvement districts and residential community associations were sufficiently large to count as "neighborhood-level institutions." *Id*. at 88.

Briffault's categories capture two elements largely ignored by this Article: the provision of special services at the sublocal level—such as more frequent street cleaning or higher levels of security[51]—and physical improvements financed by sublocal assessments.[52] This Article instead focuses on regimes that, as part of their core purpose, allow communities to develop unique rules and regulations.[53]

Definitions and distinctions aside, the owners of properties within both public and private rule-bound communities are still governed by local law to a varying degree, including traditional city-wide zoning regulations, such as code dictating 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 broad types of property uses permitted.[54] The rules that form rule-bound communities, however, whether part of an overlay to a code or a declaration of covenants, conditions, and restrictions, add stricter limitations to this base zoning. This Article focuses on the limitations that create a consistent community aesthetic, which are very specific as to the uses that may occur on individual properties. The rules, for example, often dictate the type and size of sheds, fences, accessory apartments, and garages that may be built on the lot[55] and require that objects such as trash cans and dumpsters be screened from view.[56] In other cases, they provide guidelines that structure the size and designs of homes and businesses—requiring, for example, a certain number of

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51. *Id.* at 96.

52. The central purpose of the business improvement district discussed by Ellickson and Briffault, for example, is to provide special yet "traditional municipal services" to businesses within discrete geographic areas. *See* Briffault, *supra* note 12, at 521–22. Although business improvement districts also provide regulations specific to the district, this is often a collateral purpose. *See id*. (explaining that the BID "sometimes increases regulation").

53. Although the Article discusses some regimes, such as the private covenanted community and the hybrid community, which offer sublocal services and special assessments in addition to sublocal rules, it focuses only on these regimes' rules.

54. *See, e.g.*, Alejandro Esteban Camacho, *Mustering the Missing Voices: A Collaborative Model for Fostering Equality, 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); Nelson, *supra* note 17, at 835 (describing zoning's typical provisions, such as setbacks and lot size).

55. *See, e.g.*, CITY OF MILWAUKEE, DEP'T OF CITY DEV., EAST VILLAGE NEIGHBORHOOD CONSERVATION OVERLAY DISTRICT, *available at* http://www.mkedcd.org/planning/plans/NC/EastVillage/EastVillageExhibitC.pdf (last modified Mar. 29, 2005) (requiring fences to be "fifty percent transparent" and limiting their height to four feet); City of Milwaukee, Wisconsin Legislative Research Center, File # 040668, *available at* http://milwaukee.legistar.com/LegislationDetail.aspx?ID=159539&GUID=E60F4528-0622-415C-9EBE-2BCFD8AD302D&Search=040668&Options=ID|Text| (last modified Jan. 12, 2005) (showing above ordinance effective as of April 15, 2005); TOWN OF CHAPEL HILL, NEIGHBORHOOD CONSERVATION, DESIGN GUIDELINES 7, *available at* http://townhall.townofchapelhill.org/agendas/2006/12/04/5a/5a-2_kings_mill_morgan_ck_greenwood_ncd_guide.pdf (placing limitations on accessory apartments); *see also infra* text accompanying note 85 (describing limitations on accessory structures in a private covenanted community).

56. *See, e.g.*, CITY OF MILWAUKEE, DEPARTMENT OF CITY DEVELOPMENT, *supra* note 55 (stipulating that new construction and exterior changes "should make provisions for all carts and dumpsters to be screened from street view").

windows on walls[57] or specific architectural features.[58] The rules may also prevent the demolition or modification of buildings absent prior approval from a committee,[59] or limit the type of driveways permitted or the location of parking.[60] No matter their exact wording, they are unified in their limitation on individuals' ability to physically alter and improve private property.

In private covenanted communities, 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.[61] This Article, however, will focus on the physical rules because these play a large part in defining community character and form a common thread connecting the three types of rule-bound communities identified here.

A. PRIVATE COVENANTED SUBDIVISIONS

A prevalent form of rule-bound community in the United States is the private covenanted subdivision, which is both praised and maligned[62] for its frequently stringent rules. Although these developments include cooperatives and condominiums in addition to private subdivisions,[63] this Article will focus on the

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57. HOPKINS, MINN. CODE § 556.10, *available at* http://mail.hopkinsmn.com/weblink8/1/doc/46956/Page1.aspx (requiring "[a] minimum of 30% of the ground level façade and sides of buildings adjacent to public streets" to "consist of transparent materials" and providing that "it is encouraged and may be required that windows and doors be incorporated into building designs to provide large open views into the commercial space").

58. *See, e.g.*, CITY OF SEATTLE, DESIGN REVIEW: GREENWOOD/PHINNEY NEIGHBORHOOD DESIGN GUIDELINES 8 (2006), *available at* http://www.seattle.gov/dpd/static/greenwood2006_LatestReleased_DPDP_015964.pdf (describing criteria considered by a design review board, which include roof pitch and facade features).

59. *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* CITY OF MILWAUKEE, DEP'T OF CITY DEV., *supra* note 55 (noting that permits for new construction or exterior alternations will not be issued unless the construction or alterations meet the design standards of the conservation overlay); The First Amendment to the Deed of Amendment to the Deeds of Dedication of Reston § VI.1(c) (Apr. 2006), *available at* https://www.reston.org/Portals/3/Inside%20RA/Reston%20Association%20Governance/Governing%20Documents/Deed.pdf [hereinafter Reston, First Amendment] (prohibiting external modifications and repairs to structures within a private covenanted community without prior approval of a design review board).

60. *See, e.g.*, CITY OF MILWAUKEE, DEP'T OF CITY DEV., *supra* note 55 (requiring newly constructed garages to be "located in a rear yard"); WESTRIDGE ROAD NEIGHBORHOOD CONSERVATION OVERLAY 15, *available at* http://www.greensboro-nc.gov/NR/rdonlyres/92D416B9-1400-4452-B448-1C50EA1187AD/0/westridge_nco_plan_7_3_08.pdf (limiting the placement of garages on lots).

61. *See* NELSON, *supra* note 16, at 54 (explaining that in private communities, "collective controls may extend into various realms of social behavior").

62. For praise, see, e.g., Ellickson, *supra* note 20, at 1527 (arguing that by protecting the integrity of covenants, courts "can provide genuine choice among a range of stable living arrangements"); Bethany Lyttle, *W/ Full Mud Bath*, N.Y. TIMES, Feb. 6, 2009, at D4 (extolling the "lack of pretension . . . and . . . [the] emphasis on physical well-being" in a private community in Calistoga, California). For criticism, see, e.g., Franzese, *supra* note 44, at 561 (arguing that covenanted communities' "formalized mandates and broad enforcement mechanisms . . . create cultures of distrust").

63. The communities that I refer to as "private covenanted communities" are typically described as common interest communities and are defined by "common ownership of residential property, mandatory membership of all owners in an association that governs the use of the common property, and

subdivisions. They are uniquely important, in that they often consist of stand-alone homes on individual lots and thus invoke some of the most deeply held beliefs about individual rights to make use of property.[64]

The private covenanted community is by no means a new phenomenon,[65] although the early covenanted communities boasted only covenants and not the associated "governing body" of the homeowners' association.[66] Despite its long history,[67] this type of community has only recently grown to nationwide dominance. In 1962, there were approximately 500 private covenanted communities;[68] in 1975, the number had risen to 20,000.[69] And by 2008, there were 24.1 million housing units in 300,800 private covenanted communities across America,[70] housing nearly one in every five Americans.[71] As such, private covenanted communities are increasingly the norm in housing for middle and even lower-middle class residents.[72] In many suburbs—which are now the more affordable places to live for many homebuyers[73]—almost all new development occurs

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governing documents that provide a 'constitution' by which the association and its members are governed." *See* Stephen E. Barton & Carol J. Silverman, *History and Structure of the Common Interest Community*, *in* COMMON INTEREST COMMUNITIES: PRIVATE GOVERNMENT AND THE PUBLIC INTEREST 3, 3 (Stephen E. Barton & Carol J. Silverman eds., 1994). Cooperatives, condominiums, and covenanted subdivisions all fall within this definition. *Id.*

64. *See, e.g.*, Fennell, *supra* note 5, at 878 (arguing that the "detached single-family dwelling . . . for many U.S. homeowners . . . has come to epitomize the idea of private property").

65. *See* Reichman, *supra* note 59, at 257 (observing that "the homeowners' association is by no means a new invention").

66. *See* EVAN MCKENZIE, PRIVATOPIA: HOMEOWNER ASSOCIATIONS AND THE RISE OF RESIDENTIAL PRIVATE GOVERNMENT 35 (1994).

67. *See* EDWARD J. BLAKELY & MARY GAIL SNYDER, FORTRESS AMERICA: GATED COMMUNITIES IN THE UNITED STATES 19 (1997) (describing the development of the "master-planned suburb of Radburn, New Jersey, in 1928" and the use of restrictive covenants in that suburb); Barton & Silverman, *supra* note 63, at 7 (discussing Gramercy Park in New York and Louisburg Square in Boston, built in the 1830s and 1840s).

68. This number may be an underestimate, as there were many early covenanted communities in the United States that did not have homeowners' associations. *See* MCKENZIE, *supra* note 66, at 35 (discussing the diverse uses of restrictive covenants in the nineteenth century and explaining that most "did not involve homeowners' associations").

69. *Id.* at 82.

70. Community Associations Institute, Industry Data, http://www.caionline.org/info/research/Pages/default.aspx (last visited Jan. 16, 2009). The institute refers to these communities as "association-governed communities." *Id.*

71. NELSON, *supra* note 16, at xiii. In 2008, the Community Associations Institute estimated that 59.5 million Americans lived in "association-governed communities." This figure includes condominiums and cooperatives. Community Associations Institute, *supra* note 70. In 2008, the U.S. Census Bureau estimated that the total U.S. population was 304,059,724. U.S. Census Bureau, Population Finder, United States, http://factfinder.census.gov/servlet/SAFFPopulation (last visited Feb. 26, 2009).

72. *See* BLAKELY & SNYDER, *supra* note 67, 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").

73. Todd Swanstrom et al., *Pulling Apart: Economic Segregation in Suburbs and Central Cities*, *in* 3 REDEFINING URBAN & SUBURBAN AMERICA: EVIDENCE FROM CENSUS 2000, *supra* note 8, at 144 (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* 1 REDEFINING URBAN & SUBURBAN AMERICA: EVIDENCE FROM CENSUS

within private subdivisions.[74] The first-time homebuyer seeking a $150,000 or $200,000 home will therefore often find herself within a private covenanted community.[75]

The homeowners moving to these communities, if seeking only an affordable living space, are likely vaguely aware that general zoning regulations of the municipality apply but may be surprised by the detailed set of additional rules that they encounter. To create this community, a developer (sometimes unbeknownst to the buyer), first bargains with the city or county government that has jurisdiction over the land, providing infrastructure and other amenities in exchange for approval. The developer then obtains approval of a plat and subdivision plan and drafts the private rules for the community,[76] most of which are contained within the declaration of covenants, conditions, and restrictions, and then records the declaration prior to the sale of the first lot.[77] The declaration is binding upon all current and future property owners as well as the property owners' or homeowners' association,[78] which is the community's governing body.[79] Accompanying the covenants are the architectural or design review guidelines, which are also typically adopted by the developer[80] and place additional restrictions on property use.[81] Finally, bylaws are adopted by the association's board of directors. These substantially affect residents' rights, particularly by setting some of the procedures that the board must follow in modifying or enforcing rules.[82]

Combined, the architectural review guidelines, covenants, and bylaws form a

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2000, at 167 (Bruce Katz & Robert E. Lang eds., 2003) (discussing varying "city-suburb disparities in housing availability [and] costs").

74. *See* Siegel, *supra* note 43, at 867 ("Most new residential development in the fastest growing southern and western states is subject to governance by a community association.").

75. *See* SETHA LOW, BEHIND THE GATES: LIFE, SECURITY, AND THE PURSUIT OF HAPPINESS IN FORTRESS AMERICA 44, 50 (2003) (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 43, at 1125 (describing how private covenanted communities "can be the most affordable housing available in certain housing markets").

76. *See* URBAN LAND INSTITUTE, THE HOMES ASSOCIATION HANDBOOK 198 (1964) (explaining that the developer "prepare[s] and record[s]" the declaration); *see also* Franzese & Siegel, *supra* note 43, at 1127 (describing how covenanted communities "are created by developers who plan, design, and construct them").

77. *See* URBAN LAND INSTITUTE, *supra* note 76, at 198–99.

78. *See* Wayne S. Hyatt, *Declaration of Covenants, Conditions and Restrictions: Mountain Vista Resort*, *in* ALI-ABA COURSE OF STUDY 147, 167 (2003) (providing, in a course of study on "formation, documentation, and operation" of "resort real estate and clubs," a detailed example declaration).

79. *See* Franzese, *supra* note 44, at 556–57 (describing the association's duties).

80. *See* Hyatt, *supra* note 78, at 177–78.

81. The architectural review guidelines dictate, along with the covenants, how individual property owners may develop or modify their land and the structures on their land. *See id*. at 175–77; *see also* Garden Lakes Community Ass'n, Inc. v. Madigan, 62 P.3d 983, 984 (Ariz. Ct. App. 2003) (describing covenants, which provided that "[a]ll solar energy devices Visible from Neighboring Property or public view must be approved by the Architectural Review Committee prior to installation").

82. *See* Hyatt, *supra* note 78, at 235–53.

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,[83] 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" by a board or committee.[84] 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," and "all . . . garbage containers or other equipment" must be "screened by appropriate fencing, decorative walls, landscaping or a combination" of such guards.[85] And in Reston, Virginia, one of the largest private covenanted mixed-use subdivisions (containing residences, workplaces, and recreational areas) with approximately 60,000 residents,[86] the covenants also require review and preapproval of all proposed external modifications of property.[87]

The homeowners' association board in the private covenanted community, with the help of neighbors, enforces most of these detailed rules.[88] If a homeowner wishes to modify any portion of her property in a manner that deviates from these rules, she typically must request approval from a design review or architectural review board, which answers to the homeowners' association board[89] and grants or denies her request in an individual writing.[90] Homeowners' associations and their committees and boards, with the sometimes unenviable task of enforcing these numerous rules, have become somewhat infamous

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83. Hilton Lake Homeowners Association, http://www.hiltonlake.org/ (last modified May 26, 2008).

84. DECLARATION OF COVENANTS, CONDITIONS AND RESTRICTIONS OF HILTON LAKE HOMEOWNERS ASSOCIATION art. VI (1979), *available at* http://www.hiltonlake.org/HLHOA-CCRs.pdf.

85. MASTER DECLARATION OF COVENANTS, CONDITIONS AND RESTRICTIONS FOR HOWARD RANCH, EXHIBIT B: ARCHITECTURAL GUIDELINES (2005), *available at* http://www.howardranch.com/FinalDraftMasterDec(wExhs)-1.pdf.

86. Reston Association, *Who We Are*, http://www.reston.org/InsideRA/Governance/WhoWeAre/Default.aspx?qenc=HzT9ACzZbNs%3d&fqenc=DP5lX%2fL7n1MKoJO9wkrIsg%3d%3d (last visited Oct. 2, 2009).

87. Reston, First Amendment, *supra* note 59, at § VI.1(c)(2).

88. *See* FRED FOLDVARY, PUBLIC GOODS AND 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").

89. *See, e.g.*, Reston, First Amendment, *supra* note 59, at § III.6 (explaining that the Design Review Board is appointed by the association's Board of Directors and that its members may be removed by the Board of Directors).

90. *See, e.g.*, Seabreak Homeowners Ass'n v. Gresser, 517 A.2d 263, 267 (Del. Ch. 1986) (discussing a covenant that required approval "in writing by the Association, through its duly designated Architectural Review Committee" prior to the construction of walls, fences, garages, or other improvements); Ritchie v. Carriage Oaks Homeowners Association, 592 So. 2d 361, 362 (Fla. Dist. Ct. App. 1992) (discussing a covenant that prohibited the construction of walls or fences without written approval of the homeowners' association or "its architectural review committee").

for their role as the "property police."[91] One can envision 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 OVERLAY COMMUNITIES

Zoning is in many ways a child of the covenants that are central to private communities,[92] 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 an attempt to ensure that the uses are compatible. Although increasingly detailed—many codes now include at least forty different types of zoning districts[93]—traditional zoning does not delve into nuanced aesthetic strictures.[94] Instead, it imposes over the city map a set of zones or districts where certain broad types of uses may occur, including commercial, heavy industrial, light industrial, single-family residential, and multi-family residential.[95] Within each of these areas, the code then dictates the allowed individual uses, such as videotape rentals, grocery stores, and retail establishments, in a neighborhood commercial district.[96] The zoning ordinance also places basic restrictions on how structures are to be built and situated within those zones.[97]

Cities have governed the layout of streets and lots and the structures on those lots for several millennia. In the Indus Valley, for example, religious writings—

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91. *See* Franzese & Siegel, *supra* note 43, at 1132–33 (describing the enforcement activities of several homeowners' associations as involving "miscommunication, acrimony, and an abuse of power").

92. *See* MARC A. WEISS, THE RISE OF THE COMMUNITY BUILDERS: THE AMERICAN REAL ESTATE INDUSTRY AND URBAN LAND PLANNING 3–4 (1987) (arguing that private covenants formed "the physical and political model for zoning and subdivision regulations"); *see also* NELSON, *supra* note 16, at 33 (describing Weiss's and others' observation of zoning's roots in covenants).

93. *See, e.g.*, CODE OF MIAMI-DADE COUNTY, FLA. arts. XIII–XXXIII(Q) (2009), *available at* http://www.municode.com/resources/gateway.asp?pid=10620&sid=9 (follow "Chapter 33 ZONING*" hyperlink) (naming Miami-Dade County's forty-nine zoning districts); BOSTON ZONING CODE AND ENABLING ACT, ch. 665, arts. 27–36, 38–67, 70–73 (1956) (amended through 2001), *available at* http://www.bostonredevelopmentauthority.org/zoning/downloadZone.asp#volume2 (listing Boston's zoning districts, of which approximately forty are labeled as "districts" or "neighborhood districts"); CITY OF NEW YORK ZONING REG. ch. 11, § 12 (2009), *available at* http://www.nyc.gov/html/dcp/pdf/zone/art01c01.pdf (listing more than 184 zoning districts).

94. The aesthetics regulated by traditional zoning are typically broader-brush than those that arise in the new zoning overlays. *See, e.g.*, Kenneth Pearlman et al., *Beyond the Eye of the Beholder Once Again: A New Review of Aesthetic Regulation*, 38 URB. LAW. 1119, 1122–48 (2006) (discussing state courts' upholding zoning regulations based purely on aesthetics, such as those involving billboards and mobile homes).

95. *See, e.g.*, Michael Lewyn, *Sprawl, Growth Boundaries, and the Rehnquist Court*, 2002 UTAH L. REV. 1, 50 (2002) (describing the typical zoning ordinance).

96. *See, e.g.*, SPRINGFIELD, OHIO, ZONING CODE § 1113.02 (2009), *available at* http://www.ci.springfield.oh.us/govt/ord/1113.pdf.

97. *See supra* note 54 and accompanying text.

believed by some scholars to be 4,000 years old[98]—provided that "the height of buildings in the same street should correspond," "[b]etween any two houses . . . the intervening space shall be four . . . (feet),"[99] and trees should be planted before buildings are constructed.[100] They also contained penalties for rule violations.[101]

In America, early city codes were not as detailed but were instead limited to creating large districts wherein incompatible property uses were prohibited. For example, Los Angeles passed ordinances in 1909–1910 that created one "residence district" and seven industrial districts.[102] New York enacted one of the earliest ordinances that would now be described as a zoning code in 1916.[103] Following its passage, many of America's other growing cities quickly embraced zoning.[104] 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."[105] All states have since adopted portions of the Act or provisions substantially similar to its model language.[106] Whatever the exact language of a state's enabling legislation, it gives municipalities—cities, towns, and sometimes counties—"the power to zone."[107]

Armed with this tool, municipalities have gradually and continuously expanded zoning to ever more specific land use goals. One of the earlier American uses of zoning to control the "look" of a place—to govern the collective aesthetic created by the design and composition of buildings, for example—was the ordinance aimed at preserving historic structures.[108] These ordinances were originally enacted for the purpose of preserving individual buildings deemed to

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98. ERAN BEN-JOSEPH, THE CODE OF THE CITY: STANDARDS AND THE HIDDEN LANGUAGE OF PLACE MAKING 5–7 (2005) (quoting BINODE DUTT, TOWN PLANNING IN ANCIENT INDIA 58, 248–57 (1925)).

99. *Id.* at 6.

100. *Id*. at 7.

101. *Id.*

102. *See Ex parte* Quong Wo, 161 Cal. 220, 222 (1911) (describing Ordinance Nos. 19,500 and 19,563 categorizing these districts).

103. NEW YORK, N.Y., CODE OF ORDINANCES (1916).

104. *See* Symposium, *Developments in the Law—Zoning*, 91 HARV. L. REV. 1427, 1433–34 (1978) (discussing how "zoning as it is currently conceived became prominent when large urban centers began to develop" and how the number of city zoning codes increased from five in 1915 to "nearly five hundred" in 1925).

105. ADVISORY COMM. ON ZONING, U.S. DEP'T OF COMMERCE, A STANDARD STATE ZONING ENABLING ACT (1926); *see also* Jerry Frug, *The Geography of Community*, 48 STAN. L. REV. 1047, 1081 (1996) (describing how the Act was first published and widely circulated in 1923).

106. 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.").

107. *See* Jonathan Moore Peterson, *Taming The Sprawlmart: Using an Antitrust Arsenal to Further Historic Preservation Goals*, 27 URB. LAW. 333, 374 (1995) (discussing typical enabling legislation).

108. A HANDBOOK ON HISTORIC PRESERVATION LAW 38 (Christopher J. Duerksen ed., 1983) (discussing how many cities and towns already had adopted preservation programs by enacting ordinances prohibiting landmark demolition).

be important historic landmarks.[109] The ordinance addressed by the Supreme Court in *Penn Central Transportation Co. v. City of New York*,[110] for example, was New York's Landmarks Preservation Law.[111] Over time, municipalities expanded their historic zoning restrictions. Even as early as 1973, New York—in addition to preserving individual historic structures under the law at issue in *Penn Central*—allowed areas to be designated as "historic district[s]."[112] In 1976, a town in Colorado attempted to draw an Historic Preservation District that "encompassed all real property within the municipal limits" and "overlaid all existing zoning districts."[113] The proposed district, although rejected by the Colorado Supreme Court for its overly vague guidelines,[114] hinted at the substantial zoning expansions that would soon emerge. Zoning would no longer apply only to the generalizable characteristics of buildings and lots but would also address the individual characteristics of those properties and owners' ability to modify them.[115] Indeed, municipalities have moved from the preservation of individual structures to the designation of large historic districts and beyond.[116]

Though overlays like the historic district were prevalent by the late 1970s and have continued to expand in size,[117] there has also been a rapid, more recent rise in the number of, and diversification of, overlays. These overlays do not simply contain familiar and commonplace individualized aesthetic zoning regulations[118] but are instead comprehensive sets of rules defining many aspects of community character. They build on the same concept as the historic district overlay but implement rules often unrelated to historic purposes. The "neighborhood conservation district," for example, often aims to preserve certain types of

109. *See* RICHARD C. COLLINS ET AL., AMERICA'S DOWNTOWNS: GROWTH, POLITICS & 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.").

110. 438 U.S. 104 (1978).

111. *Id.* at 104.

112. *See id.*

113. South of Second Assocs. v. Georgetown, 580 P.2d 807, 808 (Colo. 1978).

114. *Id.* at 811.

115. *See* SHERRY HUTT 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").

116. *See, e.g.*, *id.* at 26 (describing how under local preservation laws, "most jurisdictions regulate both proposed alterations and demolitions of historic structures and new construction within a historic district").

117. *See, e.g.*, Adam Lovelady, *Broadened Notions of Historic Preservation and the Role of Neighborhood Conservation Districts*, 40 URB. LAW. 147, 148–54 (2008) (noting that there were 500 local preservation commissions to protect historic districts in 1980 and more than 2,000 by 2000).

118. Individual aesthetic restrictions were validated indirectly by *Berman v. Parker* in its 1954 discussion of the broad police power. *See* 348 U.S. 26, 33 (1954) ("It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled.").

building styles and scale and not just old buildings.[119] Increasingly, municipalities have also created districts to allow neighborhoods to preserve other types of physical amenities, such as small, affordable structures,[120] attractive landscape features, or commercial or industrial areas deemed to be important to a neighborhood.[121] Where municipalities enable this type of sublocal zoning, most require a good deal of notification and community deliberation prior to creating such a district. In a typical scenario, 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.[122]

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119. *See, e.g.*, Lovelady, *supra* note 117, at 154–55.

120. *See* CITY OF MILWAUKEE, DEP'T OF CITY DEV., *supra* note 55.

121. In 2000, the ten largest cities by population were New York, Los Angeles, Chicago, Washington, DC, San Francisco, Philadelphia, Boston, Detroit, Dallas, and Houston. U.S. Census Bureau, CENSUS 2000 PHC-T-3, RANKING TABLES FOR METROPOLITAN AREAS: 1990 AND 2000, *available at* http://www.census.gov/population/www/cen2000/briefs/phc-t3/tables/tab03.pdf. At least half of these cities have, or are in the process of developing, sublocal zoning. Although some of this zoning is the familiar historic preservation, other zoning represents an expansion of detailed property restrictions to property characteristics unrelated to historic features. *See, e.g.*, BABCOCK & LARSEN, *supra* note 21, at 155 (discussing New York's "Special Zoning Districts"); CITY OF LOS ANGELES DEPARTMENT OF CITY PLANNING, OFFICE OF HISTORIC RESOURCES, HISTORIC PRESERVATION OVERLAY ZONES, *available at* http://preservation.lacity.org/hpoz (describing Los Angeles' "24 designated HPOZs [Historic Protection Overlay Zones], which "range in size from neighborhoods of approximately 50 parcels to more than 3,000 properties"); D.C. MUN. REGS. tit. 11, § 1300.3 (2000), *available at* http://dcoz.dc.gov/info/reg/chapter13_pdf.shtm (describing the Neighborhood Commercial Overlay District, which is intended to "[e]ncourage . . . a continuous pattern [of varied establishments] at ground level" and to "encourage a scale of development, a mixture of uses, and other attributes"); Michael Hauptman, *Queen Village is the First Neighborhood Conservation District in Philly*, http://www.planphilly.com/node/5470 (last visited Feb. 16, 2009) (describing Queen Village, "the first Neighborhood Conservation District in Philadelphia"); BOSTON ZONING CODE AND ENABLING ACT ch. 665, arts. 50–67, 70–73 (1956) (amended through 2001), *available at* http://www.bostonredevelopmentauthority.org/zoning/downloadZone.asp#volume3 (listing Boston's many neighborhood districts); DALLAS CITY CODE § 51A-4.507(a)(2), (4) (2005), *available at* www.dallascityhall.com/pdf/DevSvcs/Ordinance_26161.pdf (describing Dallas' several neighborhood stabilization overlay districts, first enabled by the Dallas City Counsel in 2005, which "[are] intended to preserve single family neighborhoods"); *see also* SEATTLE MUNICIPAL CODE § 23.59.010 (1996), *available at* http://clerk.ci.seattle.wa.us/public/toc/t23.htm (follow "23.59" hyperlink; then follow "23.59.010" hyperlink) (describing overlay districts, which "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"); CITY OF PHILA. BILL NO. 08-080080-A, *available at* http://www.qvna.org/committees/NCD-ordinance.pdf (showing that Queen Village Neighborhood Conservation District was formed July 15, 2008, when the mayor signed the ordinance).

122. *See, e.g.*, Nancy DeVille, *Whitland Compromises*, TENNESSEAN, Feb. 25, 2009, at 1H (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); 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); NEIGHBORHOOD PROTECTION OVERLAY (NPO): DESIGNATION AND REGULATION PROCESSES 1 (2007), *available at* http://www.durhamnc.gov/forms/planning_npo_process.pdf (for overlay districts in Durham, North Carolina, neighborhood groups seeking a Neighborhood Protection overlay must submit "[a] plan for neighborhood engagement"); Town of Chapel Hill: Neighborhood Conservation Districts, http://www.ci.chapel-hill.nc.us/index.aspx?page=570#initiation (last visited Oct. 7, 2009) (requiring a "Town sponsored Public Information Meeting" to commence the overlay process).

After many deliberative meetings, the residents who worked to create the rules must, in some municipalities, then spend months convincing their neighborhood,[123] and ultimately the municipality, that the new rules should be adopted.[124] In certain cases, a majority of the property owners within the community must vote to recommend the initiation of a neighborhood overlay.[125] The city then provides written notice to all property owners who will be affected by the new rules and votes on the rules at a public hearing.[126]

In other municipalities, no neighborhood vote is needed to initiate an overlay rezoning, but a good deal of deliberation must still occur prior to rule implementation. In Durham, North Carolina, for example, the city considers designating a neighborhood as an 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.[127] The city prepares an Historic District Preservation Plan,[128] after which the Historic Preservation Commission provides notice of and conducts a public hearing,[129] and then recommends denial or approval of the historic designation.[130] The Planning Commission also provides the requisite notice, conducts a public hearing,[131] reviews the designation, and recommends for or against historic designation.[132] Finally, the city provides notice of and holds yet another public hearing,[133] after which the city determines whether

123. *See, e.g.*, LEXINGTON-FAYETTE URBAN COUNTY GOVERNMENT, *supra* note 22 (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).

124. *See, e.g.*, CITY OF DALLAS, *supra* note 122 (requiring Planning Commission and then City Council approval for a Neighborhood Stabilization Overlay); Town of Chapel Hill, *supra* note 122 (requiring Planning Board recommendation and then Town Council endorsement in order for Neighborhood Conservation District to be approved).

125. *See, e.g.*, AUSTIN CITY CODE § 25-2-242(5) (2009), *available at* http://www.amlegal.com/nxt/gateway.dll/Texas/austin/thecodeofthecityofaustintexas?f=templates$fn=default.htm$3.0$vid=amlegal:austin_tx$anc= (follow "TITLE 25. LAND DEVELOPMENT" hyperlink; then follow "25.2" hyperlink; then follow "25-2-242" hyperlink) (requiring "petition of the owners of at least 60 percent of the land in the proposed district" for the initiation of historic district zoning (amended to 51% by Ordinance No. 20090806-068, Part 3 (Oct. 7, 2009), http://www.cityofaustin.org/edims/document.cfm?id=130027)); 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_enb_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").

126. *See, e.g.*, LEXINGTON-FAYETTE URBAN COUNTY GOVERNMENT, *supra* note 22 ("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.").

127. DURHAM CITY-COUNTY UNIFIED DEVELOPMENT ORD. § 3.2.5(A), (B)(1), (B)(2)(a), *available at* http://www.ci.durham.nc.us/departments/planning/udo/pdf/udo_03.pdf.

128. *Id*. at § 3.17.3 (A)(3).

129. *Id*. at § 3.17.3 (D)(1).

130. *Id*. at § 3.17.3 (D)(2)–(3).

131. *Id*. at § 3.17.3 (E)(1).

132. *Id*. at § 3.17.3 (E)(2).

133. *Id*. at § 3.17.3 (F)(1).

to approve or deny the designation.[134] If approved, the designation finally becomes part of the city code.[135] Thus, even where municipalities do not have to obtain signatures from a large percentage of property owners 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.

The resulting rules in overlay communities can be quite detailed—often equally as detailed as the private covenants seen in suburban subdivisions. 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.[136] In Milwaukee, new construction or renovation in the East Village must screen garbage and recycling "carts and dumpsters" from street view, and "all front porches . . . [must] remain open."[137] In Queen Village, Philadelphia, "[f]or all newly constructed front facades, a light illuminating the sidewalk shall be installed adjacent to the front door."[138] In Pine Knolls, a neighborhood in Chapel Hill, North Carolina, accessory structures to single family homes may not be taller than thirty-five feet.[139] In Dallas, the Cedar Oaks Neighborhood Conservation Overlay provides that "[g]arages must be to the rear of the single family structure."[140]

Despite these rules' strong resemblance to covenants,[141] they differ markedly from covenants 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. They also differ in their manner of enforcement: overlay communities do not typically have a sublocal institution for enforcement. Rather, a local commission that serves the entire city, in addition to or in lieu of a planning board and the city council, makes ultimate decisions about the

134. *Id*. at § 3.17.3 (F)(2).

135. *Id*. at § 3.17.3 (F)(4).

136. BOSTON ZONING CODE § 50-41(1)(a), *available at* http://www.bostonredevelopmentauthority.org/pdf/zoningcode/article50.pdf.

137. CITY OF MILWAUKEE, DEPARTMENT OF CITY DEVELOPMENT, *supra* note 55.

138. CITY OF PHILADELPHIA, BILL No. 080080 § 14-908(4)(a)(9)(g), http://webapps.phila.gov/council/attachments/5407.pdf.

139. PINE KNOLLS NEIGHBORHOOD CONSERVATION DISTRICT PLAN 3 (2006), *available at* http://www.ci.chapel-hill.nc.us/Modules/ShowDocument.aspx?documentid=820.

140. DALLAS, TEX. ORDINANCE No. 27120 § 2(4) (2008), *available at* http://www.dallascityhall.com/development_services/pdf/nso_cedar_oaks.pdf.

141. This Article does not purport to draw a substantive line that defines whether rules look more like "traditional zoning" or covenants; nor does it attempt to identify which rules may be the most troublesome substantively in terms of the negative externalities that they may impose or by some other measure. That is the subject of a future paper. Rather, this Article attempts to generally identify rules that resemble covenants in many respects.

enforcement and application of rules.[142]

Cities have occasionally implemented unique sublocal institutions to enforce overlay rules, however, thus bringing public overlay rules even closer to the realm of covenants. These sublocal institutions, like homeowners' associations, enforce the detailed rules dictating property use, although they do so within a much narrower realm than that of the homeowners' association. In Cambridge, Massachusetts, for example, which enables existing communities to implement Neighborhood Conservation Districts,[143] 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, 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.[144] The NCD Commission has relatively broad enforcement powers, as it may approve all proposals for "all construction, demolition or alteration" of buildings within the district, and owners must obtain this approval before any work is commenced.[145] Where rules will create an undue hardship for an individual owner and the owner requests a variance, the Commission may issue a Certificate of Hardship permitting noncompliance after holding a public hearing.[146] Thus, similar to what occurs in private covenanted communities, some public neighborhoods

142. *See, e.g.*, Lovelady, *supra* note 117, at 157 (observing that "[u]sually the local historic commission oversees both the historic and the conservation districts").

143. CAMBRIDGE, MASS., MUN. CODE art. III, tit. 2, § 2.78.180(C) (2008), *available at* http://www.municode.com/Library/Library.aspx (follow "Mass." hyperlink; then follow "Cambridge" hyperlink; then follow "Cambridge Code of Ordinances" hyperlink; then follow "Title 2 ADMINISTRATION AND PERSONNEL" hyperlink; then follow "Chapter 2.78 HISTORICAL BUILDINGS AND LANDMARKS" hyperlink; then follow "Article III. Establishment of Neighborhood Conservation Districts and Protected Landmarks" hyperlink; then follow "2.78.180 Designation procedures" hyperlink).

144. *Id.* § 2.78.160, *available at* http://www.municode.com/Library/Library.aspx (follow "Mass." hyperlink; then follow "Cambridge" hyperlink; then follow "Cambridge Code of Ordinances" hyperlink; then follow "Title 2 ADMINISTRATION AND PERSONNEL" hyperlink; then follow "Chapter 2.78 HISTORICAL BUILDINGS AND LANDMARKS" hyperlink; then follow "Article III. Establishment of Neighborhood Conservation Districts and Protected Landmarks" hyperlink; then follow "2.78.160 Neighborhood conservation district commission—Established—Membership requirements" hyperlink).

145. NEIGHBORHOOD CONSERVATION DISTRICTS IN CAMBRIDGE (2002), *available at* http://www.cambridgema.gov/historic/ncd_brochure.pdf; *see also* CAMBRIDGE, MASS., MUN. CODE art. III, tit. 2, § 2.78.170 (2008), *available at* http://www.municode.com/Library/Library.aspx (follow "Mass." hyperlink; then follow "Cambridge" hyperlink; then follow "Cambridge Code of Ordinances" hyperlink; then follow "Title 2 ADMINISTRATION AND PERSONNEL" hyperlink; then follow "Chapter 2.78 HISTORICAL BUILDINGS AND LANDMARKS" hyperlink; then follow "Article III. Establishment of Neighborhood Conservation Districts and Protected Landmarks" hyperlink; then follow "2.78.170 Powers and duties" hyperlink).

146. *See id.* § 2.78.210, *available at* http://www.municode.com/Library/Library.aspx (follow "Mass." hyperlink; then follow "Cambridge" hyperlink; then follow "Cambridge Code of Ordinances" hyperlink; then follow "Title 2 ADMINISTRATION AND PERSONNEL" hyperlink; then follow "Chapter 2.78 HISTORICAL BUILDINGS AND LANDMARKS" hyperlink; then follow "Article III. Establishment of Neighborhood Conservation Districts and Protected Landmarks" hyperlink; then follow "2.78.210 Certificates of appropriateness, nonapplicability or hardship" hyperlink).

now have opportunities to implement both sublocal rules and sublocal institutions to enforce those rules. And they have done so despite the early Supreme Court rulings that limit the extent to which zoning power may be delegated to small entities,[147] working within these constitutional confines to create unique neighborhood-specific regimes.

C. PUBLIC-PRIVATE HYBRID COMMUNITIES

Following the trend toward neighborhood-specific zoning, a third type of rule-bound community—what I call the "hybrid community"—also employs a zoning overlay with detailed guidelines for uses and building design, but it applies the overlay in order to create a new community within a city rather than to add rules to an existing neighborhood. Increasingly, cities that revitalize downtown areas—often former industrial, military, or commercial urban sites[148]—work with a developer, or serve as the developer, to design and build a new community with residences, commercial areas, and sometimes workplaces.[149] The hybrid community is essentially a private covenanted community constructed in the middle of a city rather than a suburb. It is governed by the base zoning code, a specialized zoning overlay, and private covenants.

Hybrid communities, however, differ substantially from the typical suburban private covenanted subdivision. First, they are created with more public participation and are subject to more city-wide zoning regulations, as well as a more detailed zoning overlay, than their suburban counterparts. Private covenanted subdivisions, by contrast, are often in the extraterritorial jurisdiction zone of a city or in a suburb governed by less stringent subdivision rules and, although formed through a planned unit development incorporated into a zoning code, are typically subject to substantially fewer zoning rules than are hybrid communities. Further, particularly where a city redevelopment agency is the developer[150] and thus writes the private covenants for the hybrid community, these covenants are likely to reflect the purpose of the rules within the public overlay.

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147. *See, e.g.*, Washington *ex rel.* Seattle Title Trust Co. v. Roberge, 278 U.S. 116, 121–22 (1928) (noting that where a nuisance is not involved, it is a violation of due process for zoning powers to be delegated to property owners within 400 feet of a development in dispute).

148. *See, e.g.*, *infra* note 174 and accompanying text; Anne Marie Pippen, Note, *Community Involvement in Brownfield Redevelopment Makes Cents: A Study of Brownfield Redevelopment Initiatives in the United States and Central and Eastern Europe*, 37 GA. J. INT'L & COMP. L. 589, 590 (2009) (describing "Atlantic Station, a 138-acre mixed-use development site including retail, residential, commercial, and public space" built on a site "formerly contaminated with industrial by-products of the Atlantic Steel Mill").

149. *See, e.g.*, Matthew J. Parlow, *Greenwashed?: Developers, Environmental Consciousness, and the Case of Playa Vista*, 35 B.C. ENVTL. AFF. L. REV. 513, 528 (2008) (describing the Playa Vista urban redevelopment, "where people can work, live, and recreate").

150. *See, e.g.*, About the Lowry Redevelopment Authority, http://www.lowry.org/info/about_lra.htm (last visited Oct. 7, 2009) (describing how the Lowry Redevelopment Authority, a "non-profit, quasi-public organization established by the Cities of Denver and Aurora to redevelop the former Lowry Air Force Base . . . serves as master planner and developer of the 1,866-acre site with responsibility for zoning, infrastructure improvements and real estate sales").

The hybrid community is perhaps the newest form of rule-bound community, although, like sublocal zoning and private covenants, it has precedents. In England, at the "advent of the industrial revolution," visionary figures created "model villages,"[151] 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 urban residents as early as the mid-seventeenth century. Near Halifax, Nathaniel Waterhouse "built numerous workhouses, almshouses, and orphans' schools."[152] 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 of preventing "the sudden withdrawal of workpeople."[153] The houses consisted of "three long rows, together with four shops," and they were "backed against the railroad embankment"[154] (forming an early "mixed-use" development, perhaps). 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."[155]

The concept of creating contained urban villages moved to America, where George Pullman, the famous industrialist, designed and built the private town of Pullman, Illinois in the late 1800s.[156] The town boasted an "integrated landscape design" with lots arranged in a grid-based pattern,[157] and 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.[158]

In a way, the early concept of the industrial village is mirrored in modern hybrid communities, which create an urban village of mixed uses and mixed incomes, although now with public involvement.[159] These types of communities first emerged in the 1950s and 1960s[160] when states began to allow developers

151. WALTER S. CREESE, THE SEARCH FOR ENVIRONMENT: THE GARDEN CITY BEFORE AND AFTER 13 (1966).

152. *Id*.

153. *Id*. at 22–23.

154. *Id*. at 23.

155. *Id*. at 27.

156. *See* Keith Aoki, *Race, Space, and Place: The Relation Between Architectural Modernism, Post-Modernism, Urban Planning, and Gentrification*, 20 FORDHAM URB. L.J. 699, 709 (1993); *see also* STANLEY BUDER, PULLMAN: AN EXPERIMENT IN INDUSTRIAL ORDER AND COMMUNITY PLANNING, 1880–1930, at 50–51 (describing how Pullman hired Solon Spencer Berman "to design factory and homes" and Nathan F. Bartrett to "lay out the buildings and to landscape them").

157. Pullman State Historic Site, Planning the Town of Pullman, http://www.pullman-museum.org/theTown/planning.html (last visited Feb. 16, 2010); *see also* BUDER, *supra* note 156, at 76 (showing the grid layout).

158. Pullman State Historic Site, The Town of Pullman, http://www.pullman-museum.org/theTown (last visited Feb. 16, 2010).

159. *See, e.g.*, Parlow, *supra* note 149, at 527 n.84, 528 (describing mixed use development and the promise of 15% affordable housing at the Playa Vista redevelopment).

160. *See* Mandelker, *supra* note 28, at 420.

to group together a large number of adjacent land lots and build unified communities of homes and businesses on this cluster of lots.[161] The developer could ignore the pre-existing lot lines, creating a denser and more diverse pattern of development than was permitted within the existing zoning district.[162]

Just as a developer of a suburban private covenanted subdivision buys a piece of land in a suburb, lays out a subdivision, and writes rules to govern that subdivision, a developer of a hybrid community purchases land and begins the same process, although typically in an urban "infill" area,[163] which is intended to increase urban density. Similar to the process followed for suburban subdivisions, however, the planning commission and sometimes the city council, or a similar body, must approve the specific layout of the redevelopment by signing off on a "master plan" for the community.[164] This process typically involves intense bargaining between the city and the developer, wherein the developer promises to provide certain amenities to the broader locality.[165] The master plan for a hybrid community lays out the community's streets, sidewalks, public transportation stops, open space, and lots for housing and commercial structures; it also describes the types of uses within the planned community and where those uses will occur.[166]

The primary difference between suburban covenanted subdivisions and hybrid communities arises in the formation of the rule set. The rules for the hybrid 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 (if the commission does not serve as the developer

161. *See id*. at 421–22.

162. *See* Lenard L. Wolffe, *New Zoning Landmarks in Planned Unit Developments*, 62 URB. LAND INST. TECHNICAL BULL. 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).

163. *See* Mandelker, *supra* note 28, at 419 (describing these communities as "a major component of suburban and infill development in many metropolitan areas").

164. *See id.* at 448 n.128 (describing Mississippi's statute for master-planned communities, which involve "'a development . . . consisting of residential, commercial, educational, health care, open space and recreational components that is developed pursuant to a long range, multi-phase master plan providing comprehensive land use planning'" (quoting MISS. CODE. ANN. § 19-5-10 (2003))); John R. Nolon & Jessica A. Bacher, *Zoning and Land Use Planning*, 36 REAL EST. L.J. 211, 216–18 (2007) (describing the urban redevelopment of a site in Yonkers, New York, wherein the city adopted design standards in a master plan).

165. This is done in a manner that avoids the unconstitutional practice of "contract zoning"; the developer's promises are not "directly" exchanged for a zoning guarantee. *See* Steven P. Frank, *Yes in My Backyard: Developers, Government and Communities Working Together Through Development Agreements and Community Benefit Agreements*, 42 IND. L. REV. 227, 236 (2009) (discussing unconstitutional contract zoning).

166. *See, e.g.*, Hawaii Community Development Authority, GGP Ward Neighborhood Master Plan Application, http://hcdaweb.org/october-15-2008-public-hearing-set-for-ggp-ward-neighborhood-master-plan-2 (last visited Feb. 20, 2009) (describing the master plan for an urban development in Hawaii).

itself), and city residents[167] and sketches a vision for the area, describing the density and design of the proposed structures[168] and the aesthetic and related priorities to be encompassed within those structures.[169] The city draws up a zoning overlay to cement the vision,[170] 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 govern the community.[171] These covenants, conditions, and restrictions are similar to those seen in suburban private covenanted subdivisions and are administered in the same manner. As in covenanted communities, the neighbors and property owners' association are jointly tasked with enforcing the covenants, and an architectural or design review committee of the association reviews homeowner requests to make physical changes to individual properties within the redevelopment.[172] Enforcement of the overlay is, of course, still left to the governing municipality, as is enforcement of the base zoning code. In one Denver hybrid community, for example, the community's private rules warn:

> In addition to obtaining the [Design Review] Committee approval for specified property improvements, owners may also be required to obtain . . . certain permits . . . from the City and County of Denver. Approval by the Committee does not mean or warrant that the proposed improvement will comply with the building and zoning code of the City and County of Denver.[173]

The hybrid communities, then, with their publicly implemented, detailed overlays and privately enforced covenants, are an interesting blend of the two other rule-bound communities.

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167. *See, e.g.*, *id*. (discussing the public hearing on the GGP Ward Neighborhood Master Plan application, where more than 200 residents spoke).

168. *See, e.g.*, MIDWEST REGIONAL REDEVELOPMENT AUTHORITY, BRUNSWICK NAVAL AIR STATION REUSE MASTER PLAN 188 (Dec. 2007), *available at* http://www.mrra.us/images/Section_6_BNAS_Reuse_Master_Plan.pdf (describing the residential district of "single family attached or detached" housing as well as multifamily apartments and establishing proposed densities of dwelling units per acre).

169. *See, e.g.*, Lowry Redevelopment Authority, *Lowry Builder Named Green Builder of the Year*, RE: DEVELOPMENTS, Feb. 2009, at 3, http://www.lowry.org/news/LRA9002-FebNwslttr09(online).pdf (describing how Lowry redevelopment near Denver provides "energy-efficient homes"); Mueller, Sustainability, http://www.muelleraustin.com/green/sustainability.php (last visited March 8, 2009) (describing an urban redevelopment in Austin, Texas, which has solar panels and recycled building materials).

170. 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. Nolon & Bacher, *supra* note 164, at 217.

171. *See* SAN ANTONIO, TEX. *supra* note 31.

172. *See, e.g.*, LOWRY COMMUNITY MASTER ASSOCIATION, LOWRY PROPERTY OWNER RULES AND REGULATIONS, *available at* http://api.ning.com/files/V3ri3ykXuD47tQWk3xAs*bhDNQlxuui-QN6xtHRsdk7cOt5mfSDvbC*UP7s7l97Kd3gOUBR*1j9d6bWqw2QzvfyHuK0Sn34t/designguidelines9.2008.pdf (setting forth the rules administered by the Lowry Design Review Committee).

173. *Id.* at 2, § 1.2.

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.[174] The Lowry Redevelopment Authority, a nonprofit, quasi-public organization, drew up a master plan, which the city councils of Aurora and Denver approved.[175] The councils also approved zoning to "accommodate new residential and commercial development."[176] The Lowry Community Master Association, a private property owners' association, was then formed to govern the community, along with a set of rules.[177] Under the rules and regulations adopted by the homeowners' association, homeowners wishing to change the color of their fence must submit a "request for painting or staining fences" to the design review committee, and fence colors must "harmonize with surroundings."[178] "[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.[179] All new trees that are planted must be at least 2.5 inches in circumference, and willows, poplars, box elders, Siberian elms, and silver maples are prohibited.[180]

At Playa Vista in Los Angeles, touted as the "largest urban infill project in the country,"[181] developers worked with community stakeholders[182] to create a community with bicycle trails, energy efficient residential living, solar-heated swimming pools, and open space.[183] 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."[184]

Hybrid communities, as a unique blend of the previously described private covenanted and overlay communities, operate under an intriguing mix of private and public rules. Although the covenants are identical to those within a typical suburban subdivision and are written by one developer, these covenants sometimes reflect the "public" principles contained within the overlay, particularly where the developer is a quasi-public urban redevelopment agency. Potential residents of urban redevelopments, as a result of the public overlay process that

174. Lowry, Information Center, http://www.lowry.org/info/about_lra.htm (last visited Feb. 23, 2009).

175. LOWRY, FACT SHEET (2006), http://www.lowry.org/news/Timeline.pdf.

176. *Id*.

177. LOWRY COMMUNITY MASTER ASSOCIATION, *supra* note 172.

178. *Id*. at 8, § 2.8.2 (describing fence requirements), 1, § 1.1 (describing the Lowry Design Review Committee).

179. *Id*. at 6, § 2.6.

180. *Id*. at 10, § 2.11.2.

181. Parlow, *supra* note 149, at 523.

182. *Id*. at 525–27.

183. *Id*. at 528–30.

184. City of Las Vegas, Symphony Park, http://www.lasvegasnevada.gov/Government/7598.htm (last visited Mar. 6, 2009).

forms the urban redevelopment, may ultimately have more *ex ante* 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 village in downtown Los Angeles or a large, private suburban city like Reston, Virginia, are increasingly the norm in housing development. It appears that several factors are driving this trend. In many cases, consumers demand rules: rule-bound communities have advantages, including the creation of a built environment with a discrete character. These types of advantages inspire consumers to "purchase" these communities by moving to them. The critical literature addressing private covenanted communities, however, argues that many consumers are not demanding rules but are instead misinformed; they are purchasing a home while remaining ignorant of the rules surrounding it. The same could be true for public rule-bound communities, where rules are, at times, even more obscured.

Even where consumers are not sending strong demand signals for rule-bound communities, municipalities and developers have independent incentives to produce these communities, which likely also contributes to their prevalence. Governments encourage the formation of rule-bound communities—not just private communities, as others have suggested[185]—as a result of tight municipal budgets and developer-influenced votes. Consumers' lack of a full understanding of the rules governing these communities, combined with the potential overproduction of such communities due to government and developer incentives, however, does not suggest that there is no demand for rules. This Part attempts to explore in more detail why public, private, and hybrid rules governing property use have become so prevalent, despite many Americans' preference for strong individual property rights.[186]

A. COMMUNITY BY CHOICE: A PREFERENCE FOR A COMMUNITY TO CALL ONE'S OWN

A simplistic market-based explanation for the trend toward rule-bound communities is that consumers prefer them. And the steady progression, over nearly a century, toward detailed zoning overlays and privately governed communities with complex sets of covenants would seem 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

185. *See, e.g.*, *infra* notes 248–49 and accompanying text.

186. *See* Laura Oppenheimer & James Mayer, *Poll: Balance Rights, Land Use*, THE OREGONIAN, Apr. 21, 2005, at C1 (explaining how, in a poll of 500 Oregon residents, "respondents valued protecting property rights more than farmland, the environment or wildlife habitat," and "60 percent chose individual rights over responsibility to their community").

nearby schools,[187] job availability, and commuting costs,[188] would largely depend on the upkeep of the structures on that property. But many Americans can no longer afford to live in isolation.[189] The American dream, then, is inherently tied up in one's neighbors' dreams. The rules in rule-bound communities, because of their unusual specificity, allow homeowners to predict and control their neighbors' land uses[190] 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.[191]

Charles Tiebout's theory would suggest that prospective homebuyers are indeed driving the trend toward rule-bound communities as they search for defined communities to call home.[192] 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.[193] Tiebout pointed out, however, that intentionally or not, consumers do express their preferences for public goods by moving. If a local government provides a suboptimal package of public goods, consumers move to a municipality with a preferred level of goods,[194] thus "voting with their feet."[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 that is sometimes enforced by a sublocal institution. As such, there is a new layer of community shopping. Community consumers may choose among various levels of sublocal public goods, as well as among the local governments that enable the provision of these public goods—thus, consumers "vote" for sublocal rule sets that offer varying controls over neighbors' land uses and, as a

187. *See* FISCHEL, *supra* note 36, at 111 (arguing that declining school funding should correlate with lower property values).

188. *See* 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).

189. *See supra* note 8 and accompanying text.

190. *See* NELSON, *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").

191. For discussions of the efficiencies of group covenants, see Ellickson, *supra* note 19, at 107; Epstein, *supra* note 9, at 915–16; Fennell, *supra* note 5, at 846–47.

192. *See* Tiebout, *supra* note 10, at 418, 420 (arguing that consumers express preferences for public goods through their movements and that although governments do not respond directly to preference, they ultimately offer various levels and types of goods as suboptimal levels and types are rejected).

193. *Id*. at 416–17.

194. *Id*. at 418, 420.

195. *See* FISCHEL, *supra* note 36, at 39 (describing the Tiebout hypothesis as involving residents who "vote with their feet").

result, a variety of community aesthetics.[196]

Consumers want to limit neighbors' land uses not only to improve their own property values (or in the case of long-time homeowners in gentrifying areas, to keep their property values and tax bills from rising in the near term), but also to ensure that they can enjoy their property while they are living on it.[197] Financial value considerations appear to heavily drive individuals' selection of rule-bound communities. Gregory Alexander described the "nearly universal emphasis that residents [in interviews] gave to maintaining property value."[198] Constance Perin conducted interviews in public neighborhoods in the 1980s and similarly concluded that neighbors were most worried about property values.[199] 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."[200] A property inspector further revealed how property values motivate complaints about neighboring property uses, explaining:

> [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 $5000 just because of the neighbors. And that hurts.[201]

The empirical literature also suggests, however, that some community consumers demand the rules themselves—or at least the aesthetics created by the rules—in order to obtain daily emotional value from the property. 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.[202] As one resident of a private covenanted subdivision explained in an interview with Setha Low, "[I]t does protect you from the crazy neighbor who wants to paint the house red. . . . I chose the neighborhood because I like the

196. *See* Frantz, *supra* note 42, 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").

197. *See infra* notes 203–04 and accompanying text.

198. Gregory Alexander, *Conditions of "Voice": Passivity, Disappointment and Democracy in Homeowner Associations*, *in* COMMON INTEREST COMMUNITIES, *supra* note 63, at 145, 157.

199. CONSTANCE PERIN, BELONGING IN AMERICA: READING BETWEEN THE LINES 64 (1988) (describing how "[i]n homeowners' calculus, the physical appearance of their block matters the most").

200. *Id.*

201. *Id.*

202. *See* Gillette, *supra* note 37, 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).

style of the homes."[203] 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."[204]

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.[205] A good number of people seek out security; gated communities, a popular form of private subdivision, reassure residents that access to their neighborhood will be limited.[206] Some community consumers want neighbors of similar interests or age and a 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 explicit social grouping functions. Many retirement communities in Florida and other sunny southern areas are now age restricted, for example.[208] Yet another consumer group demands the location, liveliness, diversity,[209] and green living options offered by mixed-use downtown living within hybrid communities.[210]

Covenanted communities, because they are typically part of a new, cohesive project on an empty piece of land, generally offer the most diverse array of community aesthetics and permitted activities. There are "health" communities with hiking trails and spas[211] and "green communities,"[212] "recreation" and

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203. LOW, *supra* note 75, at 165.

204. Alexander, *supra* note 198, at 157.

205. *See* Mark A. Malsapina, Note, *Demanding the Best: How to Restructure the Section 8 Household-Based Rental Assistance Program*, 14 YALE L. & POL'Y REV. 287, 290 (1996) (describing "the lack of affordable housing and the limitations on residential choice" as "two fundamental residential problems").

206. *See* BLAKELY & SNYDER, *supra* note 67, 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) (discussing how approximately half of his community is populated by retired "snowbirds" who wished to live amongst other residents their age).

208. *See* BLAKELY & SNYDER, *supra* note 67, at 39 (describing "lifestyle" retirement communities in the Sunbelt).

209. *See, e.g.*, Gillette, *supra* note 37, 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* Eugenie L. Birch, *Who Lives Downtown?*, *in* 3 REDEFINING URBAN & SUBURBAN AMERICA: EVIDENCE FROM CENSUS 2000, *supra* note 8, at 32, 38 (discussing cities' downtown mixed-use residential projects as "something of a renaissance" and observing that the population in more than 70% of thirty-two city downtowns sampled grew in the 1990s).

211. *See, e.g.*, Lyttle, *supra* note 62 (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").

"retirement" communities,[213] "family-friendly"[214] communities, and "no pet"[215] communities. As discussed above, 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.[216] These communities are somewhat more limited in the types of restrictions they may impose than private covenanted subdivisions—hence the focus of this Article on aesthetic rules. Bans on pets and minimum age restrictions in public neighborhoods are likely to fail,[217] if only due to a sense that such rules are too intrusive for a public neighborhood.[218] Although courts typically give deference to these types of rules in private covenanted communities[219] because they presume that individuals willfully "contracted" for such rules, they are highly suspect of such rules in the public context.[220] That said, courts have even allowed age restriction through zoning in some circumstances, thus leading zoning closer to the realm of private covenants.[221]

In contrast to the current political and judicial barriers to the implementation of rules addressing very personal, human uses of property such as pet and age limits in public communities,[222] overlay communities face fewer impediments to placing strict limits on the built environment. Residents within the communi-

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212. *See, e.g.*, NELSON, *supra* note 16, at 67 (describing a Virginia neighborhood association, "EcoVillage"); Joe Cantlupe, *Going Green*, COMMON GROUND (Jan.–Feb. 2008) (through paid access and on file with author) (discussing a private covenanted conservation community in Illinois).

213. *See, e.g.*, Frantz, *supra* note 42, at 66 (describing "Leisure World Laguna Hills in Orange County," a "retirement community with over 22,000 residents"); *id*. at 67–68 (describing communities with polo courts, bridle paths, and golf courses).

214. *See, e.g.*, Robert Schwarting, *Guided By Voices*, COMMON GROUND (July–Aug. 2002) (through paid access and on file with author) (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").

215. *See, e.g.*, Gary A. Poliakoff, J.D., & JoAnn Nesta Burnett, Esq., *Prescription Pets*, COMMON GROUND (Jan.–Feb. 2008) (through paid access and on file with author) (describing the "many pet-restricted community associations" and how homeowners often seek waivers from pet rules). *But see* Chateau Vill. N. Condo. v. Jordan, 643 P.2d 791, 792 (Colo. App. 1982) (prohibiting a condominium board of directors from enforcing a discretionary no-pet policy).

216. *See* Briffault, *supra* note 12, at 517 (explaining that "special district zoning" tailors "land use regulation to conditions specific to particular neighborhoods").

217. *See* Ellickson, *supra* note 20, at 1528 (explaining that "lower courts perceive municipal zoning by age as posing serious constitutional questions").

218. The rules likely would survive a rational basis challenge, which is why I argue that their failure is more likely a political one or is to be attributed to a general sense of discomfort with intrusive "public" rules. *See infra* note 221.

219. *But see* O'Connor v. Vill. Green Owners Ass'n, 33 Cal. 3d 790, 797 (Cal. 1983) (invalidating a private community's "restrictive covenant against children").

220. *See* Ellickson, *supra* note 20, 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").

221. *See, e.g.*, Taxpayers Ass'n of Weymouth Twp., Inc. v. Weymouth Twp., 364 A.2d 1016, 1021, 1037–38 (N.J. 1976) (affirming a zoning ordinance's creation of a district for an elderly mobile home park); Maldini v. Ambro, 36 N.Y.2d 481, 483, 488 (1975) (affirming a town's powers to amend a zoning ordinance to allow for a "Retirement Community District").

222. *See supra* note 217 and accompanying text.

ties who work to create the rules—or those who move in after the rules are formed—can choose an historic community,[223] a community that prevents the replacement of modest homes with large structures,[224] or a tree-loving community.[225] Downtown, in hybrid rule-bound communities, potential residents may also find mixed-use and mixed-income communities that offer some affordable living options.[226]

In creating these types of options for built environments, rules respond to individual preferences for such environments. Clayton Gillette observes, for example, that covenants "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."[227] Robert Ellickson similarly believes in the ability of covenant-type regimes to capture "unanimous wishes" of a community's members.[228]

In enlarging options for more types of defined communities and thus potentially responding to consumer preferences, public overlay communities also offer what traditional zoning—a very broad-brush approach to land use—and public neighborhoods typically do not.[229] 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.[230]

Just as traditional zoning with its blunt approach to rules fails to offer many options for controlling the sublocal community aesthetic, applying covenants to

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223. *See supra* note 26.

224. *See id.*

225. *See, e.g.*, HIGHWAY GATEWAY CORRIDOR OVERLAY DISTRICT PLAN, EXHIBIT B, *available at* http://www.sanantonio.gov/planning/pdf/neighborhoods/Corridor_Dist/Hwy_151_Standards.pdf (describing San Antonio's Corridor Overlay District, which requires "existing trees and understory plants" to be preserved).

226. *See supra* note 159.

227. Gillette, *supra* note 37, at 1395.

228. Ellickson, *supra* note 20, at 1528.

229. *See* NELSON, *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").

230. Krieger, *supra* note 2, at 9.

old communities[231] is not generally a practically achievable endeavor.[232] Communities with structures 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 is grim. Yet property owners—like other consumers—still wish to define the character of their community using rules that are specific to their sublocal environment. This widespread desire is why several authors have proposed that private covenants should be more readily available to and usable by existing public communities.[233]

Public neighborhoods, however, have found other creative ways to implement covenant-type rules within existing governance structures using the sublocal overlay. Although some bargaining is required as the city government must approve this new set of overlay rules—and in some cases, a portion of the existing residents must first vote to initiate these rules—the time and resources that must be invested in the bargaining process are negligible compared to what would be required to persuade a community to unanimously agree to covenants.[234]

The question remains, of course, whether the processes for enforcement and modification of the rules in all three types of rule-bound communities allow the rules to match consumers' preferences—a question that will be addressed in Part III.

B. COMMUNITY BY MISTAKE: RULE BLINDNESS

Despite the apparent desire for rule-bound communities, those who doubt that these communities are purely the result of consumer demand also have support in the literature: a substantial number of people buy a house without realizing that they are joining a rule-bound community.[235] These homeowners are either not notified of the rules before they buy, fail to become aware of the rules

231. This phrase builds off of Ellickson's suggestion of "New Institutions for Old Neighborhoods." *See* Ellickson, *supra* note 19.

232. *See supra* note 18 and accompanying text.

233. 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." NELSON, *supra* note 16, at 266. Robert Ellickson, although wary of extensive 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. Ellickson, *supra* note 19, at 99. George Liebmann proposes that existing neighborhoods should be allowed to implement private associations without requirements of unanimous consent. Like Ellickson, however, he proposes that they should have only limited regulatory powers. Liebmann, *supra* note 18, at 369.

234. *See supra* note 18 and accompanying text.

235. *See infra* notes 315–19 and accompanying text.

despite constructive notice of their existence, or fail to read or understand the fine print in the piles of papers presented at closing. As such, their "votes" for these communities are not fully accurate, nor are these 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."[236] This absence of understanding is an important notice-based flaw: 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.[237]

The literature often operates on the assumption that consumers understand both the characteristics of the individual physical property that they purchase and the nature of the community surrounding that property. Tiebout and many others view homebuyers as informed individuals who are aware of the local public goods in the community and who have preferences for community type[238] when buying;[239] they have faith in consumers' specific knowledge of the community and preferences for it. Tiebout concedes that "[c]onsumer-voters do not have perfect knowledge and set preferences," but he observes that several studies "seem to indicate a surprising awareness of differing revenue and expenditure patterns"[240] within the community. Similarly, Fischel believes that "there is an active market in communities as well as in homes,"[241] pointing to several studies with evidence "that homebuyers are aware of fiscal and public service differences among communities."[242] Although it is likely that many homebuyers do not directly consider these differences,[243] he argues that homebuyers use proxies or "heuristics"[244] to understand the communities in which they consider purchasing a home. Kenneth Bickers and Robert Stein, for example, found that prospective residents often determine the quality of the schools offered by a community not by comparing test scores but by looking for the presence of wealthy or academic residents who are likely to demand better

236. Franzese & Siegel, *supra* note 43, at 1126–27.

237. Oren Bar-Gill, *The Behavioral Economics of Consumer Contracts*, 92 MINN. L. REV. 749, 761–65 (2008) (discussing, in the context of credit card borrowing, evidence of consumers' systematic errors and misperceptions).

238. FISCHEL, *supra* note 36, at 59–60 (describing consumers who shop "for a community and a school district as well as for homes with larger lots or more bathrooms").

239. Tiebout, *supra* note 10, at 423.

240. *Id.* (citing Wendy Bell, *Familism and Suburbanization: One Test of the Choice Hypothesis*, RURAL SOCIOLOGY (1956)).

241. FISCHEL, *supra* note 36, at 60.

242. *Id*. (citing studies performed by Wallace Oates in 1969; Teske, Schneider, Mintrom, and Best in 1993; and Schneider, Teske, Maschall, and Roch in 1998).

243. *Id*. at 59 (arguing that "people move for reasons that typically have little to do with local government").

244. *Id*. at 61.

schools.[245]

In light of the many types of rule-bound communities that have emerged and the many rules that form these communities, these assumptions of individual- and community-based knowledge of property may no longer hold true for a growing subset of consumers entering communities. Even if consumers do take a hard look at the community surrounding their home, they may lack actual notice of rules that form the community,[246] as will be discussed in more detail in Part III. Private covenants do not always produce physically observable evidence of their existence and, although they are recorded, are typically so numerous and detailed that a casual reader will fail to sufficiently comprehend their import. Overlay communities also fail to provide adequate heuristics to imply the existence of certain rules.[247] This does not mean, of course, that residents do not vote for community rules with their feet. Assuming that residents at 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 and hybrid communities) or neighbors (in the case of overlay communities) to produce them. This is in large part because rule-bound communities can be lucrative for cash-strapped local governments.[248] In both hybrid and private covenanted communities, the developer often provides infrastructure, such as roads and sidewalks, as well as services the municipality would otherwise have to fund.[249] In most cases, residents in these developments also pay the same tax rate as the other citizens within the municipality despite the reduced quantity of public services that they receive.[250]

Local governments may also prefer rule-bound communities out of a basic

245. *Id*. (citing Kenneth N. Bickers and Robert M. Stein, *The Microfoundations of the Tiebout Model*, 34 URB. AFF. Q. 76 (1998)).

246. *See infra* notes 315–19 and accompanying text.

247. *See infra* note 331 and accompanying text.

248. *See* James L. Winokur, *Choice, Consent, and Citizenship*, *in* COMMON INTEREST COMMUNITIES, *supra* note 63, at 87, 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").

249. *See* 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.").

250. *See* Franzese & Siegel, supra note 43, at 1121 (noting that "CIC residents seldom receive a local tax credit to offset" association fees for private services provided).

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,[251] 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 run-down, dangerous parks, for example. 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 potential to increase crime rates and decrease surrounding property values, both of which burden the municipal budget.

Under the more cynical model, local governments may alternatively encourage the formation of private covenanted and hybrid communities primarily as a result of lobbying by strong interest groups, particularly developers.[252] Public choice theory suggests that governments are not influenced primarily by considerations of individual welfare but rather by powerful special interest groups; they listen to the views of the most powerful groups or lobbyists and broker deals among them.[253] Indeed, developers are notoriously influential in city politics[254] and support policies that give them more flexibility to build;[255] provisions within the municipal code that provide for site plan approval of large, privately planned communities to be governed by property owners' associations do just this.[256] Rather than having to obtain the city's blessing for each and every house, a developer can obtain approval of an entire subdivision with one sweep of the pen.[257]

Neighborhoods are also, in some municipalities, a powerful and vocal special

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251. *See supra* note 21.

252. *See infra* note 263 and accompanying text.

253. *See* 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").

254. *See, e.g.*, Robert Becker & Dan Mihalopoulos, *Community Input an Illusion*, CHI. TRIB., Jan. 28, 2008, at 1 (describing a developer's large contributions to an alderman's campaign committee).

255. *See, e.g.*, *id.* (describing developers who seek "valuable zoning changes that allow them to build bigger and taller projects").

256. *See* LOW, *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*, *in* PRIVATE CITIES: GLOBAL AND LOCAL PERSPECTIVES 45, 56 (George Glasze et al. eds., 2006) (describing how "[d]evelopers usually approach the village board saying, 'We need more flexibility in designing our subdivisions'" (citing field notes of Jörg Plöger)).

257. *But see* Nicole Stelle Garnett, *Unsubsidizing 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.").

interest group.[258] Neighborhood groups who wish to accomplish traditional NIMBY-ist goals or to preserve what they view as important characteristics of their neighborhood may successfully push for neighborhood-specific overlay zoning creating a public rule-bound community.[259]

Tiebout's model would suggest, however, that local governments' policies to encourage private covenanted developments or overlay communities are not merely top down, special interest-focused decisions but instead largely respond to broad-based consumer preferences.[260] 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 subentities such as property owners' associations and neighborhood groups.[261] Further, William Fischel's "homevoters"—the homeowners who most actively participate in local affairs[262]—are the most likely to elect the government officials and thus influence the rules voted upon by those officials, which enable and even mandate the establishment of private covenanted communities. This would again suggest that individuals may be collectively choosing these regimes. Critics argue, alternatively, that consumer preferences are not reflected in local government policy or the developer decisions that capitalize on such policy.[263]

Both consumer preferences and developer lobbying likely have contributed to the rise of rule-bound communities, particularly private covenanted and hybrid communities. Even if governments or developers are pushing these communities on unwilling consumers, as some have argued, a number of consumers actively seek out rules and the communities formed by rules. And, of course, developers' production of communities and consumers' demand for them cannot be fully separated: developers profit from building the houses that community consumers prefer. This combination of forces influencing the rise of rule-bound communities suggests that these communities are, to some extent, responding to growing demand. Yet the ways in which these communities' rules are implemented, enforced, and modified may ultimately fall short of consumer expectations.

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258. *See* Eagle, *supra* note 43, at 911 (explaining that "existing homeowners . . . constituted the key [special interest] groups behind zoning in the suburbs").

259. *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).

260. *See supra* note 194 and accompanying text.

261. *See* Fennell, *supra* note 13, at 170 (discussing how entry and exit can change the composition of local government voters and hence, local government policies).

262. FISCHEL, *supra* note 36, at 80.

263. *See, e.g.*, *supra* note 236 and accompanying text; MCKENZIE, *supra* note 66, at 103–04 (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").

III. MEETING EXPECTATIONS? PROBLEMS IN THE VINDICATION OF CONSUMER PREFERENCES

Rule-bound communities have much to offer to consumers. Although they produce societal concerns ignored here, they are an exceedingly important development in an exceedingly complicated and crowded world. At a time when the space surrounding homes matters deeply to many residents, these communities offer important options for a chosen aesthetic, and they do so for a wide range of interests and incomes. They allow residents to achieve a desired community aesthetic by controlling individual property uses in both new and existing neighborhoods and, particularly where sublocal institutions exist, to ensure that the aesthetic is preserved through enforcement of the rules. Where it is available, sublocal control helps communities to have and enforce the rules they want. The sublocal regulations that form these communities are also a welcome development, offering both existing neighborhoods and new communities significantly greater control over the preferred character of their built environment than traditional zoning.

There are several concerns related to rule-bound communities' long term success. Indeed, private covenanted subdivisions—the rule-bound communities with which we are most familiar—have created a lively debate in the scholarly literature. Apart from the serious concerns that such communities encourage exclusion and isolation of large segments of the population, there are interesting discussions surrounding these communities' internal worth. Though some argue that they are ideal, offering more opportunities for residents to participate in community decisions[264] as well as ways to meet unique consumer preferences for communities,[265] others insist that little democratic participation in fact occurs[266] and that many consumers lack adequate notice of the many rights that they give up[267] in exchange for achieving community preferences through rules. Furthermore, the ability to change rules, particularly those instituted through zoning, can undermine the original purpose of rules, whether this change is accomplished through individual variances from enforcement of the rules or formal changes to the rule text through modification.[268]

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 resulting fines.[269] These residents believe that homeowners' association boards often use enforcement

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264. *See, e.g.*, Reichman, *supra* note 59, at 263 (arguing that the private community encourages participation and "revers[es] . . . anti-community trends").

265. *See supra* notes 227–28 and accompanying text.

266. *See, e.g.*, Alexander, *supra* note 198, at 162 (concluding, after studying several private developments, that "apathy and frustration co-existed on a fairly widespread basis").

267. *See infra* notes 315–19 and accompanying text.

268. *See infra* note 369 and accompanying text.

269. Fennell, *supra* note 5, at 557.

powers overzealously and unfairly,[270] targeting individuals who have a dispute with a board member or whom a board member happens to dislike. Although 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. Such institutions can better ensure rule durability than can a distant local government, but there is always a risk that those with enforcement powers will use them indiscriminately.[271]

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 and thus to influence *ex ante* the preferred community aesthetic. Second, it looks to the communities' processes for notifying incoming consumers of the available rule set. Finally, it discusses the durability and flexibility of the rules in the three communities, asking whether there is some guarantee that the rules, and thus the preferred aesthetic, will not be abruptly and irreversibly changed through variations in modification or enforcement, while also investigating whether the modification and enforcement processes permit some desired changes over time.

A. RULE FORMATION AND IMPLEMENTATION

One way to avoid rule-related concerns in rule-bound communities is to allow residents and potential residents of a community to write their own rules, or at least to have some say in the rules' content. The extent to which rule-bound communities offer this opportunity varies substantially, both in terms of the amount of direct "voice" permitted as well as the number of potential residents who may participate in the rule formation process. In private covenanted communities, the bulk of the rule set is drafted and recorded by a private developer.[272] Potential consumers in these communities influence rule

270. *See, e.g.*, Telephone Interview with anonymous resident (Dec. 19, 2009) (arguing that "there's really no democracy associated with HOA [homeowners' association] governance"); Telephone Interview with anonymous resident (Jan. 8, 2009) (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 with anonymous resident (May 12, 2008) (explaining that a board had retaliated against the homeowner after she called problems to their attention, enforcing what she believed were nonexistent violations that they failed to enforce against other neighbors).

271. *See* Carol M. Rose, *New Models for Local Land Use Decisions*, 79 NW. U. L. REV. 1155, 1156–60 (1985) (noting that local institutions often make small decisions involving small numbers of people, and these very types of decisions "may open the door to arbitrariness or inside deals").

272. *See* Fennell, *supra* note 5, at 838 ("In the usual case, a developer drafts and records a master deed, also known as a declaration, which contains a set of CC&Rs."); Franzese & Siegel, *supra* note 43, at 1113 ("[T]he developer makes the most critical decisions concerning CIC organization and governance" in its role as the drafter of the declaration.).

content only through market signals, which may be inexact.[273] This influence, although indirect, may be broad, however: market signals emanate from a wide geographic range of consumers.

Overlay communities, in contrast, offer existing residents as well as potential consumers abundant and direct say in the rule content because the rules are approved through a public zoning process. Direct consumer voice is somewhat limited in overlay communities, however, as only residents of the municipality approving the rules have a say; only residents may vote out or approve of the officials who enact the rules.[274] Further, those who dislike the overlay rules may be overpowered by a supportive majority and may ultimately be burdened with an entire rule set to which they strenuously object.[275]

Hybrid communities, although they import some of the problems of overlays and covenants, perhaps offer the best of both worlds: they provide the democratic public zoning process of overlay communities without the retroactivity concern because they are created anew. They also contain covenants that at least hypothetically respond to broad market signals, thus allowing for those outside of the community to influence one set of rules.

1. Private Covenanted Communities: Indirect Influence Through Consumer Signals

Private covenanted communities offer few practical opportunities for consumer input in the rule writing and implementation process.[276] Because—apart from any concessions to the local government during the negotiation process and the often minimal zoning regulations that exist at the city fringes or in the suburbs—developers are the sole authors of the bulk of the rules, potential consumers of these communities have little say in their content. Consumers theoretically have abundant opportunities to influence the rule content by voting with their feet because developers, like local governments in Tiebout's world, may respond to varying preferences by offering different types of rule sets.[277] Lee Fennell, however, explains that developers may not always accurately respond to preferences. Rules are bound up in packages,[278] and consumers who strongly prefer one rule may sign on to a rule set despite disliking a good

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273. *See* Fennell, *supra* note 5, at 869 (observing that "market signals from buyers to developers are often muted").

274. *See* Richard Briffault, *The Local Government Boundary Problem in Metropolitan Areas*, 48 STAN. L. REV. 1115, 1128 (1996) ("The right to vote in local elections is nearly always limited to people physically resident within local boundaries.").

275. *See supra* note 125 and accompanying text.

276. *See* Fennell, *supra* note 5, 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 44, at 582 (discussing "[r]esidents' lack of perceived and actual influence").

277. *See* Fennell, *supra* note 5, at 857–58 (applying Tiebout's theory to private covenanted communities).

278. *See, e.g.*, Epstein, *supra* note 9, at 912.

number of the other rules.[279] As such, their full preferences are not reflected in their decision to move. Furthermore, developers often use boilerplate language[280] and may not, in fact, create a healthy variety of rule sets from which consumers may choose. James Winokur goes so far as to suggest that "[o]bjectionable provisions in one set of restrictions will increasingly be contained in restrictions of other area subdivisions" due to developers' reliance on boilerplate language and their aversion to straying from servitude language "recommended" by federal mortgage and housing agencies as well as state real estate agencies.[281] And even if servitude language manages to provide a healthy diversity of rules across different developers (assuming that they stray from the recommended language), if a developer has no competition within an area, consumers in that area may lack a choice of rule sets.[282]

2. Overlay Communities: "Democratic" Processes with Retroactivity Concerns

Unlike private covenanted communities, consumers of rules in overlay communities have abundant and direct influence in the content of rules. Although a municipal body often drafts the rules,[283] in some cases a neighborhood committee writes the rules itself for later approval by the municipal body.[284] And in some overlay communities, a certain percentage of property owners within the community must also vote in favor of the rules.[285] Regardless of whether a community vote is required and whether the community or a city writes the rules, the rules—like any other zoning rules—must ultimately be approved through a public, democratic hearing, wherein the municipality's legislative body approves or rejects them. For residents of the municipality, then, there are real options to directly influence rule content.

Despite offering direct opportunities for voice in the rulemaking process, overlay communities present a unique problem: unlike in private covenanted communities and hybrid communities, it is possible for residents to become part of overlay communities without their consent. This is because the rules are "imposed" upon an existing community. Although consumers have an opportu-

279. Fennell, *supra* note 5, at 873–76 (discussing the benefits and problems of bundling).

280. *See, e.g.*, Winokur, *supra* note 248, at 99 (observing that "developers regularly . . . lift servitude language from government forms"); *id.* at 98 & n.30 (observing that "standard forms proliferate" and that "[s]ervitudes are often largely boilerplate language, drafted by attorneys who rely on increasingly standardized forms").

281. *Id.* at 99 & n.31.

282. *See* Epstein, *supra* note 9, at 917–18.

283. *See, e.g.*, URBANA ZONING ORDINANCE ART. XIII-5.G., *available at* http://www.city.urbana.il.us/urbana/community_development/planning/Zoning/Article-13.pdf (explaining that "the City, in consultation with district property owners and residents, will prepare a plan to conserve and promote desirable characteristics of the neighborhood").

284. *See, e.g.*, CITY OF DALLAS, CONSERVATION DISTRICT OVERVIEW 5, *available at* http://www.dallascityhall.com/pdf/planning/ConservationTotalPacket.pdf (explaining how a neighborhood proposing a Conservation District establishes "a steering committee to meet with city staff and develop a proposed ordinance to govern the zoning changes").

285. *See supra* note 125 and accompanying text.

nity to voice their objections to the rules, their objections may not be reflected in the ultimate vote. The consumers have a voice in the process, but their voice is overwhelmed by a majority of property owners voting in favor of the rules (where such a vote is required) and by the vote of the city's legislative body.

This dilemma is nothing new in the grand scheme of democratic majority voting, but it presents particular problems in the realm of detailed rules governing property uses: many of the rules in overlay communities prevent individuals from doing things with their property that were legal prior to the rule. The simple fact that one owned property prior to the implementation of the rule and had plans to modify that property does not, unless a vested right is found, allow those plans to be carried out. 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.[286] 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.[287] And in Carmel, Indiana's Old Town District, "[a]lterations that reduce the roof pitch of an existing [contributing] building more than five degrees" are prohibited, and "existing porches" may not be removed, unless they will be "upgraded or replaced in a manner consistent with [the] guidelines."[288]

Important concerns related to property preferences emerge when these types of detailed rules are imposed on existing owners,[289] particularly because the local government has the power to tax and sanction individuals. Individual expectations in property are diminished—and it is fair to say that most residents of public neighborhoods bought their homes without any idea that they could one day be subject to extremely detailed "private" rules—yet there is typically little formal 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"[290] balancing test set forth in *Penn Central Transportation Co. v. City of New York City*.[291] The limitations on or requirements for property uses, however, are not merely potential financial burdens on the rule-objecting owner; they could somehow interfere with core "liberty"

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286. CAMBRIDGE, MASS., CODE § 2.78.180(I) (2009), http://library.municode.com/HTML/16889/level3/T2_C2.78_AIII.html#T2_C2.78_AIII_2.78.180.

287. COLLINS ET AL., *supra* note 109, at 33–34.

288. CARMEL CITY CODE ch. 10, art. 1, § 23D.03-C.1.d., *available at* http://www.ci.carmel.in.us/services/DOCS/DOCSZOchptrs/ZO%20Ch%2023D%20Old%20Town%20Overlay%20(Winter%202009%20v1).pdf.

289. *See* Ellickson, *supra* note 19, at 103 (arguing that "a rule of creation by the owners of a simple majority of property value poses risks of majoritarian oppression").

290. *See* Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1030–31 (1992).

291. 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").

interests outside of the constitutional definition of the word. The effects of the rules will of course differ in importance depending on the rules' substance, which requires much deeper consideration than is attempted here. As a first cut, the measure might be the degree to which the rules exclude would-be residents; fail to capture broader "public" values such as historic preservation; or impose affirmative burdens on individuals[292] for the benefit of the larger community—such as the requirement that a resident install a particular type of light or renovate the exterior of a home with certain types of construction materials. Although not unconstitutional in most cases,[293] these effects should not be ignored.

As detailed above, where municipalities enable sublocal zoning, most, but not all, at least partially consider these concerns, requiring a good deal of notification and community deliberation prior to enacting the rules. As discussed in more detail in Part III, however, notice may not be an adequate solution to the problems associated with retroactive rule formation and implementation in overlay communities. 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, as occurs with all other forms of majority decisionmaking, rules are forced upon unwilling residents; some procedure for limited deliberative modification of the rules over time is important for these residents.

3. Hybrid Communities: Voice for Interested Parties and Broader Consumer Signals

The hybrid community provides consumers with more say in developing the rules, and it avoids the concern that arises in overlay communities—that of "imposing" rules on existing owners—altogether. Because hybrid communities, like the private covenanted subdivisions of the suburbs, are created anew, they offer all consumers an opportunity to choose or reject the entire rule package. The real element of choice in these hybrid communities, however, which also

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292. *See* Jed Rubenfeld, *Usings*, 102 YALE L.J. 1077, 1159 (1993). The requirement that an individual use a certain architectural design for any new construction might not rise to the level of state "conscription" described by Rubenfeld, but it has trappings of his concerns over requiring affirmative action on the part of individuals. *Id*. at 1080.

293. *See, e.g.*, Penn Cent. Transp. Co. v. City of N.Y., 438 U.S. 104, 109, 115, 138 (1978) (holding that the application of a New York City historic landmark ordinance, which was enacted after Penn Central purchased the property, was not an unconstitutional taking); Vill. of Euclid v. Ambler Realty Co., 272 U.S. 365, 387 (1926) (describing "[r]egulations, the wisdom, necessity, and validity of which, *as applied to existing conditions*, are so apparent that they are now uniformly sustained" (emphasis added)); Collins v. Historic Dist. Comm'n of Carver, 897 N.E.2d 1281, 1282–83, 1286 (Mass. App. Ct. 2008) (finding no taking where a town applied a historic district bylaw to property purchased prior to the enactment of the bylaw); Lackland & Lackland v. Readington Twp., No. SOM-L-344-3, 2005 WL 3074714, at *1, *5, *36–37 (N.J. Super. Ct. Nov. 16, 2005) (affirming the constitutional validity of an "agricultural-residential" zoning district, which was to "facilitate farmland preservation" and "maintenance of the Township's rural character," among other purposes, and was adopted after a property owner acquired property and applied to develop the property).

distinguishes them from private covenanted communities, is consumers' ability to directly influence the content of the rule package. Hybrid communities provide a public democratic process through which potential residents may voice their preferences for overlay rules (assuming, of course, that these residents live nearby and anticipate a move to the hybrid community). If the city proposes a package of rules for the development, to be codified in the overlay, 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.[294] Rather, they can object to specific pieces of the package during the public process, asking that these pieces be modified or thrown out before they become official. This adds a layer of consumer influence—although limited to those currently living in the city—in the rule formation and implementation process, which is currently unavailable in private covenanted communities. Furthermore, hybrid communities frequently include a mandatory percentage of affordable units and thus provide realistic options for some individuals who lack the luxury of choice.[295]

Although only those residents of the municipality where the hybrid communities are proposed will have a direct say in the rules through the public hearing process, market signals may also provide nonresidents with an indirect voice in the covenants implemented by the hybrid community developer, particularly where the city does not act as the developer. Overall, the combination of a public hearing for the overlay portion of the rules and market signals for the covenant portion (even if inexact) may offer the broadest opportunity for consumers to influence the content of rules in rule-bound communities.

B. NOTICE: MATCHING COMMUNITY GOODS WITH PREFERENCES

Once the rules that form a rule-bound community are in place, it is important that consumers moving into the communities are notified of the existence and content of the rules. This applies equally to all rule-bound communities, and it applies at the moment in time when the rules have already been formed. In the case of private covenanted communities, the developer has recorded the declaration of covenants, conditions, and restrictions (CC&Rs); in overlay communities, the municipality has enacted the overlay within the code; and in hybrid communities, 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, residents' preferences for rules may conflict with the rules that are in place,

294. *See* Gillette, *supra* note 37, at 1407 (describing covenants as an "all-or-nothing regime"). Although private suburban subdivisions are also governed by a planned unit development "overlay," incorporated within the municipal code, many are within cities' extraterritorial jurisdiction or in counties with few zoning restrictions. Both of these scenarios offer fewer opportunities for public influence in the overlay drafting process.

295. *See* Parlow, *supra* note 149, at 527 n.84; *supra* text accompanying note 157.

and exit is not easy.[296] As such, consumers may dislike the rules that they later discover, and they may push back against the rules, either ignoring them completely or attempting to change them. Better notice does not solve everything, of course. Buyers, even if fully aware of the rules, are still forced to accept rules that they dislike because they are purchasing a rule package. But notice could ensure that more of the rules match more of the consumers' preferences. It could also instill fairness into the process by ensuring that buyers are not later surprised by rules that they view as particularly intrusive.

1. Private Covenanted Communities: Strong Theoretical Notice and (Some) Actual Notice

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.[297] On paper, however, this type of rule-bound community offers three distinct forms of notice to the incoming consumer: the common law, statutory disclosure requirements, and heuristics.

The common law of covenants evolved in large part in response to notice concerns. As Carol Rose explains, the formal distinctions between easements, equitable servitudes, and covenants—which the American Restatement later aimed to collapse—existed due to "considerations of notice," a "concern that loomed very large" in these old distinctions.[298] 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 included an affirmative duty.[299] In order for restrictions on property use to run with the land, both English and American courts have thus 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 or one's enjoyment of the land.[300] Requiring this connection to the land will sometimes place buyers on visual notice that

296. *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, *supra* note 198, at 153–54 (arguing that in private covenanted communities, "[t]ransaction and other costs . . . constrain disappointed owners from choosing . . . [the exit] option").

297. *See infra* notes 315–19.

298. Carol M. Rose, Comment, *Servitudes, Security, and Assent: Some Comments on Professors French and Reichman*, 55 S. CAL. L. REV. 1403, 1405 (1982).

299. *See* Olin L. 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").

300. *See, e.g.*, Uriel Reichman, *Toward a Unified Concept of Servitudes*, 55 S. CAL. L. REV. 1177, 1229 (1982) (explaining that American courts, in applying the touch and concern rule, required that the "promised activity . . . be carried out on the promisor's land" and that it "benefit the promisee's land"); Note, *Touch and Concern, The Restatement (Third) of Property: Servitudes, and A Proposal*, 122 HARV. L. REV. 938, 939 (2009) (describing the first English explanation of touch and concern in *Congleton v. Pattison*, which required the covenant to "'directly affect[] the nature, quality, or value of the thing demised, [or] the mode of occupying it'" (quoting Congleton v. Pattison, (1808) 10 East 130, 103 Eng. Rep. 725 (Ch.)).

there are constraints associated with the property they are buying, and it may also protect against unreasonable and unpredictable constraints on property.[301] Although courts in both countries have since loosened the touch and concern requirement,[302] they still require that the covenant somehow affect the value of the land.[303]

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 the touch and concern requirement, has important undertones of notice.[304] 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.[305] In America, horizontal privity is often interpreted only to require that the original covenanting parties shared an interest in the land other than the covenant alone, or simply that a real covenant was part of the original conveyance.[306] Even this loosened privity requirement helps to provide notice of the covenant because the covenant is passed down as part of the deed from the original covenantor and covenantee to subsequent ones.[307] America's strict recording requirements ensure notice and are sometimes viewed as eliminating the need for privity altogether.[308]

In addition to the common law requirements associated with covenants, many

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301. *See, e.g.*, Susan F. French, *Toward the Modern Law of Servitudes: Reweaving the Ancient Strands*, 55 S. CAL. L. REV. 1261, 1290 (1982) (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").

302. *See* Newman & Losey, *supra* note 40, at 1332; *see also* RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 3.2 (2000) (eliminating the touch and concern requirement). *But see* Note, *supra* note 300, at 938 (discussing how only "one line of cases" has adopted the test that replaces touch and concern in the Restatement).

303. *See* Newman & Losey, *supra* note 40, 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").

304. *See* Browder, *supra* note 299, at 16 (discussing how the English court in *Keppel v. Bailey*, (1834) 2 My. & K. 517, 39 Eng. Rep. 1042 (Ch.), 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").

305. *See* Newman & Losey, *supra* note 40, at 1322 (discussing how English courts require a "relationship of lessor and lessee" for covenants to run).

306. *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.").

307. *See* Mary Van Houweling, *The New Servitudes*, 96 GEO. L.J. 885, 896 (2008) (discussing how American courts' "more liberal definition of horizontal privity" was practical for America "[b]ecause covenants entered into in the context of a land transfer would be publicly recorded in the deed").

308. *See* Browder, *supra* note 299, at 16 (arguing that recording eliminates the privity requirement); *see also* Van Houweling, *supra* note 307, at 896 (observing that "[r]ecording acts . . . represent . . . [a] notice-facilitating mechanism").

state legislatures have created further notice protections through 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 in a community with a private property owners' association must first provide to the buyer "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.[309] In Virginia, the seller is also required to provide a "disclosure packet" to the prospective buyer,[310] which must include "[a] copy of the current declaration, the association's articles of incorporation and bylaws, and any rules and regulations or architectural guidelines adopted by the association."[311] Further, the property owners' association board must "[d]evelop and disseminate a one-page form," which accompanies the disclosure packet and "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."[312] 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."[313]

If consumers miss the notice provided by recorded covenants and the disclosure of the covenants that is often required by state law, heuristics might help them to determine the type and quality of the rules that form the private covenanted community.[314] 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 theoretical notice protections in private covenanted communities, however, many homeowners indicate that they were unaware of the covenants when they were in the process of purchasing a home within these communities. In a 2007 Zogby survey commissioned by the Foundation for Community Associations, 12% of the 709 residents interviewed responded "no" when asked whether they "were told that . . . [their home] was in a community association" when they "were considering the purchase or rental of . . . [their] current home."[315] Of course, this does not indicate that the

309. MINN. STAT. § 515B.4-107 (2002 & Supp. 2008).

310. VA. CODE ANN. § 55-509.4(A)(ii) (Supp. 2009).

311. *Id.* § 55-509.5(A)(12).

312. *Id.* § 54.1-2350(3).

313. CAL. CIV. CODE. § 1368(a)(1) (West 2007).

314. *See* FISCHEL, *supra* note 36, at 61; *supra* text accompanying notes 242–44.

315. ZOGBY INTERNATIONAL, FOUNDATION FOR COMMUNITY ASSOCIATION RESEARCH TRACKING POLL 3, 17 (2007), http://www.cairf.org/research/zogby.pdf.

residents failed to become aware of the presence of an association by other means. Nor does it show whether the residents were informed of the specific rules that are part and parcel of an association-governed community. Other studies have concluded that as many as 85% of residents of private covenanted communities were unaware of both the servitudes and the existence of a homeowners' association upon entering a private covenanted community,[316] leading James Winokur to conclude that "few prospective owners intelligently review the restrictions to which they subject themselves upon acceptance of a deed."[317] Gregory Alexander interviewed only twenty-one residents in private covenanted communities, offering too small of a sample size from which to draw full quantitative conclusions, but he found that "[l]ess than 10 percent of the residents interviewed had read the rules before closing on the home."[318] And one resident of a private covenanted community in Minnesota, who also manages homeowner associations, believes that "ninety-five percent of the people don't even bother to read through the documents."[319]

No matter the actual percentage of homebuyers who are not fully informed of the rules in private covenanted communities, even a small number of uninformed buyers poses a concern both for the buyers themselves as well as for the long-term integrity of the rules. There are several reasons for the failure of notice protections in this type of rule-bound community. One may be the daunting stack of papers presented to the buyer at closing. Some buyers claim not to 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 mentioned above, 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."[320] 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 "you take a general view on it [the set of CC&Rs], and you wouldn't have ever thought they could be enforced."[321] Residents in other interviews have described similar scenarios of late notice and incomplete comprehension of the rules and their consequences. For example, one homeowner explained to Gregory Alexander, "I only learned about the homeowners' association during the closing just before I signed on the dotted line."[322]

316. Winokur, *supra* note 248, at 99 n.32 (citing Interviews by Nathan Simmons with Jeff Morrison, Subdivision Appraiser, U.S. Dep't of Hous. and Urban Dev., Denver, Colo. (July 14–15, 1987)).

317. *Id*. at 99.

318. Alexander, *supra* note 198, at 155.

319. Telephone Interview with anonymous resident (Jan. 28, 2009).

320. *Id*.

321. Telephone Interview with anonymous resident (Jan. 8, 2009).

322. Alexander, *supra* note 198, at 156.

In addition to homeowners receiving notice of the rules late, 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 emphasized the . . . [homeowners' association] and in some cases not to have mentioned its existence at all. A typical response [from a homeowner] 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."[323]

Similarly, one homeowner in a private covenanted community in Oregon explains that he "had to walk out of the sale before closing in order to get the covenants; they didn't want to share them."[324] Another homeowner, who previously lived in a private covenanted community in Arizona, says 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 [homeowners' association] agreements there for viewing. They told me they could get them, or once I signed the sales agreement, I'd see them."[325] Similarly, a homeowner in a private covenanted community in Indiana believes that "real estate agents are out to sell homes . . . [and] most purchasers are not really informed or understand what they are getting into until they get to the closing meeting."[326]

Finally, the common law protections associated with covenants may simply not have sufficiently evolved to address the complex sets of CC&Rs that now accompany subdivisions. Although 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, such as the requirement that all exterior modifications and construction be preapproved by an architectural review committee. These are the types of requirements, similar to those preventing construction on a lot in order to ensure sunlight access for an adjacent owner, for which buyers "may have no clear visual or other sensual signals"[327] alerting them to the existence of a servitude. Even recording, which is supposed to solve all of the notice dilemmas associated with servitudes, does not fix everything. The simple act of recording a covenant with the deed does not ensure that people reading the recorded

323. *Id.*
324. Telephone Interview with anonymous resident (Jan. 29, 2009).
325. Telephone Interview with anonymous resident (Dec. 19, 2008).
326. Telephone Interview with anonymous resident (Dec. 15, 2008).
327. Rose, *supra* note 298, at 1406.

language are "completely inform[ed]" of obligations that run.[328]

In the end, despite consumers' many opportunities to learn of the content of CC&Rs before buying a home within a covenanted community, many apparently fail to do so. As such, individuals' preferences for rules may fail to match the rules that exist within those individuals' communities. Although this failure to self-notify may indeed be the fault of the consumer—we do, after all, assume individual knowledge of the law—it is still a concern. If many uninformed consumers are entering these communities, there is likely to be conflict down the road.

2. Overlay Communities: A Failure of Notice

The failure of some residents to notice the rules in private covenanted communities—where there are several layers of theoretical notice protections—has broad implications for the remaining types of rule-bound communities. These implications are strongest for overlay communities. Overlay communities, which implement covenant-type rules through a public and noncontractual process, offer none of the three notice protections—whether those protections are real or merely theoretical—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.[329] Even those who actively attempt to learn of community rules before purchasing a home in overlay communities will have trouble identifying them. A quick visit to the city code will not reveal the neighborhood-specific zoning overlay absent vigilant research.[330]

Complicating the problem of imposing covenant by zoning is the lack of heuristic clues to the unwary prospective buyer.[331] Because the rules in overlay communities aim to preserve existing character, they are often implemented when that character has started to erode[332] 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

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328. *Id*. at 1407.

329. A title search is of course likely to reveal basic zoning restrictions, but it may not reveal restrictions in a "targeted zoning ordinance." Seth Schofield, *In Search of the Institution in Institutional Controls: The Failure of the Small Business Liability Relief and Brownfields Revitalization Acts of 2002 and the Need for Federal Legislation*, 12 N.Y.U. ENVTL. L.J. 946, 1007 (2005); *see also* Michael J. Garrison & David Ritzel, *Zoning Restrictions and Marketability of Title*, 36 REAL ESTATE L.J. 257 (2006) (discussing the "general rule that zoning laws are not encumbrances and do not impair marketability of title").

330. Anthony J. Samson, *A Proposal to Implement Mandatory Training Requirements for Home Rule Zoning Officials*, 2008 MICH. ST. L. REV. 879, 892–93 (describing new zoning tools as "complex" and explaining many land use officials' lack of understanding or awareness of them).

331. The lack of heuristic clues arises due to previously legal property uses that occur prior to the imposition of covenants, thus resulting in a lack of uniformity in the communities. *See, e.g.*, COLLINS ET AL., *supra* note 109, at 33 (discussing the "rate at which historic buildings were being lost" prior to the implementation of Atlanta's preservation ordinance).

332. *See id*.

built, creating sharply contrasting 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 and may not suspect that there are complex rules in place.

3. Hybrid Communities: Notice Through Heuristics and City Advertising

One might expect that hybrid communities, which have both overlays and covenants, suffer from the practical notice concerns associated with private covenanted communities and overlays. Yet they have several unique characteristics that strengthen prospective buyers' awareness of the rules. First, the promoting city typically heavily advertises these communities[333] and also attempts to involve its citizens in their formation process. This alerts potential residents to the uniqueness of the community and its unusually specific rules. Additionally, 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 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."[334]

Although the buyers in these hybrid communities lack formal notice of the public rules—aside from the overlay buried within the city code—hybrid communities, like private covenanted communities, provide strong heuristic hints of the rules. Hybrid communities are built on a vacant piece of land, or on land where many of the pre-existing structures are razed or substantially renovated as part of the redevelopment,[335] resulting in the organized layout of the community and the consistent design and aesthetic that are more likely to alert buyers to the existence of rules. Assuming the rules are enforced as time passes, the lack of formal notice will be substantially remedied by this constructive notice provided to incoming residents.

Despite all of the theoretical benefits associated with notifying consumers of the rules, hybrid communities do not solve all notice concerns. Although cities advertise the general amenities and restrictions within these new communities,

333. *See, e.g.*, HAWAII COMMUNITY DEVELOPMENT AUTHORITY, MASTER PLAN SUMMARY 113–25, *available at* http://www.wardneighborhood.com/Proposals/11_Master%20Plan%20Summary-WN_Apr16_08.pdf.

334. *Id.* at 113.

335. *See, e.g.*, Press Release, Forest City Washington, Groundbreaking at The Yards: Construction Now Underway on Major Mixed-Use Project in Near Southeast (Oct. 3, 2007), *available at* http://www.dcyards.com/pdf/News100207.pdf (discussing the redevelopment of old navy yards in Washington, D.C., where the developer plans to rehabilitate the existing industrial buildings and convert them to apartments).

such advertisements do not typically boast that the area will be turned over to a private homeowners' association.[336] Furthermore, residents coming from out of town may miss altogether the cities' advertisements and must therefore rely on heuristics alone—unless they manage to find the overlay within the city code and thoroughly study the covenants. Similar to private communities, heuristics alone may fail to hint at the many covenants limiting property uses in nuanced ways.

C. MODIFICATION AND ENFORCEMENT: CHANGES TO RULES IN THE NEAR AND FAR FUTURE

The question of whether rule-bound communities effectively match residents' preferences for a community aesthetic is a complicated one because it contains two somewhat conflicting components: whether such preferences are met in the near-term and whether the rules allow for the aesthetic to change along with evolving preferences. The conflict arises where some individuals want to ensure the community continues to reflect their original preferences—an apparently common phenomenon, particularly within private covenanted communities[337]—and others experience changing needs and preferences. Further complicating this question is the achievement of a compromise among individual residents' conflicting aesthetic preferences.

This paper will not attempt to answer all of these questions, saving most of the difficulties surrounding changing property preferences and needs over time for later discussions. It will, however, focus on rule-bound communities' ability (or lack thereof) to achieve a delicate balance between maintaining the initial rules, thus satisfying those who prefer the status quo, and sufficiently modifying the rules to meet the reformers' needs. Wayne Hyatt has described the challenge, in the context of private covenanted communities, as one of creating a "governance mechanism that balances multiple interests, . . . protects flexibility, provides the powers necessary to permit an association to remain dynamic during periods of change, and yet reasonably protects the property owners' reliance interests and their expectations for an appropriate degree of certainty."[338]

The need to balance residents' demands for rule flexibility and rule endurance is important in three respects. First, even those who were notified of the rules may have purchased a rule package that contained some rules that they disliked and wished to change—in some cases, a majority of residents may wish a particular rule altered from the beginning. Second, even if most incoming

336. *See, e.g.*, *id.* (advertising an urban redevelopment project but not mentioning a homeowners' association); *see also* HAW. CMTY. DEV. AUTH., *supra* note 333.

337. *See* Frantz, *supra* note 42, at 74 (concluding that Americans move to private gated communities "to guarantee that the community they have bought themselves into will not change drastically in the course of time").

338. Wayne S. Hyatt, *A New Look: Community Governance Structures that Work in the Market and in Practice*, A.L.I.-A.B.A. COURSE OF STUDY 425, 433 (2008).

residents preferred the entire rule package, the enforcement of certain rules, such as the prohibition of children's play areas in yards or the barring of accessory apartments to accommodate elderly relatives, may create serious rights-based concerns for the affected individuals.[339] And finally, even where a community initially prefers all of the rules in the package, its collective property needs are likely to evolve over time. For example, the community may eventually wish to convert its common golf course, which the covenants require to be maintained in perpetuity as a recreational area,[340] to a community garden or a swimming area. This section 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. Central to this question is the ability of citizens to meaningfully influence the process. Where changes result from top-down, external forces, as occurred with urban renewal projects in the mid-twentieth century, rules will be a burden rather than a benefit,[341] and they will rapidly crumble.

1. Private Covenanted Communities: "Democratic" Processes Overshadowed by Discretionary Mechanisms for Modification and Enforcement

Somewhat paradoxically, private covenanted communities may offer the least assurance that implemented rules will remain in place or, alternatively, that rules will be flexible where necessary. This uncertainty results from the property owners' association board's wide discretion in enforcing rules and, in some cases, abandonment of rules through lack of enforcement or varied enforcement.[342] The level of rule modification in private covenanted communities, in other words, depends largely on the actions of a small group of people that typically has broad discretion to act without the official input of community members.[343] Despite residents' attempted objections at board meetings and other efforts at expressing their dissatisfaction, the board may, as is the stereotype, enforce the rules too rigidly and resist needed changes. Then again, if a

339. *See, e.g.*, Ann Martindale, Comment, *Replacing the Hardship Doctrine: A Workable, Equitable Test for Zoning Variances*, 20 CONN. L. REV. 669, 669 (1988) (explaining that the "hardship" test for granting variances to land use regulations was developed "as a safeguard against the unconstitutional 'taking'").

340. *See, e.g.*, SADDLEBROOKE TWO HOMEOWNERS ASSOCIATION, RULES AND REGULATIONS 18 (Mar. 9, 2009), *available at* http://www.sbhoa2.org/picture/rules_and_regulations_march_09.pdf (prohibiting homeowners from "landscap[ing] or plac[ing] anything . . . on . . . Golf Course area").

341. *See, e.g.*, DOUGLAS YATES, NEIGHBORHOOD DEMOCRACY 19–20 (1973) (discussing the failure of urban renewal to foster community participation and the strong neighborhood opposition that it caused).

342. *See, e.g.*, Vernon Twp. Volunteer Fire Dep't, Inc. v. Connor, 855 A.2d 873, 880 (Pa. 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.").

343. *See, e.g.*, Franzese, *supra* note 44, 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 59, at 269 ("The modern attitude is to vest an almost unlimited discretion in an architectural control committee to pass upon building plans.").

board purposefully fails to consistently enforce a requirement, a court may strike down the board's later attempt to enforce this requirement on a landowner's property.[344] This could lead to the steady and consistent erosion of a number of rules that were originally intended to form a unified community aesthetic.[345]

Granted, it is not always easy to abandon or waive covenants. Covenants are typically abandoned where "lot owners have acquiesced in . . . substantial violations within the restricted areas."[346] Nevertheless, even if only a perceived threat, this common law rule may cause some boards to carefully enforce each and every covenant.[347] The Community Association Institute's Board Member Tool Kit, for example, advises as much by warning board members of the risk: "If a problem ends up in court, nothing will lose the association's case faster than evidence that the rule hasn't been applied consistently."[348] Conversely, owners' association boards may be too busy,[349] or simply not sufficiently committed to the rules, to consistently enforce them. Even if the rules are not officially abandoned as a result of this behavior, a consistent lack of enforcement will cause similar substantial departures from the initial rules that formed the community aesthetic.

In the long term, if individual rules slowly erode, the community may change to such an extent that it becomes physically distinct from the original plat recorded by the developer, and the rule formally modified or eliminated. For

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344. *See supra* note 342; *see also* Welshire Civic Ass'n v. Stiles, 1993 WL 488244, at *3–4 (Del. Ch. 1993) (holding the 1937 deed restrictions containing specific criteria about the structure and material of fences unenforceable because the Association tasked with enforcement "repeatedly ignored its own standards").

345. *See, e.g.*, Rose, *supra* note 298, at 1410 & n.30 (explaining that where neighbors in a private community "allow a change by failing to object," this "'change of circumstance' may be used as a way of saying that they acquiesced in the relaxation of the restriction," and citing cases where abandonment occurred in such circumstances).

346. Simms v. Lakewood Vill. Prop. Owners Ass'n, 895 S.W.2d 779, 786 (Tex. App. 1995); *see also* Stolba v. Vesci, 909 S.W.2d 706, 710 (Mo. Ct. App. 1995) (requiring "continuous acquiescence evidenced by persistent violations" for a showing of waiver or abandonment); Hammons v. Table Mountain Ranches Owners Ass'n, 72 P.3d 1153, 1156 (Wyo. 2003) (finding that a covenant is "abandoned by failure to enforce" when "the covenant is violated, the violations are ignored and acquiesced to, and the violations are . . . so great . . . as to neutralize the benefits of the restriction" (internal quotation marks omitted)).

347. *See, e.g.*, Winokur, *supra* note 248, at 119 & n.118 (arguing that although waiver due to inconsistent enforcement is rare, "board members may fear that enforcement flexibility will open the board itself to the risk of having permanently waived a restriction it fails to enforce against every technical violator"); *see also* Wayne Hyatt, *Common Interest Communities: Evolution and Reinvention*, 31 J. MARSHALL L. REV. 303, 336 (1998) (observing that "[i]n many instances, community associations enforce rules, make decisions, or take other actions because there is a fear that if they do not, they will 'set a bad precedent'" and "[i]n part this is the result of cases dealing with estoppel and waiver . . . [and] an obvious need to be concerned about these legal issues.").

348. COMMUNITY ASSOCIATIONS INSTITUTE, BOARD MEMBER TOOL KIT, SECTION 15: RULES, *available at* http://www.caionline.org/members/Board%20Member%20Tool%20Kit/toolkit15.pdf (through paid access and on file with author).

349. *See, e.g.*, NELSON, *supra* note 16, at 78 (discussing how board members face "high demands on their time").

example, if a board allows homeowners to construct large additions to their homes or accessory structures on their lots or to carve up a common area into private lots, the original rules may become inapplicable. In that 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.[350]

With a high level of enforcement discretion in the near term, then, and changed conditions in the long term, there are opportunities for modification of the rules in private covenanted communities. Even for rule reformers who want rules to change over time, the modifications may not match their desired changes. This imbalance results because the modifications occur without much formal input from the community residents, aside from their ability to complain at monthly board meetings, to appeal a decision to a committee of the homeowners' association board,[351] and, in rare circumstances, to appeal an enforcement decision to a referendum vote of all of the community's homeowners.[352] This style of rule modification also leaves those who prefer the status quo unhappy.[353]

Residents do have some limited avenues of recourse. There is one formal democratic, yet private, mechanism for modifying or adding community rules in private covenanted communities,[354] which should allow both those who demand the status quo and those who prefer reform to influence the continued existence and enforcement of the rules. A private subdivision's declaration of covenants, conditions, and restrictions typically allows a community to amend the declaration through a vote of a substantial percentage of owners within the subdivision.[355] In this case, a group of landowners who strongly objects to the

350. *See, e.g.*, Vernon Twp. Volunteer Fire Dep't, Inc. v. Connor, 855 A.2d 873, 880 (Pa. 2004) ("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.").

351. *See, e.g.*, SADDLEBROOKE TWO HOMEOWNERS ASSOCIATION, *supra note* 340, RULES AND REGULATIONS 2, 4, *available at* http://www.sbhoa2.org/picture/rules_and_regulations_march_09.pdf (describing the Rules Compliance Committee's authority, including its power to hear appeals from an enforcement decision, subject to the homeowners' association board's approval).

352. *See* NELSON, *supra* note 16, 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").

353. *See, e.g.*, Topanga Ass'n for a Scenic Cmty. v. County of L.A., 522 P.2d 12, 19 (Cal. 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.").

354. 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").

355. *See* NELSON, *supra* note 16, at 94–95 (explaining that a covenanted community's constitution (the declaration) "generally requires a vote of the full membership" and "a vote considerably greater

continued application of certain rules or, conversely, wants to strengthen and uphold existing rules, could go door-to-door within the community, persuading residents to come out and vote. But the voting percentage required for modification is often prohibitively high, preventing many rule amendments from ever occurring.[356] Similarly, if a board is sufficiently unpopular—and reformers can find replacement candidates (for what is often an unpaid, labor-intensive job)—it can be removed via election, but sometimes this does not occur in time. Substantial changes can occur even within one term of a board, and a board may impose large fines during its tenure as a result of residents' failure to follow rules.[357]

Just as the discretion of the board in a private covenanted community to enforce rules makes it difficult for the community at large to have a significant voice in the durability or flexibility of rules over time, the process for granting individual variances from rules in these same communities often limits the influence of community members in rule enforcement decisions. As mentioned above, individual homeowners may request a variance from a rule where it presents a particular problem for their property. The board, typically through a letter, then grants or rejects the request.[358] If the board recommends that a variance be granted, some declarations provide homeowners with an opportunity to support or reject that recommendation. A declaration for a covenanted

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than 50 percent"). And even where permitted, the extent of the amendments may be limited. *See, e.g.*, Brockway v. Harkleroad, 615 S.E.2d 182, 184 (Ga. Ct. App. 2005) (describing an enforceable 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," although recognizing that those amendments "destructive of the [declaration's] uniform scheme . . . may impair the *protected* interests of lot owners who do not consent" (emphasis added)); Lee, *supra* note 354, at 774 (describing a Missouri court decision that interpreted a private "community's original declaration [that] included a modification clause which permitted amendments by a majority vote" as precluding the ability to "add new or different covenants"); *HOAS: Right to Change Restrictive Covenants*, 36-DEC. REAL EST. REP. 5, 5 (2006) (explaining that even though "to govern communities over long periods of time, most declarations provide for amendments," a North Carolina court decision required amendments to "be reasonable in light of the contracting parties' original intent").

356. *See, e.g.*, Curtis Sproul, *The Many Faces of Community Associations under California Law*, *in* COMMON INTEREST COMMUNITIES, *supra* note 63, at 45, 73 n.71 (describing, after "assist[ing] over 200 community association clients in campaigns soliciting member approvals to amend bylaws and CC&Rs," the near impossibility of getting "more than a majority of all members to cast ballots" and adding that the common supermajority approvals required in private covenanted communities are therefore "particularly burdensome"); *see also* Winokur, *supra* note 248, at 118 (observing that "[i]n many communities . . . [unanimous or supermajority vote] amendment requirements render even noncontroversial amendments infeasible").

357. *See* RiverPointe Homeowners Ass'n v. Mallory, 656 S.E.2d 659, 659–61 (N.C. Ct. App. 2008) (upholding a homeowners' association's ability to fine a homeowner $2200, place a lien on her property, and foreclose on the lien as a result of the homeowner's failure to maintain appropriate landscaping in accordance with the covenants).

358. *See, e.g.*, Dwan v. Indian Springs Ranch Homeowners Ass'n, 186 P.3d 1199, 1203 (Wyo. 2008) (describing a letter from a homeowners' association board to a resident, confirming and approving her request to "obtain a variance . . . in order to build a guest house/garage" above the height limit).

community in Wyoming, for example, provides that "[a] variance shall be allowed from the conditions and restrictions of any of [the covenants] upon the written approval of the [homeowners] owning two-thirds of the [lots] *after recommendation of approval by the [b]oard*."[359] However, when a homeowners' association board makes clear that it will not recommend a variance, the homeowner alternatively may go straight to court.[360] As a result, the ability of residents to participate in the variance process in private covenanted communities that follow this Wyoming example is only triggered if the board takes certain discretionary actions. Although the board's ability to grant variances is essential to accommodating individual rights-based concerns, residents need more input in the process if the decision to change or to retain rules is to truly represent their preferences.

2. Overlay Communities: Democratic Rule Modification Constrained by Problems of Governance Structure and Capture

Private covenanted communities provide a democratic method of modifying rules, but the discretion of the board undermines residents' ability to formally influence the level of rule enforcement and, as a result, the degree of rule modification that occurs within their community. Rule modification in overlay communities, in contrast, is conducted through a formal, public process, thus providing an opportunity for more input into rules' endurance and variation. The decision maker is frequently a local, not sublocal body, however, and that body's willingness to listen dictates the degree to which residents' modification preferences are implemented.

In overlay communities, the procedures for repealing rules are similar to those required for initially forming rules.[361] Changes to the rules occur through the public rezoning process, wherein citizens of a community must persuade the municipal body of the rule modifications' desirability, often necessitating a majority or supermajority vote from that body (as opposed to from the residents, as occurs in private covenanted communities) in order for rule modification to occur.[362] Even if flagrant violations of the rules have occurred over time as a result of sloppy enforcement, 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 it views as important to maintaining the community aesthetic. It also allows for the commu-

359. *Id.* at 1201 (emphasis added) (internal quotation marks omitted).

360. *Id.* at 1201–02.

361. *See* CITY OF GREENSBORO PLANNING DEPARTMENT, *supra note* 125, at 4, *available at* http://www.greensboro-nc.gov/NR/rdonlyres/B1A22D97-4EA4-4C60-8D4D-F47006E34D5A/0/packet_7_5_07_wo_enb_ord.pdf (explaining that boundaries of neighborhood conservation overlays "may be altered in the same manner as they are created").

362. *See* Mandelker, *supra* note 28, at 425–26 (describing how rezonings require a majority vote of the local legislative body and a supermajority vote if 20% or more of interested property owners object to the rezoning); *see also* Eagle, *supra* note 37, at 858 (describing zoning rules as "difficult to alter").

nity to vote out the rules where it wants more flexibility. And the modification procedure is relatively predictable because it is not left to the discretionary actions of a small group of enforcers.[363]

Although this process offers a more formal procedure for rule modification than the discretionary modification-through-non-enforcement pattern in private covenanted communities, it is not ideal.[364] A city's governmental body ultimately decides whether to modify sublocal zoning rules, which contributes to the larger problem of capture. Through rezoning, the rules may be modified, or their modification may be denied, in a process where individual voices are overwhelmed by strong, self-interested groups with high stakes in the outcome of a vote.[365] Indeed, some writers have characterized zoning as "corrupt . . . and usually subject to derision," as well as "unfair[,] . . . self-serving[,] . . . [and] poorly administered."[366] At a minimum, the body that makes the rezoning decisions, even if not captured, is distant from the community and not likely to be strongly vested in maintaining or modifying that community's rules.[367]

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, to grant individual variances from rules where landowners would experience hardship if the rules were applied.[368] In some cases, cities

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363. *But see* Craig A. Peterson & Claire McCarthy, *Small-Tract Rezonings: Toward Expanded Procedural Safeguards*, *in* LAND USE LAW: ISSUES FOR THE EIGHTIES 188, 188 (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 treatises").

364. *See, e.g.*, Nelson, *supra* note 17, at 835 (arguing that zoning places "matters such as the control of fine details of neighborhood architecture . . . under . . . substantial influence . . . [of] outsiders leav[ing] the neighborhood exposed to regulatory actions that it does not want").

365. *See, e.g.*, Peterson & McCarthy, *supra* note 363, at 191 (suggesting that the "lobbying or informal advocacy which often precedes rezoning hearings . . . undermines public confidence in the rezoning process").

366. Paul H. Sedway, *Commentary, Plan-Based Administrative Review: A Planning and Zoning Debate*, *in* LAND USE LAW: ISSUES FOR THE EIGHTIES, *supra* note 363, at 9595.

367. This argument builds from the broader decentralization literature, which suggests that the smaller the size of the government and the citizen unit, the more ability there is for voice and effective deliberation. *See* Briffault, *supra* note 12, at 505.

368. *See, e.g.*, ARIZ. REV. STAT. ANN. § 11-807B (Supp. 2008) ("The board of adjustment may: . . . Allow a variance from the terms of the ordinance when, owing to peculiar conditions, a strict interpretation would work an unnecessary hardship . . . ."); CAL. GOV'T CODE § 65906 (West 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. STAT. § 8-6(a)(3) (2003) (granting the zoning board of appeals the power "to determine and vary the application of the zoning . . . ordinances . . . where . . . a literal enforcement of such . . . ordinances . . . would result in exceptional difficulty or unusual hardship"); MASS. GEN. LAWS ch. 40A, § 10 (2004) (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 . . . would involve substantial hardship"); 53 PA. CONS. STAT. § 10910.2(a) (1997) (allowing the zoning hearing board to grant a variance when, among several requirements, the property has "unique physical circumstances . . . and that the unnecessary hardship is due to such conditions").

may grant so many variances that the rules become meaningless.[369] The rules are not at risk of being officially waived or abandoned, as they would be in a private covenanted community, but the rules are substantially weakened. In this case, those preferring the status quo have some recourse. Neighbors may appear before the board of adjustment or a similar quasi-judicial body[370] to protest against each variance request.[371] As occurs in private covenanted communities, they may also appeal the board's decision to a local court.[372] This gives 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.[373] As such, residents of overlay communities have limited options for ensuring that rules remain in place and that they have a meaningful say in modifying the rules where needed.

Finally, where a community relies upon the city—a governance structure very distant from the individual neighborhood—to enforce its rules, violations of rules disliked by certain individuals within the community may be frequent. Cities are often too busy or understaffed to enforce the rules to the degree that the community would prefer.[374] In one instance, it took New York City 366 days to change a streetlight bulb.[375] 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.[376] 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.

3. Hybrid Communities: An Interaction Between Two Rule Sets

In hybrid communities, which typically have both a zoning overlay and private covenants to govern the community aesthetic, property owners have

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369. *See, e.g.*, Martindale, *supra* note 339, at 670 (observing that in Connecticut, "[a]n estimated ninety-five to ninety-nine percent of 'homeowner' variances are granted for conditions presenting no hardship whatsoever" and suggesting that "[d]isrespect for the hardship doctrine is virtually a tradition . . . nationwide").

370. *See* Shawn Jensvold, *The Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA): A Valid Exercise of Congressional Power?*, 16 BYU J. PUB. L. 1, 9 (2001) (describing boards of adjustment).

371. *See, e.g.*, MASS. GEN. LAWS ch. 40A, § 10 (allowing the permit granting authority, which also grants variances, to grant a variance only after a public hearing).

372. *See, e.g.*, N.J. STAT. ANN. § 40:55D-17a (West 2008) ("Any interested party may appeal to the governing body any final decision of a board of adjustment . . . .").

373. *See, e.g.*, *supra* note 266 and accompanying text.

374. *See, e.g.*, Sara C. Bronin, *The Quiet Revolution Revived: Sustainable Design, Land Use Regulation, and the States*, 93 MINN. L. REV. 231, 259 (2008) (discussing "local land use departments" that are too "[u]nderfunded and understaffed" to revise laws to be more environmentally sound).

375. Sam Roberts, *How Long to Repair A Streetlight Bulb? 12 Months, if You're Persistent*, N.Y. TIMES, Feb. 7, 2009, at A1.

376. *See, e.g.*, BABCOCK & LARSEN, *supra* note 21, 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).

more venues to express their preferences for the continuance or modification of rules. These two sets of rules create an interesting procedural interplay. Though the public process allows for the larger principles within the overlay to remain in place (absent rezoning), there are private means to avoid, at least theoretically, covenants that further implement the vision of the overlay. Particularly where a city serves as the developer and thus writes both the overlay and the covenants, the covenants are likely to reinforce the principles in the overlay, and violation of the covenants may therefore weaken the city's—and perhaps many residents'—ultimate vision for the community's character.[377]

Viewed together, all three types of rule-bound communities involve an ongoing dynamic among individuals who wish to change the rules, groups of residents who wish to keep them in place, and entities who have the discretion to enforce the rules or not. In private subdivisions, modification is left almost entirely to a private body—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, although they may vote to amend the rules themselves. Residents in overlay communities do not lose rules simply through intentional nonenforcement by the municipality; their voices in support of modification or perpetuation of the rules may not be heard if a distant and captured city government makes the ultimate determination through rezoning. In hybrid communities, the democratic process permitted by rezoning of overlay rules may be undermined by the more specific rules within the covenants, conditions, and restrictions, which may be waived at a private board's discretion and ultimately may be abandoned. Overlay communities may offer the best rule durability, as well as formal and predictable processes for flexibility, but they may not accurately and fully reflect residents' rule preferences. In sum, rule-bound communities as a whole have failed to achieve the benchmark for responding to consumer preferences for rules.

IV. SOLUTIONS: PROVIDING BETTER NOTICE AND ENSURING A RULE DURABILITY-FLEXIBILITY BALANCE

Public and private rule-bound communities 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 suggests that improvements to rule implementation in overlay communities, as well as to notice, modification, and enforcement mechanisms in all three types of rule-bound communities, could create a better fit between consumers' preferences

377. For example, where a rule within the hybrid community's public zoning overlay requires "green building" to ensure environmentally responsible urban living, *see, e.g.*, MUELLER GREEN RESOURCES GUIDE 7–10, *available at* http://www.muelleraustin.com/pdf/mgrg.pdf (requiring that new construction meet national or local green building standards), and the city is unwilling to modify that rule through rezoning, a homeowner could nonetheless (hypothetically) get away with violating a more specific private covenant that related to green building.

and the rules that form their community in the near and long term. In overlay communities, existing residents should have to vote for the rules in order for the city council to implement them, and those in the minority should perhaps be able to opt out, although this proposal should not be taken lightly because it could result in adverse "checkerboard" effects. In overlay and hybrid communities, incoming residents (once the overlay has been formed) should be formally alerted to the existence of overlay rules in closing paperwork. And in all three types of rule-bound communities, better physical notice of rules should be provided at the outset through the use of noticeable signs.

To allow for continued residential input in the modification or preservation of rules over time, informal variance proceedings should be available in private covenanted and hybrid communities where residents could object to permitted individual exceptions to rules. In overlay communities, where variance proceedings already exist, sublocal institutions with limited enforcement powers should be formed, thus allowing those closer to the communities' concerns to have a say in enforcement of or variance from rules.

A. RULE FORMATION AND IMPLEMENTATION IN EXISTING NEIGHBORHOODS: VOTING SAFEGUARDS

Because strong retroactivity concerns arise when overlays are implemented in existing neighborhoods—from potential interference with individuals' liberty interests to more standard concerns about value diminution[378]—governments implementing overlay communities must carefully consider the implications of retroactive rule formation and enact safeguards. One necessary safeguard is to require property owners within the community to vote on the new rules or at least petition for the rules before the city ultimately approves them, rather than allowing a city board or commission to independently initiate and approve them.

Robert Ellickson has suggested that even a vote, however, is at times insufficient, as a simple majority vote "poses risks of majoritarian oppression."[379] Though a supermajority vote could be required in order to retroactively impose rules, as suggested by Ellickson, this might create an insurmountable barrier to rule implementation in many neighborhoods, similar to the difficulty faced by residents in private communities attempting to change their bylaws. A majority requirement for retroactive rule implementation may therefore be preferable.

As an alternative, local governments could create a mechanism whereby the

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378. *See supra* notes 290–92 and accompanying text.

379. *See, e.g.*, Ellickson, *supra* note 19, at 103. In some cases, city politicians have informally required a supermajority vote where it was not required by law. In Dallas, for example, when 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." Bush, *supra* note 26.

community's residents, in voting for the new rules, agree to exclude certain objecting property owners' lots from the overlay.[380] This type of mechanism is already available where cities allow overlay zones to be created for single blocks. In Greensboro, North Carolina, for example, neighborhood conservation overlays "can be as small as one block face."[381]

Regardless of the measures applied to mitigate or avoid the negative effects of retroactive imposition of undesired rules, local governments must remember that the protective element of choice—the defense that the consumer chose the rules and "contracted" for them by purchasing a deed with covenants attached[382]—does not exist for those in the minority who objected to overlay communities. With this recognition, governments should reconsider the methods for writing, implementing, enforcing, and modifying the rules to ensure that they do not conflict strongly with individual preferences for rules.

B. NOTICE: PROVIDING VISUAL CUES OF RULES AND FORMAL NOTICE OF OVERLAYS

Once a community has been formed, retroactivity is of course not a concern for owners moving to the community. The element of choice, in other words, has been reintroduced. Any community consumer who dislikes the rules may simply choose to avoid the community altogether. That said, notice to incoming consumers is still vital. Consumers will not find the rules that they prefer if they are not aware of the rules that they "purchase" by moving to a community. And if consumers, despite the several forms of notice available to them, are unaware of the rules before they purchase and later discover and dislike them, they will feel cheated and trapped, potentially leading to significant discord in the form of repeated rule violations and variance requests. Thus, it is important to strengthen notice requirements, regardless of whether partial constructive notice is already provided.

In private covenanted and hybrid communities—where common law, disclosure requirements, and heuristics provide prospective homeowners with multiple opportunities for notice of the covenants—many consumers still fail to read the rules. Although the detail and specificity of these rules is beneficial, as consumers who do read them will have a clear idea of the limitations on their

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380. Voters may legally approve zoning that might otherwise be considered spot zoning. *See, e.g.*, City of Eastlake v. Forest City Enters., 426 U.S. 668, 680 (1976) (Powell, J., dissenting) (describing the majority's decision, which allowed voters by referendum to make a zoning decision about the "status of a single small parcel owned by a single 'person,'" as a "'spot' referendum"); *id.* at 679 (majority opinion) (affirming a procedure by which voters by referendum rejected a "zoning change to permit construction of a multi-family, high-rise apartment building").

381. CITY OF GREENSBORO PLANNING DEPARTMENT, *supra* note 125, at 4. Allowing individual homeowners to "opt out" of the overlay will detract from the goal of creating a broader community aesthetic. And it may give the opting-out homeowners an unfair advantage because their neighbors' property rights will all be equally restricted, leaving only the opt-outs free and clear. But requiring community voting on an overlay to approve the opt-outs will address these concerns.

382. Epstein, *supra* note 9, at 914 (discussing the "voluntary decision to purchase" and how that decision, combined with notice, creates consent in private covenanted communities).

property, something is needed to alert consumers to the rules in the first place and to persuade them to read beyond the first page. Stronger forms of notice are also needed in overlay and hybrid communities, where the closing paperwork contains no formal mention of the overlay rules or a copy of the rules themselves. Though some rule-bound communities offer better forms of notice than others, all have deficiencies.

Better visual cues are necessary in all types of rule-bound communities to quickly alert prospective buyers through signals even more obvious than the heuristics of an organized subdivision.[383] The sign at one of the prominent entrances to the community—a popular public thoroughfare in an overlay or hybrid community, or the gate or main entryway to a private covenanted community—should advertise that the community is governed by uniquely detailed rules. Some signs will not even require textual changes to provide notice of the community's uniqueness. If the local government requires street signs in rule-bound communities to be a different color than those in traditional communities, for example,[384] this will alert consumers that something is different about this community, ideally leading them to further inquire and to find the rules that best match their preferences.[385]

In addition to visual cues, state governments should require that a symbol be added to property search databases to indicate whether a property is within a rule-bound community. And, just as many states require paper disclosure of covenants prior to or at closing,[386] overlay rules should appear in contracts of sale for properties in both overlay and hybrid communities, and the rules should be disclosed prior to closing.[387] Visual and formal notice requirements in all three forms of rule-bound communities are essential to better ensure that community consumers' rule preferences are realized in the community that they ultimately choose.

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383. Many historic neighborhoods already place markers on street signs to alert passersby to the existence of an historic district. *See, e.g.*, The South End Historical Society, Inc., http://www.southendhistoricalsociety.org/about.htm (last visited Nov. 30, 2009) (describing a project to fund "the installation of markers on major street signs designating the area as an historic district"); Welcome to Ogden City, http://archive.ogdencity.com/index.php?module=ibcms&fxn=press.pr_96 (last visited Nov. 30, 2009) (describing as an "action to be taken" within a historic district the goal to "replace street signs with brown signs to denote the historic district").

384. Conversation with Terry Martin, Interim Dir. of Research, Tarlton Law Library (Feb. 4, 2009) (suggesting the addition of colored signs to neighborhoods with overlays).

385. These same suggestions for notice might also be useful for rule-bound communities not discussed in-depth in this Article because they are more strongly oriented toward services. A potential buyer in a business improvement district, for example, might benefit from a sign alerting him to the presence of this district, although potential business owners are likely to be more informed of the rules going in than the typical property buyer.

386. *See supra* notes 309–13 and accompanying text.

387. Although paper notice has failed to alert many incoming homeowners in covenanted communities to the rules, it is still an important first step. *See supra* notes 300–07 and accompanying text.

C. MODIFICATION AND ENFORCEMENT: CREATING SUBLOCAL INSTITUTIONS AND ENHANCING RESIDENTS' INFLUENCE

Part III discussed three distinct problems with the processes for modification and enforcement that exist in rule-bound communities. First, though small, sublocal enforcement institutions are essential because those who serve on such institutions are invested in the rules, enforcement bodies frequently have too much discretion and need not seek or consider residents' input in enforcement decisions. For those who want rule flexibility, a board's insistence on enforcing each and every rule can be overzealous and intrusive.[388] For those who strongly prefer the status quo, a board's discretion to intentionally avoid enforcing certain rules can lead to unwanted modification of the rules through waiver and possible abandonment in private communities. Second, in overlay communities without a sublocal enforcement authority, captured or uninterested government officials voting on modifications and variances may not in fact respond to residents' preferences for rules and rule enforcement. Third, in the hybrid communities, where there are two sets of detailed rules—one enforced by a distant governmental body and the other by a sublocal property owners' association—the association's modification or abandonment of rules can undermine the broader principles of 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 are also flexible. A second paper will be required to adequately address the need for rule flexibility; several initial suggestions, however, follow.

1. Private Covenanted and Hybrid Communities: Variance Hearings

In private covenanted communities, mechanisms similar to public communities' hearings for variance and modification—though at a less formal level in order to reduce participatory obstacles—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. Adding participatory, deliberative processes is not always beneficial.[389] But in this case, the existence of a participatory process coupled with the inclusion of individuals who have knowledge of the issue to be decided is important[390] because it helps to ensure that the rules better match individuals' preferences for the physical community

388. *See, e.g.*, Alexander, *supra* note 198, at 160 (describing how one homeowner exclaimed in an interview, "I find the rule that you can't build any structure without the approvement [sic] of the [homeowners' association] board to be completely unreasonable. The homeowners' association has got to be kidding; this is my property!").

389. *See, e.g.*, Mathew D. McCubbins & Daniel B. Rodriguez, *When Does Deliberating Improve Decisionmaking?*, 15 J. CONTEMP. LEGAL ISSUES 9, 30–34 (2006) (describing study indicating that deliberation, even within a very small group of individuals, can decrease social welfare).

390. *See id*. at 37–38 (describing study indicating that deliberative processes can be beneficial where there are one or several trusted, knowledgeable speakers who can teach the other participants about the issue).

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 Community Association*, for example, a property owners' association allowed a homeowner to construct a fence in violation of the covenants.[391] California's appellate court determined that the board had engaged in a zoning-type activity—the board essentially had granted a variance—and the court allowed the homeowner objecting to the variance to sue the board for failing to consider and protect neighboring property interests.[392] Another good option to ensure that residents have influence in covenant nonenforcement, without having to sit through lengthy meetings, is a requirement that neighboring property owners sign off on a homeowner's application to a design review board requesting a modification to her property, as Reston, Virginia's covenants require.[393]

Although private covenanted and hybrid communities already have regular association meetings where residents may express concerns, more formalized variance hearings would have two distinct functions. In private covenanted communities, they would provide a forum to address decisions that might otherwise occur in private. In hybrid communities, they would additionally allow residents to point out discrepancies between the desired deviation from or enforcement of a covenant and the broader vision of the overlay.

2. Overlay Communities: Sublocal Enforcement

In overlay communities, where public processes are already in place that allow for citizen input in variance decisions (through a quasi-judicial board of adjustment or similar body) and rule modification (in the form of rezoning), 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 first problem—a distant municipal body's failure to enforce rules—local codes

391. 191 Cal. Rptr. 209, 211 (Ct. App. 1983).

392. *Id.* at 214–15. Residents, however, will not likely have the time or the will to participate in multiple hearings about decisions to enforce rules or grant variances. *See, e.g.*, Alexander, *supra* note 198, at 162 (concluding that many residents in private covenanted communities are apathetic); *see also* Telephone Interview with anonymous resident (Dec. 15, 2008) (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 decision making). As such, the board—at minimum—could perhaps be required by state or city statute to provide a list of all pending enforcement decisions and solicit input about those proposed decisions. Although many residents do not attend meetings, *see, e.g.*, Matthew J. Parlow, *Civic Republicanism, Public Choice Theory, and Neighborhood Councils: A New Model for Civic Engagement*, 79 U. COLO. L. REV. 137, 165–66 (2008) (explaining that "attendance and participation in homeowners associations tend to be low"), boards could at least provide web-based or mailed notice of the list and ask residents to respond in writing with any concerns.

393. Reston, First Amendment, *supra* note 59, at Art. III.6(d)(4)(iii).

should allow overlay communities to form their own public enforcement associations, which would be similar to private homeowners' associations but would have more limited enforcement powers. Following the example of the Cambridge, Massachusetts, Neighborhood Conservation District commissions,[394] these associations should review building and construction permit applications at public hearings, and the municipality should not be able to approve a permit without first hearing the opinion of the sublocal association. This association should, as is required in Cambridge,[395] include some residents—in addition to experts such as architects—to ensure that those who are closest to the rules have a say in their enforcement.

The latter problem of capture is, of course, a more difficult one. At a sublocal level, the institution tasked with basic rule enforcement could also be captured by the individuals or interest groups with the most to lose or gain from a decision. In this limited discussion of remedies, the initial hope is that the process, being sufficiently close to the community, may allow for more direct citizen monitoring of the most serious capture problems.

3. All Rule-Bound Communities: Limited Rule Duration

Regardless of whether mechanisms are provided that allow for rule-bound residents to participate in rule enforcement and modification decisions, opportunities for participation may be insufficient in an increasingly busy world. A final remedy, to ensure that rules meet residents' needs over time, is to shorten rules' duration, whether those rules exist in the form of a covenant, overlay, or both. Paula Franzese and Steven Siegel have already suggested this remedy for private covenanted communities, recommending "mandatory sunsetting of developer-imposed rule regimes,"[396] and in 2009 a *Harvard Law Review* student note 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."[397] Indeed, a number of private covenanted subdivisions have implemented sunset rules providing for the initial covenants to run for fifteen, twenty, or thirty years, followed by ten-year automatic renewals, after which the lot owners may vote to terminate them.[398]

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394. *See supra* note 143 and accompanying text.

395. *See supra* note 144 and accompanying text.

396. Franzese & Siegel, *supra* note 43, at 1140.

397. Note, *supra* note 300, at 953.

398. *See, e.g.*, ILLANHEE NORTH ASSOCIATES, DECLARATION OF PROTECTIVE COVENANTS, CONDITIONS AND RESTRICTIONS OF THE PLAT OF ILLANHEE NORTH 1 (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); *see also* Note, *supra* note 300, at 953 (discussing how two 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 HOUS. AND URBAN DEV., LAND PLANNING PROCEDURES AND DATA FOR INSURANCE FOR HOME MORTGAGE

This type of sunsetting may be even more important in overlay and hybrid communities, where incoming consumers may lack notice of the public overlay rules. Reconsideration of overlay zoning should therefore be required every twenty or so years through modified sunset provisions to ensure that the rules in the overlay continue to match the community's needs. Sunset provisions provide those trapped within despised rules with an escape mechanism, and they allow those who favor other rules to argue, through a deliberative process, for their retention. As such, they may offer an ideal mechanism for balancing rule flexibility and durability.

V. 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. Although private covenanted communities have been on the rise for several decades, zoning overlays for existing neighborhoods and combination overlay/covenant regimes in hybrid communities are an increasingly popular method by which to apply covenant-type rules through a public process. In an underrecognized yet growing movement for rules, both new and existing public communities have expanded the early concept of the historic district to create detailed regimes that preserve an array of desired neighborhood characteristics: these overlays address the size of structures, the existence of industrial and commercial space, the "greenness" of construction, and the placement of driveways and trash cans, among numerous other physical property characteristics. The historic zoning movement of the nineteen-sixties and seventies, in other words, has branched out to protect physical community character of all sizes, shapes, and ages. As part of this expansion, public rules have become ever more detailed and have begun to resemble, in substance and character, the private covenants that now dominate many suburban subdivisions. Some public projects even use both tools—the detailed covenant and the equally detailed overlay—to dictate property uses.

None of these mechanisms, public or private, is perfect in its ability to notify consumers of the rules they are purchasing as part of the community or to ensure that consumers have meaningful input in the continuity and flexibility of those rules over time. Overlays increasingly contain covenant-type rules, but they lack the moderate notice protections that have attached to covenants through the common law. Further, 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, particularly if those rules are substantively problematic. Municipalities must recognize that individuals do not contractually enter into overlays. As such, a vote of the majority of owners and residents

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PROGRAMS app. 2, at 6 (Aug. 1968), *available at* http://www.hud.gov/offices/adm/hudclips/handbooks/hsgh/4140.2/index.cfm (select "Appendix 2: Declarations," PDF version))).

within a community in favor of an overlay should always be required, or at least a petition by a substantial number of the affected residents, in order to create overlay communities. This action would ensure that a municipal government does not itself initiate and impose a top-down rule set on an objecting community. Further, in voting for an overlay, the local government code should possibly allow residents to omit objecting owners from the rules, at least where a majority in favor cannot otherwise be obtained.

For all rule-bound communities, problems exist where community consumers move to the rules. If residents are not adequately notified before they purchase, 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 abandonment of the rules in private covenanted communities or large numbers of variances in overlay communities. Rule-bound communities must therefore provide notice of the rules to the consumer in a meaningful way. Yet consumers should not be required 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 overlay communities.

Regardless of whether consumers are notified of the rules, as time passes some will wish to vary the enforcement of those rules to accommodate individual needs. Other owners will prefer consistent and comprehensive enforcement to ensure that the community aesthetic created by the rules is not substantially eroded; these competing desires must be weighed in every community. Rule-bound communities should therefore provide local enforcement institutions, but they should also implement procedures to ensure that an institution's discretion is bounded by residential input, providing residents meaningful processes through which to object to enforcement or the lack thereof. In overlay and hybrid communities, sunset provisions requiring residents to reaffirm or reject the rules every twenty or so years would ensure that publicly invoked covenant-type rules are not set in stone, allowing residents and local governments to expand or erase rules as desired.

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 claim a collective right to control their neighbors' land uses as one component of a larger, cohesive community use. Property uses affect values tied up in both the financial aspects and enjoyment of property ownership, and individuals' behavior implies a strong preference toward community-wide rules to capture those values.

Yet all rules are not equal. Many are a surprise to the purchaser and possibly conflict directly with her preferences for rules and the community that they create. Others may offer a fleeting promise, only to be lost in the long term as

residents come and go. Still others may be too rigid, failing to bend with the winds of time. And as Paula Franzese and Steven Siegel have observed, "[R]ules can become weapons."[399] In the worst cases, they may be used indiscriminately by small groups of people with broad enforcement discretion to exact revenge upon disliked neighbors. Only with a deeper recognition of the procedural frameworks in 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 evolution of rule-bound communities continues, as public communities adopt more covenant-type strictures through noncontractual processes. The hybrid community rule formation, enforcement, and modification processes may ultimately offer the preferred route toward aesthetically defined communities in that they provide meaningful opportunities for residents to directly convey rule preferences to both 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 broad discretion to enforce numerous and detailed rules to which home purchasers bind themselves, sometimes unwittingly. In the end, entities 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.

399. Franzese & Siegel, *supra* note 43, at 1130.