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Perpetual Affordability Covenants: Can These Land Use Tools Solve the Affordable Housing Crisis?

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ABSTRACT

Approximately 3.8 million privately-owned residential housing units in America today contain affordability covenants recorded in their chains of title. State and local agencies and the District of Columbia use these covenants to ensure that publicly-subsidized properties are actually used to provide affordable housing. With rents at all-time highs and stagnant wages, the affordable housing crisis has reached a fever pitch. House Democrats are proposing billions more in housing subsidy. To the extent those funds subsidize privately-owned housing development they, too, will be secured by affordability covenants. In response to this crisis, a new trend in high cost markets is to extend the duration of affordability covenants into perpetuity to create or maintain a permanent stock of privately-owned affordable housing, rather than allowing these covenants to expire after some term of years. Despite their ubiquity, there is no scholarship and remarkably little case law on the validity of affordability covenants. This is astonishing given that affordability covenants often do not satisfy the traditional requirements for real covenants or equitable servitudes at common law, and yet are relied upon to secure billions of dollars of public investment in affordable housing. The scarce case law on affordability covenants relies on public land use justifications to uphold these covenants, ignoring traditional property law doctrine. This Article

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argues that affordability covenants belong among the new, "hybrid," public/private land use devices that straddle traditional property law and public land use law. The Article looks to other hybrid devices that have received more judicial scrutiny and scholarly interest—particularly conservation easements—and concludes that affordability covenants are at risk of judicial invalidation unless they are supported by state enabling legislation. Finally, the Article argues that the unique public purpose driving perpetual affordability covenants gives rise to legislative considerations that should be addressed by all state enabling acts.

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I. INTRODUCTION: Affordability Covenants – Ubiquitous, Unexamined and Unenforceable?

Imagine you are the director of the Department of Housing for a major American city. A group of low-income senior citizens, most of whom are Chinese-American, come to you for help. Their privately-owned apartment building of more than 300 federally-subsidized units (one of only two remaining in your city's historic but gentrified Chinatown neighborhood) is for sale. The seller's asking price is approximately $200 million more than the subsidized rents can support. The seller justifies the price by saying it is the value of the land after demolition of the existing building, assuming the land will be used for luxury housing and retail. Thirty-five years ago, in exchange for public financing, the developer of the property recorded a real covenant that runs with the land restricting the property for use as affordable housing for forty years. Even though there are five years left on the covenant, there are commercial real estate developers making bids for the building at or near the seller's asking price, confirming the market appetite to replace the building with the luxury apartments and retail now ubiquitous in Chinatown. You must either prepare for this property to leave your affordable housing portfolio when

the covenant expires, recognizing that these elderly residents will almost certainly be displaced not only from their building but from all of Chinatown, or you must jump into the fray to compete for this property at its unrestricted market rate in order to preserve it as affordable housing.[1] To avoid having to make a decision like this with future affordable housing projects, you consider an intriguing idea being used in Boston—the perpetual affordability covenant.[2] When developers record covenants that run with the land in exchange for public financing in the future, instead of allowing those covenants to expire after 15, or 40, or even 60 years, why not make the covenant perpetual?

When public resources are invested into developing privately-owned, affordable housing the public agency supplying the resource typically requires the owner of the housing to promise, or covenant, that the housing will only be used to house low- or moderate-income people.[3] To ensure that this promise is kept by whomever owns the land, even if the original owner sells the property, the covenant is recorded into the land records with the intent that the restriction "runs with the land." Typically, the covenant states that the public agency who supplied the public resource is the beneficiary of the covenant and has the right to enforce the covenant in law or in equity.[4] Federal affordable housing financing program regulations, like the HOME Investment Partnerships program ("HOME")[5] and the Low Income Housing Tax Credit program ("LIHTC"),[6] set some

1. This hypothetical is loosely based on the story of Museum Square in Washington, D.C. *See* Aaron Wiener, *Bull in Chinatown: Developer Tells Section 8 Tenants to Pay Up or Get Out*, WASHINGTON CITY PAPER (July 9, 2014), http://bit.ly/2HZwKpa.

2. I would like to gratefully acknowledge that the inspiration for this article came from my participation in a round-table meeting about the viability of perpetual affordability covenants cohosted in November 2016 by the Urban Institute, Enterprise Community Partners, D.C. Coalition for Smarter Growth, and the D.C. Fiscal Policy Institute and from my work as an appointee on D.C. Mayor Muriel Bowser's Affordable Housing Preservation Strikeforce in 2016.

3. *See, e.g.*, *Preservation,* NCSHA, https://www.ncsha.org/advocacy-issues/preservation/ (last visited Aug. 26, 2019); *Mechanisms for Preserving Affordability*, INCLUSIONARY HOUS., http://bit.ly/2YP0ksK (last visited Aug. 26, 2019).

4. As an example, New Jersey has a mandatory statutory form for affordability covenants. *See* N.J. ADMIN. CODE § 5:80-26.1 (2019).

5. The HOME program provides a formula grant match from the U.S. Department of Housing and Urban Development ("HUD") to states and localities primarily for the purpose of expanding the supply of decent, safe, and affordable housing available to low and very low-income households. To be awarded funds from HUD, participating jurisdictions must implement multi-year strategies for acquiring, rehabilitating, or constructing affordable rental housing via public-private partnerships. *See* HOME Investment Partnerships Program Rule, 24 C.F.R. § 92.1 (2019).

6. The LIHTC program encourages private equity investment in the construction and rehabilitation of rental housing reserved for households at or below 60% of the Area Median Income. An affordable housing project owner participating in the LIHTC program receives a 10-year tax credit that can be passed through to an investor in exchange for an

of the original affordability covenant durations. For example, affordability covenants required in exchange for HOME funds range from 5 to 20 years.[7] The minimum affordability period required by the LIHTC program is now 30 years.[8] At the end of the restriction period, the covenant automatically expires and the owner of the property is free to rent or sell the housing unit at market rate.

By a very rough estimate, there are approximately 3.8 million affordability covenants restricting privately-owned housing units in the United States today.[9] Affordability covenants have been regularly and commonly used in privately-owned, publicly-funded affordable housing development transactions since the 1980s, if not earlier.[10] All states, territories, and the District of Columbia require affordability covenants to be recorded in the chain of title for housing subsidized with federal, state, and local funds, including funds from the federal HOME and LIHTC programs.[11] Affordability covenants are used to restrict all types of housing tenure, from single-family, condominium, and cooperative home

equity investment made prior to the project being placed in service. *See* I.R.C. § 42 (West 2018).

7. *See* 24 C.F.R. § 92.252.

8. *See* I.R.C. § 42.

9. It is extremely difficult to even approximate the number of affordability covenants, as each covenant is recorded in the local land records for a particular property. Tallying the number of housing units subsidized by federal programs mandating running covenants or deed restrictions does not yield a reliable figure because many affordable housing projects layer many sources of federal, state, and local financing. However, for raw data, we know that 2,313,856 units were placed in service between 1995 and 2015 as a part of the Low-Income Housing Tax Credit program. *See Low-Income Housing Tax Credits*, U.S. DEP'T OF HOUS. & URB. DEV., https://www.huduser.gov/portal/datasets/lihtc.html (last updated May 24, 2019). Additionally, there are approximately 1.5 million units restricted as part of HUD's Project Based Rental Assistance, Moderate Rehabilitation, Sections 236, 202, and 811 programs. *See Assisted Housing: National and Local*, HUD, https://www.huduser.gov/portal/datasets/assthsg.html (last visited Aug. 27, 2019). According to the April 30, 2018 HOME Activities reports filed by all states, territories, and the District of Columbia, there are currently 116,300 total units subsidized with federal HOME funds. *See Post 2011 HOME Activities*, HUD EXCHANGE, http://bit.ly/2Wc79mE (last visited Aug. 27, 2019). This data does not include state and local programs that require restrictive covenants.

10. An extensive list of HUD low-income rental housing programs including, Sections 202 and 811 housing, mixed-finance public housing, project-based Section 8, and 221(d)(3) mortgage insurance programs, require long-term affordability covenants running with the land. *See Mixed-Finance Amendment to Consolidated Annual Contributions Contract (Exhibit E(V)(A))*, U.S. DEP'T OF HOUS. & URB. DEV. (Nov. 26, 1996), bit.ly/2MsYgRn. Low Income Housing Tax Credit projects require a mandatory minimum 30-year affordability covenant. The first 15 years is called the "compliance period" and the second 15 years or more is called the "extended use period." *See* I.R.C. § 42(h)(6). States have the discretion to extend the extended use period beyond 15 years. *Id*. The HOME program also requires running covenants recorded in a state's land records to secure affordability. *See* 24 C.F.R. § 92.252(e)(1)(ii).

11. *See Post 2011 HOME Activities*, *supra* note 9.

ownership units to large, multi-family, corporate-owned rental properties. Many jurisdictions require affordability covenants in exchange for state and local sources of public financing;[12] when public lands are sold, leased, or granted for residential use;[13] or in exchange for zoning or permitting requests.[14]

A recent trend in high cost markets[15] is to extend the duration of affordability covenants in perpetuity to create a lasting stock of affordable housing insulated from gentrification and skyrocketing market rate property values. Boston currently requires perpetual affordability covenants for all privately-owned, publicly-funded affordable housing projects.[16] Many other small and large municipalities are considering implementing perpetual affordability controls, or already use them in some, but not all, of their affordable housing programs. For example, the District of Columbia requires perpetual affordability secured by recorded covenants for all dispositions of public land to be used for housing.[17] For units created as a part of the District of Columbia's Inclusionary Zoning program and New York City's Mandatory Inclusionary Housing program, covenants restrict the units for the life of the building.[18] In September 2017, New York City's Housing Preservation and Development agency announced the roll-out of a policy to enable perpetual affordability in housing created on publicly disposed land.[19] In Maine and Oregon, the

12. According to the Center for Community Change's Housing Trust Fund Projects, forty-seven states and the District of Columbia have state housing trust fund programs, most of which require affordability covenants to secure investments. Survey Report, Ctr. for Cmty. Change, State Hous. Tr. Funds 2018, http://bit.ly/2Xw8KQQ (last visited June 3, 2019). *E.g.* CAL. GOV'T CODE § 62101(f) (West 2016) (establishing the California Low and Moderate Income Housing Fund and requiring affordability covenants for all funded projects).

13. *E.g.* D.C. CODE ANN. § 10-801(b-3)(1)(C) (West 2019).

14. *E.g.* N.Y.C., N.Y. ZONING RESOLUTION §§ 23–90 (2018); Los Angeles property owners requesting a broad variety of discretionary zoning adjustments are required by ordinance to consent affordability covenants. *Land Use Covenants*, HOUS. CMTY. INV. DEP'T, https://hcidla.lacity.org/land-use-covenants (last visited Aug. 27, 2019)

15. One measure of high cost housing markets is the National Low-Income Housing Coalition's annual report, "Out of Reach," which documents the gap between wages and rents in markets throughout the country. *Out of Reach*, NAT'L LOW INCOME HOUS. COAL. (2019), https://reports.nlihc.org/oor.

16. City of Boston, Neighborhood Development Housing Policies, Section 7-3, requires that all agency-assisted rental and cooperative housing be affordable in perpetuity via an Affordability Covenant. *See* BOSTON, MA., REDEVELOPMENT AUTH. § 7-3 (2019), https://bit.ly/2zdTJca.

17. *See* D.C. CODE § 10-801(b-3)(1)(C).

18. D.C. CODE § 6-1041.05(a)(2) (2007); N.Y.C., N.Y., ZONING RESOLUTION § 23911 (2018).

19. *See* Maria Torres-Springer, Comm'r, N.Y.C. Hous. Pres. and Dev., Address at the Citizens Budget Commission Breakfast (Sept. 20, 2017), https://on.nyc.gov/30rEfgI.

statutory default is that affordable housing covenants are of unlimited duration.[20]

Federal, state, and local housing subsidy programs overwhelmingly seem to require the use of affordability covenants based on the assumption that these devices are appropriate and effective in binding the covenanter and its successors at common law. Only six jurisdictions have passed affordability covenant enabling acts to ensure the judicial enforceability of affordability covenants despite their inconsistencies with common law requirements.[21] Notwithstanding their ubiquitous use, there is no scholarship and remarkably little case law on the validity of affordability covenants.[22] This is surprising given the billions of dollars of public investment these covenants are presumed to secure and the fact that affordability covenants often *do not* satisfy the traditional common law requirements for running real covenants or equitable servitudes. In contrast, environmental servitudes, including conservation servitudes and environmental remediation covenants—both close cousins of affordability covenants—have received considerably more scholarly analysis.[23] A

20. *See* ME. REV. STAT. ANN. tit. 33, § 122(3)(A) (1991); OR. REV. STAT. ANN. § 456.280 (West 2008).

21. The six states with affordability covenant enabling statutes are California, Maine, Massachusetts, Oregon, Vermont, New Jersey, and Rhode Island. CAL. GOV'T CODE § 62101(f) (West 2016); ME. REV. STAT. tit. 33, § 126 (1991); MASS. GEN. LAWS ANN. ch. 184, § 31 (West 1990); OR. REV. STAT. ANN. § 456.295 (West 2007); VT. STAT. ANN. tit. 27, § 610 (West 1995); N.J. ADMIN. CODE § 5:80-26.1 (2004); R.I. GEN. LAWS § 34-39.1-3 (1991).

22. *See generally* Martin v. Villa Roma, Inc., 131 Cal. App. 3d 632 (1982); Oceanside v. McKenna, 215 Cal. App. 3d 1420 (1989); Columbus Park Corp. v. Dep't of Hous. Pres. & Dev., 598 N.E.2d 702 (N.Y. 1992); Montgomery Cty. v. May Dep't Stores Co., 721 A.2d 249 (Md. 1998); Cannavaro v. Washington Cmty. Hous., No. CV030091521S, 2005 WL 1433790 (Conn. Sup. Ct. May 23, 2005) (finding a use restriction, not an affordability covenant, related to an affordable housing development valid, court relies on Restatement of the Law (Third): Property (Servitudes) in combining real covenants, easements and equitable servitudes under the single label "servitudes" and in finding that servitudes can be validly created for the benefit of third parties appurtenant or in gross); Tivoli Stock L.L.C. v. N.Y.C. Dep't. of Hous. & Cmty. Dev., No. 108052/06, 2006 WL 3751468 (N.Y. Sup. Ct. Dec. 12, 2006); Fairfax Cty. Redevelopment & Hous. Auth. v. Riekse, 78 Va. Cir. 108 (2009); Nordbye v. BRCP/GM Ellington, 266 P.3d 92 (Or. Ct. App. 2011); Huntington Beach v. Lee, No. 30-2009-00329477, 2015 WL 10635010 (Cal. Super. Ct. Aug. 17, 2015); Boston Redevelopment Auth. v. Pham, 42 N.E.3d 645 (Mass. App. Ct. 2015); Society Hill at Piscataway Condo. Ass'n., Inc. v. Twp. of Piscataway, 138 A.3d 596 (N.J. Super. Ct. Law Div. 2016); Payne v. Payne, No. 15 MISC 000125, 2016 WL 1230098 (Mass. Land Ct. Mar. 30, 2016); 135 Wells Ave., L.L.C. v. Hous. Appeals Comm., 84 N.E.3d 1257 (Mass. 2017); *In re* Sunnyslope Hous. Ltd. P'ship, 859 F.3d 637 (9th Cir. 2017) (en banc) (finding that in a Chapter 11 bankruptcy proceeding, the value of a Low-Income Housing Tax Credit project equals the value of the project subject to its affordability restrictions, not the unrestricted, market-rate value of the property).

23. Andrew Dana & Michael Ramsey, *Conservation Easements and the Common Law*, 8 STAN. ENVTL. L.J. 2, 3 (1989); Peter M. Morrisette, *Conservation Easements and the Public Good: Preserving the Environment on Private Lands*, 41 NAT. RESOURCES J.

comparison of this scholarly literature is cause for concern about the judicial enforceability of most affordability covenants not supported by state enabling legislation.

Although their legal footing at common law may be tenuous, the few extant cases pertaining to affordability covenants have tended to enforce the covenants, often based on uncomfortably vague public policy rationales or contract grounds.[24] However, if the trend toward affordability covenants of perpetual duration continues to gain momentum, inevitably, courts and the housing finance market will begin taking a harder look at these covenants.[25]

373, 380–84) (2001) (noting the many shortcoming of conservation easements as easements, real covenants or equitable servitudes at common law and the need for state enabling statutes); Gerald Korngold, *Privately Held Conservation Servitudes: A Policy Analysis in the Context of In Gross Real Covenants and Easements*, 63 TEX. L. REV. 433, 436–40 (Nov. 1984) [hereinafter *Privately Held Conservation Servitudes*]; Jessica Owley, *Changing Property in a Changing World: A Call for the End of Perpetual Conservation Easements*, 30 STAN. ENVTL. L.J. 121, 137 (2011) (describing conservation easements as "a hybrid entity of property law, contract law, and private zoning");
Kurt A. Strasser, *The Uniform Environmental Covenants Act: Why, How, and Whether*, 34 B.C. ENVTL. AFF. L. REV. 533, 536–37 (2007) ("The Uniform Environmental Covenant Act creates a state-law property interest that attaches use restrictions and monitoring and other requirements to the land . . . There are questions about the creation of this kind of servitude and its long term viability in the face of common law that is hostile to permanent land use restrictions, as well as questions about how such a covenant can be modified, and about achieving a level of legal enforceability . . . .").

24. For cases relying on public policy justifications, *see infra* Section II.B.2. *Columbus Park Corp.,* 598 N.E.2d at 707, (enforcing affordability covenants in multi-family rental property enforced based on contract law); *Montgomery Cty.*, 721 A.2d at 255 (finding amounts owed to county for sale of restricted property in excess of affordability covenant resale formula found to be a personal liability of the seller, not a lien against the property without analysis of validity of covenant); *Nordbye*, 266 P.3d at 100 (upholding former tenant's right to enforce an affordability covenant despite the covenant being released by the remote grantor and the original grantee); *Lee*, 2015 WL 10635010, at *5 (finding an affordability covenant unenforceable where City failed to properly record the covenant in the land records and the defendant acquired the property without constructive or actual notice of the covenant); *Pham*, 42 N.E.3d at 646 (finding the defendant did not violate the provisions of the covenant without analyzing the underlying validity of the covenant during a suit to enforce proscription on unauthorized renting contained in affordability covenant); *Society Hill at Piscataway Condo. Ass'n*., *Inc.*, 138 A.3d at 602 (finding that the New Jersey Uniform Housing Affordability Controls regulations did not authorize the township to unilaterally extend the duration of an affordability covenant where the covenant itself did not grant the township such authority); *Payne*, 2016 WL 1230098, at *3 (enforcing owner-occupancy and resale requirements without an analysis of the underlying validity of the covenant); *135 Wells Ave., L.L.C.*, 84 N.E.3d at 1265 (finding that a use restriction contained in property deed for the benefit of the city is a property interested owned by the city and that the local board of zoning appeals did not have the authority to demand that the city alter or release this interest and, further, that no change in conditions of the neighborhood had occurred that would warrant termination of the affordability covenant).

25. This same observation about the likelihood of intensifying scrutiny as restrictions age and burdened properties are conveyed to subsequent owners was made with regard to

This Article lays some necessary ground work in anticipation of that harder look at the enforceability of affordability covenants. The Article first walks through the ways that affordability covenants both conform and fail to conform to the requirements of common-law private land use restrictions (namely running covenants and equitable servitudes). Next, the Article considers how affordability covenants both resemble and fail to resemble public land use restrictions (namely zoning). Finding that affordability covenants are neither purely public nor purely private land use devices, the Article concludes that affordability covenants belong among the constellation of "hybrid" public/private land use devices created in the latter half of the twentieth century. As with other "hybrid" land use devices (namely conservation servitudes, environmental covenants, contingent zoning, and development agreements)—enabling legislation is necessary to overcome discrepancies with common-law requirements and to ensure the enforceability of affordability covenants.

Next the Article turns to an examination of the public land use rationale undergirding affordability covenant enabling legislation. A review of the six existing state enabling acts reveals that, while these enabling acts are certainly better than nothing, they generally fail to clearly articulate elements of substantive and procedural due process that are the hallmark of valid public land use regulation. Better affordability covenant enabling legislation is possible. The Article first looks to zoning law to sketch the parameters of state contracting and police powers *vis á vis* development exactions jurisprudence.

Finally, the Article weighs two alternative fundamental policy goals for perpetual affordability covenant enabling legislation: one based in suppressing the value of real estate and the other based in capturing the value of the property interest created by the covenant, and the divergent drafting concerns each approach suggests.

II. NEITHER PUBLIC NOR PRIVATE, BUT A HYBRID OF THE TWO

Perpetual affordability covenants are unquestionably land use restrictions—they are intended to restrict specific parcels of land for use exclusively as "affordable housing" (in the myriad ways that term can be defined).[26] However, they do not fall neatly into any of the categories of land use restriction cognizable in traditional property law. Most first year property students are taught that land use restrictions are bifurcated into private land use restrictions between discrete private parties, and public

Conservation Easements in 2008. C. Timothy Lindstrom, *Hicks v. Dowd: The End of Perpetuity?*, 8 WYO. L. REV. 25 (2008).

26. There is a legitimate, on-going debate about what "affordable housing" means. For simplicity, I will use the term inclusively to refer to any housing that is sold or rented below its market rate to buyers or renters whose incomes do not exceed designated limits.

land use restrictions created by public legislative or executive bodies and applied to regions through legislation and regulation.[27] In this section, the Article explains that perpetual affordability covenants resemble private land use restrictions (namely servitudes) in many ways, but not necessarily enough to be enforceable as servitudes according to traditional common law. The Article will then discuss the Restatement of Law Third (Property): Servitudes ("Restatement")'s treatment of affordability covenants, including its attempt to validate affordability covenants as well as its unclear influence on the law. Additionally, this Article will argue that while in form perpetual affordability covenants do not resemble zoning, in function they do. Thus, this part of the Article will draw the conclusion that perpetual affordability covenants are a hybrid of public and private land use regulation, potentially lacking validity as servitudes at traditional common law. After considering how the blending of state contract and police powers in public/private land use agreements can be "basically legitimate or fundamentally flawed,"[28] this part will finally consider scholarship, case law, and legislation in relation to the enforceability of another "hybrid" public/private land use device—conservation servitudes.

A. Risk of Invalidity as Common Law Real Covenants or Equitable Servitudes

1. Real Covenants and Equitable Servitudes Refresher

Before analyzing affordability covenants' validity as either real covenants or equitable servitudes, it may be necessary to provide a refresh of this arcane area of property law. Real covenants and equitable servitudes are non-possessory, private-land-use controls recognized at common law, whereby one piece of land is burdened for the benefit of another piece of land.[29] They are enforceable promises made between private landowners that are intended to "run with the land," burdening or benefiting the land regardless of whether the original parties sell their

27. WILLIAM B. STOEBUCK & DALE A. WHITMAN, THE LAW OF PROPERTY 521 (Jesse H. Chopper et al. eds., 3d ed. 2000); JESSE DUKEMINIER, ET AL., PROPERTY 777 (Vicki Been et al. eds., 8th ed. 2013); JOHN G. SPRANKLING & RAYMOND R. COLETTA, PROPERTY: A CONTEMPORARY APPROACH 665, 783 (Jesse H. Chopper et al. eds., 3d ed. 2015); ALICIA B. KELLY & NANCY J. KNAUER, PROPERTY LAW: A CONTEXT AND PRACTICE CASEBOOK 553 (2017).

28. Judith Welch Wegner, *Moving Toward the Bargaining Table: Contract Zoning, Development Agreements, and the Theoretical Foundations of Government Land Use Deals*, 65 N.C. L. REV. 957, 965 (1987).

29. CHARLES E. CLARK, "REAL COVENANTS AND OTHER INTERESTS WHICH "RUN WITH LAND" 1–6 (2d ed. 1947).

lands to subsequent buyers.[30] As promises between private parties, whether the original covenant is enforceable is determined by contract law.[31] However, whether the benefits and burdens created by the original parties are binding on subsequent owners of the subject parcels is the subject of property law.[32]

The traditional test for determining whether a covenant "runs with the land" requires: (1) the covenant be made by express grant in conformity with the Statute of Frauds; (2) horizontal and vertical privity; (3) the original parties intended that both the benefit and the burden of the covenant should "run" to subsequent owners; (4) the covenant "touch and concern" the land; and (5) subsequent parties have notice of the covenant.[33] Traditionally, an aggrieved party is entitled to a remedy at law in the event of violation of a real covenant.[34]

Equitable servitudes are similar to real covenants in that they are private restrictions on the use of land. However, they are enforceable in equity and the test for their existence is more lenient than the test for real covenants. Equitable servitudes require: (1) express grant in a writing that satisfies the Statute of Frauds; (2) intent of the original parties that the benefit of the servitude should "run"; (3) the covenant "touch and concern" the land; and (4) notice of the servitude.[35]

Traditionally, running covenants and equitable servitudes were disfavored as antithetical to the free and unfettered use of land.[36] The party seeking to enforce the covenant had the burden of proving that the covenant satisfied common law requirements.[37]

2. Affordability Covenants Often Do Not Satisfy the Requirements for Real Covenants

In this section, the Article examines whether affordability covenants satisfy each of the common law requirements for real covenants and equitable servitudes. Most affordability covenants will satisfy the following requirements: the Statute of Frauds; the parties' intent that the covenant run; vertical privity; and notice. However, this Article will argue

30. William Stoebuck, *Running* Covenants*: An Analytical Primer*, 52 WASH. L. REV. 861, 864 (1977).

31. *Id.* at 867.

32. DUKEMINIER ET AL., *supra* note 27, at 892–93.

33. Stoebuck, *supra* note 30, at 867.

34. SPRANKLING & COLETTA, supra note 27, 717–18. *See also* STOEBUCK & WHITMAN, *supra* note 27, at 473–90.

35. STOEBUCK & WHITMAN, *supra* note 27, at 492, 495–99.

36. *See* CLARK, supra note 29, at 72; Susan French, *Toward a Modern Law of Servitudes: Reweaving the Ancient Strands*, 55 S. CAL. L. REV. 1261, 1281–82 (1982).

37. RESTATEMENT (THIRD) OF PROP.: SERVITUDES ch. 3, intro. note, at 346 (AM. LAW INST. 2000).

that affordability covenants often will not satisfy the requirements of horizontal privity nor that the benefit of the covenant touch and concern the land. Moreover, this section explains how affordability covenants may be at risk of being invalidated as unreasonable restraints on alienation.

a. Affordability Covenants Typically Comply with the Statute of Frauds, Intent to Run, Vertical Privity, and Notice Requirements

Affordability covenants are usually created by express grant from the burdened land owner to a benefiting public body with language stating "this covenant is intended to bind successors in interest and run with the land" or the like.[38] This writing usually satisfies the Statute of Frauds and provides evidence of the parties' intent that the covenant should run with the land.[39] Affordability covenants are typically recorded as their own, free-standing documents in the chain of title of the burdened property, but may also be included as covenants in a deed, ground lease, or even (unwisely) mentioned in a deed or ground lease but fully articulated in an unrecorded document.[40] This recording usually supplies subsequent purchasers with valid constructive notice. Finally, because affordability covenants apply to residential real estate, which is typically conveyed in its entirety in fee simple, there is rarely concern with the vertical privity requirement for real covenants and equitable servitudes.[41]

b. Affordability Covenants Often Lack Horizontal Privity

It is less clear that affordability covenants meet the requirements for horizontal privity traditionally required for a real covenant to run at common law. The majority rule in American courts is that horizontal privity exists when part or all of an estate is conveyed from one party to another, as in the conveyance of a leasehold, easement, or fee estate.[42] In

38. *See generally* HOME Investment Partnerships Program Rule, 24 C.F.R. § 92.252(e)(1) (2013).

39. *E.g.*, New Jersey's mandatory covenant form at N. J. ADMIN. CODE §5:80-26.1 (2017).

40. *See generally* Dieckmeyer v. Redevelopment Agency of Huntington Beach, 127 Cal. App. 4th 248 (2005) (finding that a Deed of Trust secured both affordability restrictions and Note and, therefore, prepayment of the Note did not entitle the property owner to release of the Deed of Trust until expiration of the affordability restriction); Huntington Beach v. Lee, No. 30-2009-00329477, 2015 WL 10635010, at *5 (Cal. Super. Ct. Aug. 17, 2015) (finding the covenant unenforceable because the defendant bought a condominium unit without actual or constructive notice when the legal description attached to the covenant failed to properly identify the subject unit).

41. *See* STOEBUCK & WHITMAN, *supra* note 27, at 482.

42. *See* DUKEMINIER ET AL., *supra* note 27, at 895; STOEBUCK & WHITMAN, *supra* note 27, at 485.

the twentieth century, American courts broadened their view of privity to allow homeowners' associations to enforce covenants as agents of neighboring landowners.[43] This development is significant because homeowners' associations sometimes own no interest in land at all,[44] which means that there is nothing upon which a covenant benefit can attach. Therefore, property-less homeowners' associations lack both horizontal and vertical privity.

Applying the horizontal privity requirement to affordability covenants, there is a clear case for horizontal privity when there is a conveyance of real estate from a municipality to the affordable housing developer. For example, a city sale, grant, or ground lease of land that it owns to an affordable housing developer through its public disposition regulations should constitute horizontal privity.[45] However, where a municipality merely lends or grants money to an affordable housing project without having conveyed the real estate for the project, it is less certain that a court will find that the horizontal privity requirement has been met.[46]

Of course, this problem with horizontal privity can be resolved (though perhaps not easily) by conveying the real estate to the public body and then back to the intended owner, once again. Alternatively, there may be an argument that the owner's granting of a deed of trust to the public body to secure repayment of loan funds or performance of affordability covenant obligations creates a contemporaneous property interest sufficient to create horizontal privity.[47] For example, in *Dieckmeyer v.*

43. *See* Neponsit Property Owners' Ass'n., Inc. v. Emigrant Indus. Sav. Bank, 15 N.E.2d 793, 798 (N.Y. 1938).

44. *E.g.*, in *Neponsit*, a developer constructed a neighborhood and conveyed each parcel to homebuyers with a covenant requiring each homeowner to pay a neighborhood association fee. The developer assigned the benefit of the covenant to a neighborhood association, created by the developer, which owned no real estate whatsoever. When the neighborhood association attempted to enforce the covenant to pay dues against the defendant, the defendant challenged the validity of the covenant because the plaintiff neighborhood association was not in horizontal privity with the developer. *Id.* at 797–98.

45. In *Fairfax Cty. Redevelopment & Hous. Auth. v. Riekse,* the Housing Authority sold the property to the Riekses' predecessors in interest and included the affordability covenant in the deed at the time of conveyance. 78 Va. Cir. 108, 108 (2009). In *Oceanside v. McKenna*, the City's Community Development Commission sold the property to the affordable housing developer and recorded the affordability covenant at the time of conveyance. 215 Cal. App. 3d 1420, 1423 (1989).

46. *See* Montgomery Cty. v. May Dep't Stores Co., 721 A.2d 249, 257, 259 (Md. 1998) (finding that the affordability covenant instrument affecting a single-family home did not specifically create a lien against the property, nor was it a right or estate in land and, therefore, the county's right to surplus proceeds of the foreclosure sale was that of a general creditor, subordinate to other, prior recorded, judgement creditors and the purchase money mortgage).

47. In one New York case, a servitude was enforced where the covenantee was a purchase money mortgagee. Without directly addressing the issue, the court apparently

Redevelopment Agency of Huntington Beach, the California Appellate Court declined to release the deed of trust held by the municipality when the homeowner prepaid her Note to the municipality in full, because the court concluded that the deed of trust also secured the homeowner's promise to abide by the affordability restrictions contained in the conditions, covenants, and restrictions of the subdivision and in the homeowner's deed.[48]

c. The Benefit of Affordability Covenants Often Does Not Touch or Concern Land

It is also unclear whether the benefit of an affordability covenant can be said to "touch and concern" the land. Traditionally, for the burden of a covenant or servitude to run with the burdened estate, both the burden and the benefit of the covenant must "touch and concern" parcels of real estate.[49] This necessitates the existence of a "benefiting estate."[50]

When the benefit of a covenant or servitude does not touch and concern a benefiting estate, but instead benefits an individual or private party, the benefit is said to be "in gross."[51] Regardless of whether the burden of a covenant runs to a subsequent owner when the benefit is held in gross, a handful of courts have held that the covenant as between the original grantor and grantee is invalid based on the public policy favoring free alienability of land where there is no benefiting estate at the time the covenant is created.[52]

The benefiting party in an affordability covenant is typically a local body of government or a local housing agency that holds the benefit in

assumed that a mortgage was a sufficient property interest to entitle the benefiting party to enforcement of the covenant. *See* Bill Wolf Petroleum Corp. v. Chock Full of Power Gasoline Corp., 41 A.D.2d 950, 951 (N.Y. 1973).

48. In *Dieckmeyer*, the court did not address horizontal privity because it was not in dispute – the homeowner entered into the affordability covenant upon conveyance of the property from the private developer of the condominium complex. Dieckmeyer v. Redevelopment Agency of Huntington Beach, 127 Cal. App. 4th 248, 258 (2005).

49. As stated by Thomas E. Roberts:

> On the burden side, the generally accepted test is that in order for a transferee of the original promisor to be bound, both the benefit and burden must touch and concern, or be appurtenant to, land. In other words, not only must the promisor have land that is affected by the promise, but so too must the promise must also [sic] have land affected. If the benefit of the promise does not concern or relate to land, then the benefit is regarded as personal, or in gross, and the successor to the promisor will not be bound.

Thomas E. Roberts*, Promises Respecting Land Use – Can Benefits be Held In Gross?*, 51 MO. L. REV. 933, 937 (1986).

50. *Id.*

51. *Id.* at 934. *See also,* STOEBUCK & WHITMAN, *supra* note 27, at 440.

52. *See* Roberts, *supra* note 49, at 938.

gross—not for the benefit of another estate in land.[53] The majority common law rule would find these covenants, whose benefits are held in gross by a government agency, unenforceable against subsequent holders of the burdened estate.[54] For example, in *Wilmurt v. McGrane*, the New York Court of Appeals found that a covenant made by a landowner to the state Department of Health could not run because the Department of Health owned no land to which the benefit of the covenant could attach.[55]

Nonetheless, in enforcing affordability covenants, most courts have not found the touch and concern requirement an insurmountable obstacle, even if their rationales are not always clear. For example, in *Nordbye v. BRCP/GM Ellington*, an affordable housing developer recorded an affordability covenant for the benefit of the Oregon Housing and Community Services Department ("OHCS") and income-qualifying former, current, and future tenants of the property.[56] In preparing for a foreclosure sale of the property, OHCS and the subsequent owner of the property entered into and recorded a release of the property's "Extended Use Agreement" (an affordability covenant).[57] Ms. Nordbye, a resident of the property, sued for declaratory and injunctive relief to enforce the affordability covenant despite the recorded release agreement.[58] The foreclosure buyer argued that the affordability covenant was invalid and never ran with the land because there was no vertical privity and the benefit of the covenant did not touch and concern an estate of OHCS.[59] Rather than addressing these challenges to the requirement for a running real covenant directly the court dismissed them out of hand with an unsatisfying contract law rationale, relying on the fact that the original parties deemed the requirements for a running covenant satisfied in the original instrument.[60]

53. *See* RESTATEMENT (THIRD) OF PROP.: SERVITUDES (AM. LAW INST. 2000).

54. *See* Roberts, *supra* note 49, at 960 (arguing that a benefit in the public interest should be a valid substitute for a dominant estate).

55. *See* Wilmurt v. McGrane, 16 A.D. 412, 416 (N.Y. 1897); *but see* Bill Wolf Petroleum Corp. v. Chock Full of Power Gasoline Corp., 41 A.D.2d 950, 951 (N.Y. 1973) (finding that a mortgagee was entitled to enforce covenant in equity).

56. *See* Nordbye v. BRCP/GM Ellington, 246 Or. App. 209, 213–15 (2011).

57. *See id.* at 216–17.

58. *See id.* at 217.

59. *Id.* at 225.

60. The court suggested that the original parties created a running real covenant binding on subsequent purchasers based solely in contract law. Indeed, the court continued with a circumlocutory, "we are not aware of any authority supporting the proposition that such an agreement ["deemed satisfactory" language] is legally ineffective." *Id.* The rationale misses the opportunity to point out that all of the requirements for a running covenant, including privity and the requirement that the covenant touch and concern an estate of the grantee, are satisfied as between the grantor and Ms. Nordbye as a tenant beneficiary under the covenant.

There is one instance of a court specifically finding that an affordability covenant does touch and concern the land.[61] In *Fairfax County Redevelopment and Housing Authority v. Riekse,* the Virginia Circuit Court looked only to whether the burden of the covenant touched and concerned the burdened land and relied heavily on public policy and contract justifications for the affordability covenant.[62] In several other cases, the courts simply ignored the requirement that the benefit of a covenant run with the land.[63]

d. Affordability Covenants are Almost Always Unreasonable Restraints on Alienation

Beyond the problem of failing to meet the horizontal privity and touch and concern prongs of the real covenants and equitable servitudes tests, affordability covenants run the risk of being found invalid as unreasonable restraints on alienation. Until the twentieth century, running covenants and servitudes were disfavored restraints on alienation that prevented real property from being put to its highest and best use.[64] In traditional property law, restraints on alienation are divided into direct and indirect restraints.[65] A direct restraint is "a provision which, by its terms, prohibits or penalizes the exercise of the power of alienation."[66] At common law, direct restraints on alienation are generally void.[67] Direct

61. Fairfax Cty. Redevelopment & Hous. Auth. v. Riekse, 78 Va. Cir. 108, 114 (2009) (stating, "[a]ccordingly, sale of a property to carry out the Housing Authority's goal of providing "safe, decent, and sanitary housing for those citizens with low or moderate incomes" touches and concerns this property") (citing VA. CODE ANN. § 36–3 (2018)).

62. In addition, the Virginia Circuit Court stated that:

> The Housing Authority sold this property to the Tovars pursuing the goals of the Act and the Tovars purchased the property with the condition that furthered the purpose of the Act. If I were to adopt a narrow interpretation of "touch and concern the land" by holding that an unfettered sale of the property did not "touch and concern" the land I would frustrate actions taken by the Plaintiff and agreed to by the Grantees in pursuit of the legislative goals set out for it in Virginia Code § 36–2.

Id. at 113.

63. In *McKenna*, the court treated an affordability restriction contained in a neighborhood's Covenants, Conditions, and Restriction ("CC&Rs") as enforceable like any other CC&Rs, despite the fact that the parties authorized to enforce the CC&Rs are the City and the housing commission. 215 Cal. App. 3d 1420, 1423 (1989).

64. *See* Stoebuck, *supra* note 30, at 885–86; Charles E. Clark, *Limiting Land Restrictions*, 27 A.B.A. J. 737, 739 (1941).

65. *See* LEWIS M. SIMES, HANDBOOK OF THE LAW OF FUTURE INTERESTS 237 (2d ed. 1966); RESTATEMENT (SECOND) OF PROP.: DON. TRANS. I II INTRO. NOTE (1983); RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 3.4 cmt. b (AM. LAW INST. 2000).

66. SIMES, *supra* note 65, at 237.

67. *See id*. at 237–52 (cataloguing the three kinds of direct restraints on alienation, disabling restraints, forfeiture restraints, and promissory restraints, and explaining the limited circumstances when forfeiture and promissory restraints might be enforceable at common law); DUKEMINIER ET AL., *supra* note 27, at 232–33.

restraints include prohibitions on transfers without consent of a third party, prohibitions on transfers to particular persons, requirements for transfers to particular persons, options to purchase land, and rights of first refusal.[68]

Affordability covenants typically include one or more of the direct restraints listed above.[69] For example, the affordability covenants involved in several of the cases discussed above, as well as the New Jersey statutory affordability covenant form, all prohibit transfers of subject properties without prior agency approval and allow transfers only to eligible low-income buyers.[70] As discussed above, the affordability covenants in *Riekse* and *Montgomery County v. May Department Stores Co.* granted the county housing agencies options to repurchase the subject properties, another type of direct restraint.[71]

Throughout the twentieth century, some jurisdictions have turned away from invalidating all direct restraints on alienation in favor of the view that restraints on alienation may be valid if they are reasonable.[72] Reasonableness is determined by balancing the justification for the restriction against the quantum of restraint.[73] One of the three factors typically considered in the balancing test is the duration of the restriction—the longer the covenant, the greater the quantum of restraint, the more likely the covenant will be found unreasonable and thus unenforceable.[74] To the extent that common law calls into question the enforceability of affordability covenants as direct restraints on alienation,

68. *See* RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 3.4 comment b (AM. LAW INST. 2000).

69. *See* N.J. ADMIN. CODE § 5:50-26 (2018); *see also* Payne v. Payne, No. 15 MISC 000125, 2016 WL 1230098, at *2 (Mass. Land Ct. Mar. 30, 2016).

70. See Society Hill at Piscataway Condo. Ass'n., Inc. v. Twp. of Piscataway, 138 A.3d 596, 598 (N.J. Super. Ct. Law Div. 2016); *Payne*, 2016 WL 1230098, at *2; Dieckmeyer v. Redevelopment Agency of Huntington Beach, 127 Cal. App. 4th 248, 250–52 (2005) ; Huntington Beach v. Lee, No. 30-2009-00329477, 2015 WL 10635010, at *1 (Cal. Super. Ct. Aug. 17, 2015); N.J. ADMIN. CODE § 5:50-26 (2018).

71. Fairfax Cty. Redevelopment & Hous. Auth. v. Riekse, 78 Va. Cir. 108, 108 (2009); Montgomery Cty. v. May Dep't Stores Co., 721 A.2d 249, 252 (Md. 1998).

72. *See* In re Tamen, 22 F.3d 199, 205 (9th Cir. 1994); Mardis v. Brantley, 717 So.2d 702, 709 (2d Cir. 1998); Tovrea v. Umphress, 556 P.2d 814, 818–21 (Ariz. Ct. App. 1976); Richard E. Manning, *The Development of Restraints on Alienation Since Gray*, 48 HARV. L. REV. 373, 374 (1935) (exploring, and supporting, broader judicial acceptance of racially restrictive covenants at the time, stating, "the courts will necessarily be influenced by the extent to which elimination of social friction and maintenance of property values may be secured by upholding such restraints").

73. *See* Alfaro v. Cmty. Hous. Improvement Sys. & Plan. Ass'n, 141 Cal. App. 4th 1356, 1376 (Cal. Ct. App. 2009).

74. Metro. Dade Cty. v. Sunlink Corp., 642 So.2d 551, 552–53 (Fla. Dist. Ct. App. 1992) (considering duration of covenant, 30 years, with automatic 10-year extensions, unless a majority of neighboring property owners consent to release, to be unreasonable restraint on alienation); Clark, *supra* note 64, at 739; Manning, *supra* note 72, at 381–91.

perpetual affordability covenants are even more suspect; increasing the risk that the covenant will be deemed unreasonable.[75]

Despite the common law's position on direct restraints on alienation, three California cases have directly addressed whether affordability covenants are unreasonable restraints on alienation, and all three have found that they are reasonable and enforceable.[76] In *Martin v. Villa Roma*, *Oceanside v. McKenna*, and *Alfaro v. Community Housing Improvement Systems & Planning Ass'n*, the California Court of Appeals applied the balancing test and found that the covenants supported a strong public interest in creating affordable housing.

Of particular note, the *Alfaro* plaintiffs challenged the affordability covenant as unreasonable because of the fact that it was perpetual in duration.[77] The court dodged the issue without directly addressing the validity of perpetual covenants by finding that the covenant created was not of perpetual duration but was limited by the covenant language to the duration "while the 'development . . . remains in existence in or upon any part of, and thereby confers benefit upon, the subject property described herein.'"[78]

3. Affordability Covenants Often Do Not Meet the Requirements of Valid Equitable Servitudes

It is similarly uncertain whether affordability covenants pass common law muster as equitable servitudes. As mentioned above, the test for the validity of equitable servitudes also requires that the servitude touch and concern the benefiting parcel.[79] Direct restraints on alienation are similarly likely to invalidate an equitable servitude. Since modern American courts have merged law and equity, and the requirements for equitable servitudes are slightly more liberal than those for real covenants, equitable servitudes have nearly replaced real covenants in American courts.[80] The majority of equitable servitudes today are upheld as

75. "In determining the injurious consequences likely to flow from enforcement of a restraint on alienation, the nature, extent and duration of the restraint are important considerations." RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 3.4 cmt. c (AM. LAW INST. 2000).

76. *See* Martin v. Villa Roma, 131 Cal. App. 3d 632, 635 (1982); *see also* Oceanside v. McKenna, 215 Cal. App. 3d 1420,1427–28 (1989); *see also Alfaro*, 141 Cal. App. 4th at 1376–77.

77. *See Alfaro*, 141 Cal. App. 4th at 1378.

78. *Id.* at 1379.

79. *See* STOEBUCK & WHITMAN, *supra* note 27, at 495 ("To run, equitable restrictions must touch and concern benefited and burdened land, and the requirement should be exactly the same as for real covenants."); Roberts, *supra* note 49, at 934 ("[M]ost courts in this country deny enforceability to covenants and servitudes in gross.").

80. *See* STOEBUCK & WHITMAN, *supra* note 27, at 493.

neighborhood restrictions in common interest communities.[81] These so-called "reciprocal servitudes" exist when all houses in a neighborhood are bound by the same covenants, conditions, and restrictions declared by the developer of the neighborhood for the benefit of each neighboring house.[82] Often affordability covenants apply to fewer than all of the properties in a common interest community and thus are not reciprocal servitudes. For example, in *Riekse*, the Virginia Circuit Court found that the affordability restriction failed as an equitable servitude because it was not part of a common neighborhood plan imposed by a common grantor.[83] The Virginia rule, which limits equitable servitudes to only those restrictions applied to an entire subdivision by a common developer or grantor, is unusual. In the majority of jurisdictions, the difference between real covenants and equitable servitudes has been functionally erased.[84]

4. Affordability Covenants Fare Much Better Under the Restatement

While affordability covenants may not meet the traditional requirements for real covenants and equitable servitudes at common law, they are by no means the only modern land use restrictions to encounter this problem. The Restatement was published in 2000 as an ambitious effort to not only unify the law of servitudes, but also to modernize the law to better accommodate modern land use restrictions like common interest community covenants, affordability covenants, and conservation easements.[85] The effect of this Restatement, however, continues to unfold.

Private land use restrictions are a notoriously confusing area of traditional property law.[86] The Restatement attempts to modernize and streamline this disjointed, contradictory, and overlapping body of law[87] by stripping away many of the formalistic eccentricities of real covenants and

81. *See id.* at 504–14.

82. *See id.* at 505.

83. *See* Fairfax Cty. Redevelopment & Hous. Auth. v. Riekse, 78 Va. Cir. 108, 113 (2009) ("By definition, an equitable servitude can only arise when a common grantor imposes a common restriction upon land developed for sale in lots."). However, in most jurisdictions, real covenants and equitable servitudes are functionally merged, so that remedies at law or in equity may be permitted no matter the technical name of the restriction. *See, e.g.*, Oceanside v. McKenna, 215 Cal. App. 3d 1420, 1426 (1989) ("Here, the CC&Rs are covenants running with the land. The Legislature has recognized that 'covenants and restrictions in the [document creating a condominium project] shall be enforceable equitable servitudes, unless unreasonable . . . .'").

84. STOEBUCK & WHITMAN, *supra* note 27, at 493.

85. *See* RESTATEMENT (THIRD) OF PROP.: SERVITUDES intro. (AM. LAW INST. 2000).

86. Professor Susan French describes the law of easements, real covenants, and equitable servitudes as ". . . the most complex and archaic body of American property law remaining in the twentieth century," and includes a bevy of scholarly lamentation. French, *supra* note 36, at 1261 n.1.

87. *See* RESTATEMENT (THIRD) OF PROP.: SERVITUDES intro. (AM. LAW INST. 2000).

equitable servitudes under the single term "covenant that runs with land."[88] As a guiding principal, the Restatement attempts to jettison archaic technical rules that no longer serve a compelling purpose and replace them with unified rules based on freedom of contract, notice, and conformity with public policy.[89] These rules reflect the reality that throughout the twentieth century, the overwhelming majority of covenants and servitudes have been created as restrictions to govern private residential development or "common-interest communities,"[90] and have been overwhelmingly enforced as devices to enhance value and marketability of private residential property.[91] The Restatement contains several ambitious and controversial articulations of the law of servitudes,[92] but the three that most pertain to the enforceability of perpetual affordability covenants are the Restatement's treatment of the touch and concern doctrine,[93] direct restraints on alienation,[94] and the shifting of the burden of proof in establishing the validity of a servitude.[95]

a. The Restatement's Supersession of the Touch and Concern Doctrine Aids the Enforceability of Affordability Covenants

Arguably, the articulation in the Restatement that has garnered the most criticism by scholars is the section that declares the supersession of the touch and concern doctrine.[96] Section 3.2 of the Restatement states,

> Neither the burden nor the benefit of a covenant is required to touch or concern land in order for the covenant to be valid as a servitude. Whether

88. *Id.* § 1.4.

89. *See* Susan F. French, *Design Proposal for the New Restatement of the Law of Property Servitudes*, 21 U.C. DAVIS L. REV. 1213, 1231 (1988).

90. RESTATEMENT (THIRD) OF PROP.: SERVITUDES intro. (AM. LAW INST. 2000). . It has been noted "that the subject of running covenants has become virtually synonymous with covenants in subdivisions and condominiums." *Id.* The Restatement has been praised for "squarely situat[ing] the modern problems with servitudes in the context of the common interest community." *Id.*

91. *See* French, *supra* note 89, at 1217–18.

92. This Article will not explore the Restatement's extensive treatment of law related specifically to Common-Interest Communities and will only briefly consider the Restatement's attempt to discontinue the terms "real covenants" and "equitable servitudes" under the unified term "covenant that runs with land." RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 1.4. (AM. LAW INST. 2000).

93. *See id.* § 3.2.

94. *See id.* § 3.4.

95. *See id.* § 3.1.

96. *See* Note, *Touch and Concern, The Restatement Third of Property: Servitudes, and A Proposal*, 122 HARV. L. REV. 938, 938 (2009); A. Dan Tarlock, *Touch and Concern is Dead, Long Live the Doctrine*, 77 NEB. L. REV. 804, 805 (1998); Stewart Sterk, *Freedom from Freedom of Contract: The Enduring Value of Servitude Restrictions*, 70 IOWA L. REV. 615, 661 (1984).

> a servitude is valid is determined under the general rule stated in §3.1 and the particular rules stated in §§ 3.4 through 3.7.[97]

There is confusion in the scholarship over whether the Restatement eliminates the doctrine of touch and concern,[98] or retains the doctrine but eschews the label. Restatement Reporter Professor French suggested that the Restatement's intention is not to eliminate the doctrine, but only to discontinue use of what has become a confusing term of art.[99]

Agreeing that the Restatement has this effect, Stoebuck and Whitman trace the continuation of the doctrine through the various sections of the Restatement.[100] They explain that Section 5.2 of the Restatement permits "appurtenant" benefits and burdens to run,[101] and § 1.5 defines "appurtenant" as meaning "that the rights or obligations of a servitude are tied to ownership or occupancy of a particular unit or parcel of land."[102] The comment to § 1.5 explains, "[o]nly appurtenant benefits and burdens run with land . . . ."[103] However, the Restatement deviates significantly from the common law implications of the touch and concern doctrine by declaring that an appurtenant burden (for example, a perpetual affordability covenant affecting a specific parcel of real estate) can run even if the benefit of the covenant is held in gross (for example, when the beneficiary of an affordability covenant is a municipality).[104]

b. Affordability Covenants are Not Necessarily Unreasonable Restraints on Alienation

In keeping with the Restatement's goal to uphold servitudes under the rationale of freedom of contract subject to limitations based on illegality, unconstitutionality, or violations of public policy,[105] the Restatement allows direct restraints on alienation so long as the restraint is reasonable.[106] In determining whether a direct restraint is reasonable, the Restatement adopts the balancing tests articulated in *Oceanside v.*

97. RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 3.2 (AM. LAW INST. 2000).

98. Tarlock, the editor of the Harvard Law Review, and Dukeminier fall into the camp of viewing the Restatement as eliminating the doctrine altogether. Tarlock, *supra* note 96, at 805; Note, *supra* note 96, at 938; DUKEMINIER, ET AL., *supra* note 27, at 918.

99. *See* RESTATEMENT (THIRD) OF PROP.: SERVITUDES 3–4 Intro. Note (AM. LAW INST. 2000).

100. *See* STOEBUCK & WHITMAN, *supra* note 27, at 480.

101. *See* RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 5.2 (AM. LAW INST. 2000).

102. *Id.* § 1.5.

103. *Id.* § 1.5 cmt. a.

104. *See id.* § 2.6 cmt. d ("[B]enefits of affirmative and negative covenants . . . can be held in gross. Benefits in gross are useful in a variety of transactions in which burdens running with the land are desired, are permitted whether the servitude is a covenant, and easement or a profit.").

105. *See id.* § 3.1 cmt. a (2000).

106. *See id.* § 3.4.

McKenna and similar cases.[107] In weighing the utility of the restraint, the Restatement mentions servitudes used to preserve affordable housing,[108] but goes on to state, "[i]n determining the injurious consequences likely to flow from enforcement of restraint on alienation, the nature, extent, and duration of the restraint are important considerations."[109] In perhaps the most extensive acknowledgement of affordability covenants in any generalized treatment of servitudes, the Restatement actually contains a comment specifically addressing affordability covenants:

> Programs designed to provide affordable housing depend on severe restrictions on alienation to prevent resales at market prices. Such restraints include limitations on the price for which units can be sold, as well as limitations on permissible transferees. They may also include requirements that the owner sell when the owner ceases to be a member the group for whom the housing is provided. Such restraints are reasonable so long as designed to serve a legitimate purpose and so long as they permit a reasonable opportunity for the owner to transfer the unit.[110]

Such direct recognition of affordability covenants offers welcomed clarity in determining whether these direct restraints on alienation should nonetheless be deemed enforceable. By referring to "units" and obligations to sell when "the owner ceases to be a member of the group for whom the housing is provided," it is clear that the comment contemplates affordability covenants in the single-family homeownership context only, not affordability covenants as applied to owners of multi-family rental properties. In the context of perpetual affordability covenants affecting large, multi-family rental properties, the Restatement's reasonableness test for affordability restraints seems anemic. For example, the "reasonable opportunity for the owner to transfer" language in the Restatement seems to be referring to the certification process typically implemented to qualify potential buyers of affordable ownership housing.[111] In contrast, one can imagine various scenarios that regularly arise in the affordable, multi-family, rental housing industry that are beyond the Restatement's guidance, such as the impact of a covenant on a project owner's ability to refinance, recapitalize a project, or re-organize an owner-entity.

However, to the extent that the Restatement intends to shift enforceability determinations regarding servitudes away from archaic

107. *See id.*
108. *See id.* § 3.4 cmt c.
109. *Id.*
110. *Id.* § 3.4 cmt. h.
111. *Id.*; *see, e.g.*, *Land Use Covenants*, *supra* note 14.

black letter law and toward judicial oversight based on reasonableness,[112] the comment regarding affordable housing as reasonable restraints on alienation may be successful.

c. The Restatement Shifts the Burden of Proof for Servitude Validity

While much ink has been spilt about the Restatement declaration that the touch and concern doctrine is superseded, the greatest seismic shift in the Restatement is definitely in switching the presumption of validity of servitudes.[113] Traditionally, common law has disfavored servitudes as antithetical to fundamental precepts of fee simple ownership.[114] In contrast, the Restatement presumes that servitudes are valid according to modern principles of freedom of contract unless proven otherwise.[115] Perhaps the lack of controversy about section § 3.1 of the Restatement is proof that the Restatement has, indeed, documented well-established changes in the law of servitudes that have occurred over the course of the twentieth century with the advent of common interest communities.[116] As with upholding the validity of covenants in common interest communities and conservation servitudes, the Restatement's shifting of the burden to presume the validity of an affordability covenant greatly strengthens the validity and enforceability of perpetual affordability covenants.

d. The Restatement and Judicial Treatment Find Affordability Covenants Valid Where Tradition Common Law Suggests They are Not

Taken as a whole, the Restatement categorically improves the enforceability of affordability covenants, including perpetual affordability covenants, as compared to traditional common law. Not only does the

112. The Restatement declares this intention to shift the law of servitudes away from archaic black letter law while "preserving the judiciary's traditional role in protecting the public interest in maintaining the social utility of land resources." RESTATEMENT (THIRD) OF PROP.: SERVITUDES 3 Intro. Note (AM. LAW INST. 2000); Tarlock, *supra* note 96, at 821–22 ("The primary goal of the Restatement (Servitudes) is to articulate a non-constitutional standard of judicial review to address [lifestyle restrictions and restrictions that fail the reasonableness test].").

113. *See* RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 3.1 cmt. A (AM. LAW INST. 2000).

114. *See id.*; GERALD KORNGOLD, PRIVATE LAND USE ARRANGEMENTS: EASEMENTS, REAL COVENANTS, AND EQUITABLE SERVITUDES § 8.02 (1990).

115. *See* RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 3.1 cmt. a (AM. LAW INST. 2000).

116. As the Restatement explains, "the view that the wide-spread use and judicial and legislative acceptance of servitudes justifies a position that applies the concept of freedom of contract to creation of servitudes is now generally accepted." *Id. See also* Korngold, *supra* note 114, § 10.01.

Restatement reflect a fundamental shift toward upholding the validity of all servitudes under principles of freedom of contract,[117] but it also eliminates the potential obstacles of horizontal privity,[118] the touch and concern doctrine,[119] and the concern that perpetual affordability covenants will be found invalid as direct restraints on alienation.[120] Unfortunately, judicial reliance on the Restatement has been slow to gain traction.[121] Nonetheless, the common law of servitudes has evolved over nearly five centuries.[122] While relatively few cases so far have relied on the Restatement's treatment of the touch and concern doctrine, abolition of horizontal privity, or unification of real covenants and equitable servitudes with a presumption of validity,[123] numerous courts have discussed or considered the Restatement's description of modern servitude law as it pertains to these topics.[124] Perhaps more significantly, a review of case law

117. *See* RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 3.1 (AM. LAW INST. 2000).

118. *See id.* § 2.4.

119. *See id.* § 3.2.

120. *See id.* § 3.4.

121. Note, *supra* note 96, at 938 ("As of this writing, only one line of cases has used the ALI's new [public policy in lieu of the touch and concern] test."). As of this writing, only the Washington Court of Appeals has cited to the Restatement (Servitudes) § 2.4 in support of the premise that privity is no longer required for the creation of a servitude. Lake Limerick Country Club v. Hunt Mfg. Homes, Inc., 120 Wash. App. 246, 259 (2004). Only courts in California and Texas have sited to the Restatement (Servitudes) § 3.1 in support of the premise that servitudes are valid unless illegal, unconstitutional, or contrary to public policy. Cebular v. Cooper Arms Homeowners Ass'n, 142 Cal. App. 4th 106, 122 (2006); Navasota Resources, L.P. v. First Source Texas, Inc., 249 S.W.3d 526, 538 (Tex. Ct. App. 2008). No courts have cited or quoted the Restatement (Servitudes) § 3.2 to justify a claim that the touch and concern doctrine has been superseded. Six states have relied on Restatement (Servitudes) § 3.4 in determining whether a servitude was invalid as an unreasonable direct restraint on alienation, however, none of the cases involved affordability covenants. *See* Shaffer v. Bellows, 260 P.3d 1064, 1071–72 (Alaska 2011); Dye v. Diamente, 510 S.W.3d 759, 764 (Ark. 2017); Atlantic Richfield Co. v. Whiting Oil and Gas Corp., 320 P.3d 1179, 1185 (Colo. 2014); Cape May Harbor Village & Yacht Club Ass'n, Inc. v. Sbraga, 421 N.J. Super. 56, 71–74 (N.J. Super. Ct. App. Div. 2011); *Navasota Resources*, 249 S.W.3d at 538; SKI, Ltd. v. Mountainside Properties, Inc., 114 A.3d 1169, 1178–79 (Vt. 2015).

122. Most scholars trace the origins of real covenants at English common law to Spencer's Case, 77 Eng. Rep. 72 (1583).

123. *See supra* note 121 and accompanying text.

124. As of this writing, the following courts have discussed or considered the Restatement's position on the following: (1) that horizontal privity is no longer required for a real covenant to run with the land; and (2) that servitudes are presumed valid. No courts have discussed or considered the Restatement's assertion that the touch-or-concern doctrine has been superseded. Horizontal privity: In re Energytec, Inc., 739 F.3d 215, 222–23 (5th Cir. 2013); Wykeman Rise, L.L.C. v. Federer, 52 A.3d 702, 714–15 (Conn. 2012); Sonoma Dev., Inc. v. Miller, 515 S.E.2d 577, 579 (Va. 1999). Servitudes Presumed Valid: First Unitarian Church of Salt Lake City v. Salt Lake City Corp., 308 F.3d 1114, 1122 (10th Cir. 2002), *cert. denied,* 539 U.S. 941 (2003); Clinger v. Hartshorn, 89 P.3d 462, 468 (Colo. App. 2003), Wykeman Rise, L.L.C. v. Federer, 52 A.3d 702, 714, 715 (Conn. 2012); Grovenburg v. Rustle Meadow Assocs., L.L.C. 165 A.3d 193, 208 (Conn. App. Ct. 2017);

related to affordability covenants suggests that courts tend to rule in accordance with the Restatement regardless of whether they rely, discuss, or even mention the Restatement.[125] This suggests that at least as it pertains to affordability covenants, the Restatement's perspective on the state of modern servitude law accurately reflects changing judicial norms about the enforceability of servitudes. [126]

B. Affordability Covenants are Public Land Use Restrictions in Function, Not Form

In the section above, the Article demonstrated how affordability covenants often do not meet all necessary common law requirements to "run with the land." Although the Restatement approach significantly improves the legitimacy of affordability covenants at common law, and modern courts tend to enforce affordability covenants on public policy, contract, or equitable principles, significant risk remains in relying on the

1515–19 Lakeview Blvd. Condo. Ass'n v. Apartment Sales Corp., 43 P.3d 1233, 1238 (Wash. 2002).

125. The Restatement relies on *Martin*, 131 Cal. App. 3d at 632, in §3.4 comment h, explaining that affordability covenants are not unreasonable restraints on alienation so long as they are designed to further a legitimate purpose and the owner has a reasonable ability to convey the restricted unit.); *see generally* Oceanside v. McKenna, 215 Cal. App. 3d. 1420 (1989) The Restatement also relied on *McKenna*, 215 Cal. App. 3d. at 1420, in its comment h to §3.4, explaining the test for determining whether an affordability covenant is an unreasonable restraint on alienation. *See also* Columbus Park Corp. v. Dep't of Hous. Pres. & Dev., 598 N.E.2d 702, 707 (N.Y. 1992) (relying on contract justifications to uphold multi-family rental housing affordability restrictions); Cannavaro v. Wash. Cmty. Hous., No. CV030091521S, 2005 WL 1433790, at *4–5 (Conn. Super. Ct. May 23, 2005) (relying on the Restatement in combining real covenants, easements, and equitable servitudes under the single label "servitudes" and finding that servitudes can be validly created for the benefit of third parties appurtenant or in gross); Tivoli Stock L.L.C. v. N.Y.C. Dep't. of Hous. Pres. Cmty. Dev., No. 108052/06, 2006 WL 3751468, at *6 (N.Y. Sup. Ct. Dec. 12, 2006) (relying on contract and public policy rationales in upholding affordability restrictions); Fairfax Cty. Redevelopment & Hous. Auth. v. Riekse, 78 Va. Cir. 108, 112–13 (2009) (discussing the court's desire, but lack of authority, to adopt the Restatement's supersession of the touch and concern doctrine, and deeming the doctrine satisfied because of contract and public policy rationales attributed to the appurtenant burden); Nordbye v. BRCP/GM Ellington, 246 Or. App. 209, 225 (2011) (upholding running burden even though the benefit is held in gross by municipality and by third party beneficiaries); 135 Wells Ave., L.L.C. v. Hous. Appeals Comm., 84 N.E.3d. 1257, 1267–68, 358–59 (Mass. 2017) (upholding the validity of an affordability covenant where the benefit was held in gross by the municipality).

126. In the final words of the *Martin v. Villa Roma* decision, in justifying its decision to uphold the affordability covenant at issue in the case, the California District Court of Appeal stated that "[affordability covenants] are imposed pursuant to federal requirements which, in any event, would take precedence over state law." *Martin*, 131 Cal. App. 3d at 635 (citing McCarty v. McCarty, 453 U.S. 210, 220 (1981)). This off-hand justification for affordability covenants based in federal preemption has not been raised by other courts, legislatures, the Restatement, or other scholarly work, therefore, a thorough analysis of the claim is beyond the scope of this paper. However, it is certainly an intriguing topic worthy of further investigation.

common law of property to ensure judicial enforceability of these servitudes. This Article next turns to public land use law as a possible means of shoring the enforcement of affordability covenants and other public/private land use devices.

Zoning is fundamentally a public land use restriction.[127] The Supreme Court defined zoning as "the general plan by which the city's territory is allotted to different uses . . . ."[128] The Court upheld the constitutionality of zoning, generally, as a legitimate exercise of the state police power even though zoning necessarily means restricting the uses and, potentially, the value of privately owned real property.[129] In *Euclid v. Ambler Realty Co.*, Ambler Realty challenged the validity of a municipality's zoning ordinance, generally, arguing that any municipal regime that seeks to restrict Ambler's land use rights as a private property was a violation of Ambler's substantive due process rights under the Fifth and Fourteenth Amendments.[130] In upholding the municipality's zoning ordinance, which created exclusive, single family residential zones and other, more inclusive zones, the Court concluded that the municipality's exercise of the police power in generally creating the zoning ordinance was not arbitrary or unreasonable.[131] However, the Court left open the possibility of finding a specific zoning ordinance arbitrary or unreasonable when weighed against a specific harm to an individual landowner.[132]

Since the early twentieth century more than 97% of cities with 5,000 or more residents have enacted zoning ordinances.[133] To protect against further constitutional challenges, states and municipalities typically adhere to relatively uniform procedural safeguards.[134] For example, all 50 states have passed zoning enabling legislation that empowers municipalities within the state to implement a zoning regime.[135] The vast majority of state enabling legislation is based on the Standard State Zoning Enabling

127. STOEBUCK & WHITMAN, *supra* note 27, at 517–21.

128. Euclid v. Ambler Realty Co., 272 U.S. 365, 392 (1926).

129. *Id*. at 395.

130. *See id.* at 383–84.

131. *See id.* at 392, 395.

132. *See id.* at 395–96.

133. *See* Robert C. Ellickson, *Alt. to Zoning: Covenants, Nuisance Rules and Fines as Land Use Controls*, 40 U. CHI. L. REV. 681, 692 (1973); BARLOW BURKE, UNDERSTANDING THE LAW OF ZONING AND LAND USE CONTROLS 87 (2d ed. 2009).

134. *See* BURKE, *supra* note 133, at 85.

135. *See* DUKEMINIER, ET AL., *supra* note 27, at 982–83; *see* Ellickson, *supra* note 133, at 691–92; BURKE, *supra* note 133, at 87. In addition, according to the drafters of the Standard State Zoning Enabling Act, "[a] general State enabling act is always advisable, and while the power to zone may, in some States, be derived from constitutional as distinguished from statutory home rule, still it is seldom that the home-rule power will cover all the necessary provisions for successful zoning." STANDARD STATE ZONING ENABLING ACT (1928) (*reprinted in* AM. LAW INST., MODEL LAND DEV. CODE 210 Tentative Draft No. 1, 1968) https://bit.ly/2kJm2eQ.

Legislation, which was first published as a suggestion for states by the United States Department of Commerce in 1924.[136] These state enabling statutes not only authorize municipalities to create zoning ordinances that segregate land according to use and area restrictions,[137] but they also establish a uniform regulatory framework to be carried out by two regulatory bodies, a zoning commission[138] and a board of zoning adjustment,[139] to ensure that due process is protected in the municipal exercise of the zoning power.[140] Both the ordinance enactment and proceedings of the administrative bodies are usually subject to additional administrative procedures to safeguard the constitutionality of the municipal action. For example, passage or amendment of the zoning ordinance may be subject to public notice and comment or hearings.[141] Additionally, hearings held by the zoning commission and the board of zoning adjustment are typically subject to procedural due process requirements such as the right to notice, the right to cross examine witnesses, and the right to appeal.[142]

1. Formalistic Differences Between Affordability Covenants and Zoning

At first blush, perpetual affordability covenants and zoning seem to be quite dissimilar enterprises.[143] This stems from their formalistic differences.[144] After all, perpetual affordability covenants arise under contract, by mutual consent of the contracting parties, as a private agreement to restrict the use of a specific piece of real estate. In contrast, zoning is a public legislative and administrative process that sets

136. DUKEMINIER, ET AL., *supra* note 27, at 982–83; *see* STANDARD STATE ZONING ENABLING ACT (1928) (*reprinted in* AM. LAW INST., MODEL LAND DEV. CODE 210 Tentative Draft No. 1, 1968)

137. For example, in the Standard State Zoning Enabling Act, "[t]he legislative body of [municipalities] is hereby empowered to regulate and restrict the height, number of stories, and size of buildings and other structures, the percent of lot that may be occupied, the size of yards, courts and other open spaces, the density of population, and the location and use of buildings, structures, and land for trade, industry, residence, or other purposes . . . ." *Id.*. . . ." STANDARD STATE ZONING ENABLING ACT (1928) (*reprinted in* AM. LAW INST., MODEL LAND DEV. CODE 210 Tentative Draft No. 1, 1968)

138. The legislative body appoints a zoning commission "to recommend boundaries of the various original districts and appropriate regulations to be enforced therein." *Id*. at 217.

139. The board of adjustment may, in appropriate cases and subject to appropriate conditions and safeguards, make special exceptions to the terms of the zoning ordinance. *Id*. at 218.

140. *See* BURKE, *supra* note 133, at 76.

141. *See id.* at 85.

142. *See id.* at 157.

143. *See* 5 RATHKOPF'S THE LAW OF ZONING AND PLANNING §82.2 (4th ed. (2019)).

144. *See id*.

parameters for land uses across an entire municipality in accordance with an overarching comprehensive plan intended to serve the long-term public interest of the jurisdiction.[145]

Beginning in the latter half of the twentieth century, however, zoning innovations have begun to look more like private land use arrangements in form.[146] For example, zoning regulations for overlay districts are "often equally as detailed as the private covenants seen in suburban subdivisions."[147] Zoning for specific projects, as in Planned Unit Development approvals and conditional zoning, are often negotiated like private contracts.[148] These types of innovative, non-Euclidean, zones are intended to give zoning administrators both more flexibility and control over permitted uses on discreet parcels of land.[149] For example, mandatory Inclusionary Zoning laws typically require developers to set aside a portion of their developments as affordable housing and in exchange provide the developments with economic benefits like density bonuses or tax exemptions.[150]

At the same time, affordability covenants are beginning to look a bit more like public land use restrictions in that they are often required by statute or regulation and are based on templates provided by the municipality with little room for negotiation.[151] Similarly, many affordable housing "deals" which give rise to affordability covenants are imbued with a certain halo of procedural due process in that developers of subsidized housing often compete for public subsidy and are selected by a public body in accordance with published selection criteria and a jurisdictional plan.[152] In addition to obtaining zoning entitlements by a zoning commission, to win competitions for public resources, affordable housing developments must often show compatibility with other types of municipal planning, such as an agency affordable housing plan, a smart growth plan, or a comprehensive plan.[153]

145. *See* STOEBUCK & WHITMAN, *supra* note 27, at 517–21.

146. *See* Noah Kazis, *Public Actors, Private Law: Local Governments' Use of Covenants to Regulate Land Use*, 124 YALE L.J. 1790, 1801 (2015).

147. Hannah Wiseman, *Public Communities, Private Rules*, 98 GEO. L.J. 697, 719 (2010).

148. *See* STOEBUCK & WHITMAN, *supra* note 27, at 625–27.

149. *See* BURKE, ET AL., FUNDAMENTALS OF PROP. LAW 785 (2015).

150. *See* Myron Orfield, *Land Use and Housing Policies to Reduce Concentrated Poverty and Racial Segregation*, 33 FORDHAM URB. L.J. 877, 906 (2006).

151. *See, e.g.*, New Jersey's Model Affordability Covenant, N.J.A.C. 5:80-26 App. A (2004).

152. *See, e.g.*, CONN. GEN. STAT. ANN. § 8-30(g) (West 2017).

153. *See, e.g.*, CITY OF N.Y, DEP'T. OF HOUS. PRES. & DEV., 2018 LOW INCOME HOUS. TAX CREDIT QUALIFIED ALLOCATION PLAN 20 (2018); KATHLEEN PATTERSON, LOW-RANKED PROJECTS SECURE AFFORDABLE HOUSING FUNDS, A REPORT BY THE DISTRICT OF COLUMBIA AUDITOR (May 30, 2019), https://bit.ly/2kz6DOk (criticizing the lack of

2. Functional Similarities Between Affordability Covenants and Zoning

The formalistic differences between affordability covenants and zoning may obscure the more important functional similarities. When a public body sets about assembling a privately-owned stock of perpetually affordable housing, the public body is implementing a system of public land use control. The municipality is allocating public resources for the purpose of creating a public benefit – a durable stock of affordable housing. As discussed above, the courts that have enforced affordability covenants have occasionally grappled with the ill-fitting requirements for real covenants and equitable servitudes,[154] but have typically relied, implicitly or explicitly, on the legitimate public purpose the covenant is intended to further. [155] One of the clearest articulations of this public policy justification can be found in the California Supreme Court's rationale for upholding the City of San Jose's Inclusionary Zoning ordinance where the Court drew a parallel between the broad police power of a jurisdiction to engage in zoning and the broad police power of a jurisdiction to impose affordability restrictions through an Inclusionary Zoning ordinance.[156] Notably, the case is argued and decided in the headier plane of deciding whether the ordinance is a valid exercise of the police power or a regulatory taking; there is no discussion of the functional validity of the servitudes required by the ordinance to secure the on-going affordability of subject units.[157]

In the rare instances where courts have considered the functional validity of affordability covenants, some courts have nevertheless resorted to public policy rationales for finding the covenants enforceable rather than applying the common law tests for running covenants or equitable servitudes. For example, in *Martin v. Villa Roma* and *Oceanside v. McKenna,* the California Court of Appeals concluded that affordability covenants are not void as unreasonable restraints on alienation because "they support rather than offend the policies of [California]."[158] In *Reikse*,

transparency in awarding funds to affordable housing developers without a transparent process).

154. Oceanside v. McKenna, 215 Cal. App. 3d 1420, 1426 (1989); Columbus Park Corp. v. Dep't of Hous. Pres. & Dev., 598 N.E.2d 702, 706 (N.Y. 1992); Cannavaro v. Wash. Cmty. Hous., No. CV030091521S, 2005 WL 1433790, at *4–5 (Conn. Super. Ct. May 23, 2005); *Tivoli Stock L.L.C.*, 2006 WL 3751468, at *6; *Riekse,* 78 Va. Cir. at 110–14; Nordbye v. BRCP/GM Ellington, 246 Or. App. 209, 225 (2011).; *135 Wells Ave., L.L.C.*, 84 N.E.3d. at 1268–69.

155. *See supra* note 24 and accompanying text.

156. Cal. Bldg. Indus. Ass'n. v. City of San Jose, 351 P.3d 974, 1000 (Cal. 2015), *cert. denied*, 136 S. Ct. 928 (2016).

157. *Id.*

158. Martin v. Villa Roma, Inc., 131 Cal. App. 3d 632, 635 (1982); *McKenna*, 215 Cal. App. 3d at 1428.

the court grappled with the specific requirements for real covenants and equitable servitudes at common law.[159] After lamenting its lack of authority to adopt the Restatement's position superseding the "touch and concern" requirement for real covenants, the court went on to pointedly interpret the touch and concern requirement broadly enough to encompass an affordability restriction to which the county housing development agency is a party.[160] The *Reikse* court explained that a narrow interpretation of the touch and concern requirement would have resulted in frustrating the legislative intent of the state's affordable housing statute.[161] As discussed above, in *California Building Industry Ass'n,* the court upheld an Inclusionary Zoning ordinance as a valid exercise of the police power without analyzing the validity of the tools intended to secure the affordability of individual units. The court in *Tivoli Stock L.L.C. v. N.Y.C Department of Housing and Community Devevelopment*, makes it clear that an agency's decision regarding the release of a specific covenant is also action pursuant to the police power, subject to rational basis review like other quasi-legislative actions related to zoning.[162] Of course, ensuring the provision of decent, safe, and affordable housing has been recognized as a legitimate public policy objective for governmental agencies since 1934.[163] However, courts have not yet directly and decisively addressed the fundamental legitimacy of a public land use control system based on affordability covenants.

C. Affordability Covenants Belong Among a Set of New, "Hybrid" Public/Private Land Use Controls

The sections above showed that affordability covenants are neither real covenants nor public land use controls. Instead, they are some kind of hybrid. In this subsection, the Article reviews the literature related to other "hybrid" public/private land use devices such as conservation servitudes, conditional zoning, and development agreements to better understand this unconventional set of devices.

When a municipality uses private, negotiated agreements, such as covenants, to allocate public resources or to issue conditional zoning or permitting approvals, it can be difficult to ascertain whether the municipality is exercising its contracting power or its police power.[164]

159. *See Riekse,* 78 Va. Cir. at 109–11. (2009).

160. *Id.* at 112–13.

161. *Id.*

162. Tivoli Stock L.L.C. v. N.Y.C. Dep't of Hous. Pres. & Dev., No. 108052/06, 2006 WL 3751468, at *6 (N.Y. Sup. Ct. Dec. 12, 2006).

163. National Housing Act of 1943, 48 Stat. 1246 (1934); United States Housing Act of 1937, 50 Stat. 888 (1937); s*ee, e.g.*, 2910 Ga. Ave. L.L.C. v. District of Columbia et al., 234 F. Supp. 3d 281, 312 (2017).

164. *See* Wegner, *supra* note 28, at 958.

Depending on how state contract and police powers are blended, municipal action can be "basically legitimate or fundamentally flawed."[165]

Property and land use law scholar, Professor Judith Welch Wegner, examines this question in two contexts. First, she addresses the use of contingent zoning, where a jurisdiction agrees to rezone a parcel of land contingent upon the landowner's entering into agreements or covenants with other parties to develop the land in a specific way. Second, she examines, the use of development agreements, where a public body agrees to provide public benefits, such as land, financing, or tax relief, to a developer in exchange for the developer's promises related to a development project or off-site improvements.[166] Professor Wegner concludes that crucial to the success of these "hybrid" land use devices is the articulation of substantive standards, codified in state legislation and local ordinances, about when and how the tools are to be used,[167] and procedural standards including public participation and judicial oversight.[168]

Conservation servitudes have also been described as "hybrid" land use devices. [169] Environmental law scholar Professor Jessica Owley has described conservation servitudes as "hybrids of property law, contract law and zoning."[170] Environmental science scholars Mary Ann King and Professor Sally Fairfax have described conservation easements as "blurred mosaics of public and private land ownership and management priorities."[171] Conservation easements have much in common with affordability covenants. Like affordability covenants, conservation servitudes are a later-twentieth century innovation that do not satisfy common law requirements for real covenants or equitable servitudes because the benefit of the servitude is held in-gross and they are often of

165. *Id.* at 965.

166. *See id.* at 961–62.

167. *See id.* at 1014.

168. *See id.* at 986–88.

169. Conservation servitudes are also sometimes called conservation easements or restrictions. As explained by Gerald Korngold, these private land use restrictions in-gross most closely resemble the traditional definition of servitudes, so that is what they are called throughout this paper. *See Privately Held Conservation Servitudes*, *supra* note 23, at 436–37. Notably, the drafters of the Uniform Conservation Easement Act ("UCEA"), adopted by 23 states, the U.S. Virgin Islands, and the District of Columbia, explicitly rejects this approach and maintains that they are easements, not real covenants or equitable servitudes. *See* UNIF. CONSERVATION EASEMENT ACT, prefatory note (UNIF. LAW COMM'N 1980) (amended 2007).

170. Owley, *supra* note 23, at 137.

171. Mary Ann King & Sally Fairfax, *Public Accountability and Conservation Easements: Learning from the Uniform Conservation Easement Act Debates*, 46 NAT. RESOURCES J. 65, 69 (2006).

perpetual duration.[172] Moreover, their creation is encouraged by federal law,[173] and they appear to put unreasonable restraints on alienation.[174] Unlike affordability covenants, scholars have been quite concerned with ensuring the enforceability of conservation servitudes since the early 1980s.[175] This scholarly attention may be due, in part, to the significant amount of litigation involving conservation servitudes and their enforcement.[176]

As environmental law scholar Peter Morrisette explains:

> Because the common law of servitudes does not provide for negative easements or servitudes held in gross that run with the land in perpetuity, states have enacted enabling statutes that provide for conservation easements. These statutes eliminate many of the common law impediments to conservation easements—such as the restriction against negative easements held in gross, as well as privity, and touch and concern requirements.[177]

Indeed, to ensure the validity of conservation servitudes, given their shortcomings in meeting common law servitude requirements, at least 37 states have passed conservation easement statutes,[178] 25 of them based on the Uniform Conservation Easement Act ("UCEA").[179]

The UCEA is short and simple.[180] Its purpose is limited to "sweeping away certain common law impediments that might otherwise undermine a conservation easement's validity."[181] The drafters of the UCEA intended that states would insert the act into their property laws as enabling legislation.[182] Indeed, 23 states, the U.S. Virgin Islands, and the District of

172. To receive federal income tax benefits, a conservation easement must be perpetual. 26 U.S.C. §170(h)(5)(A) (2019).

173. The federal tax code creates a tax benefit for land subject to perpetual conservation easements. *See* 26 U.S.C. § 170(h) (2019).

174. *Privately Held Conservation Servitudes, supra* note 23, at 455. As with Affordability Covenants, the Restatement creates a specific exemption for conservation servitudes in its rule related to unreasonable restraints on alienation. *See* RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 3.4 cmt. i (AM. LAW INST. 2000).

175. *See Privately Held Conservation Servitudes*, *supra* note 23, at 433; *see also* Owley, *supra* note 23, at 121; King & Fairfax, *supra* note 171, at 65.

176. As an illustration, Massachusetts has a single enabling statute for conservation, preservation, and affordable housing restrictions that run with the land. 184 MASS. GEN. LAWS § 32 (2019). Of the 35 cases related to this statute as of the date of writing this article, 26 related to conservation restrictions, 9 related to agricultural preservation restrictions, and only 1 related tangentially to affordable housing restrictions. *Id.*

177. Morrisette, *supra* note 23, at 384.

178. *Privately Held Conservation Servitudes*, *supra* note 23, at 438.

179. UNIF. CONSERVATION EASEMENT ACT (UNIF. LAW COMM'N 1980) (amended 2007).

180. *Id.*

181. *Id.* § 3.

182. *Id*.

Columbia have done just that.[183] The other 27 states have enacted their own conservation easement enabling legislation.[184] In contrast, only 6 states have passed similar statutes intended to ensure the validity of affordable housing covenants, there is no uniform or model act.[185]

In sum, long-term affordability covenants are "hybrid" public/private land use devices similar to the contingent zoning, development agreements, and conservation servitudes. However, in these other "hybrid" forms, concern about common law validity has led to significant progress in enacting state enabling legislation. While all jurisdictions require the use of affordability covenants as conditions for receipt of public subsidy, only 6 states have passed legislation explicitly authorizing affordability covenants as a valid device regardless of common law obstacles to their enforceability described above.

D. Summary and Segue from Law to Policy

As Professor Gerald Korngold has explained, public ownership of land is significantly more expensive than public restriction of that land through private, opt-in land use controls like servitudes.[186] Federal affordable housing policy has embraced this shift to privately owned, privately restricted housing since the Johnson administration[187] by capping the growth of publicly owned public housing programs and pivoting to

183. *Id.*

184. CAL. CIV. CODE § 815 (West, Westlaw through 2019 Reg. Sess. Ch. 161); COLO. REV. STAT. § 38-30.5-101 (2018); DEL. CODE ANN. tit. 7 § 6902 (2019); FLA. STAT. ANN. § 704.05 (West, Westlaw through 2019 Reg. Sess.); GA. CODE ANN. § 44-10-1 (2019); HAW. REV. STAT. ANN. §198-1 (2019); 525 ILL. COMP. STAT. ANN. 33/1 (West, Westlaw through P.A. 101-65); IOWA CODE ANN. § 457A (West, Westlaw through 2019 Reg. Sess.); LA. STAT. ANN. § 9:1271 (1987);2018); MD. CODE ANN., REAL PROPERTY § 2-118 (amended 2019); NEB. REV. STAT. ANN. § 76-2,111 (West, Westlaw through 2019 Reg. Sess.); MASS. GEN. LAWS. ANN. ch. 184, §§ 31–32 (West, Westlaw through ch. 64 except ch. 47 of the 2019 Annual Sess.); MICH. COMP. LAW ANN. § 324.8204 (West, Westlaw through 2019 Reg. Sess. No. 47); MO. ANN. STAT. §442.014 (West, Westlaw through 2019 Reg. Sess.); MONT. CODE ANN. § 76-6-201 (West, Westlaw through 2019 Sess); N.H. REV. STAT. ANN. § 477:45 (West, Westlaw through 2019 Reg. Sess. Ch. 175); N.J. ADMIN. CODE § 5:80-26.1 (2019); N.Y. ENVIR. CONSER. LAW § 49-0301 (2019); N.C. GEN. STAT. ANN. § 113A-230 (West, Westlaw through S.L. 2018-145 of the 2018 Reg. Sess.); N.D. CENT. CODE ANN. § 61-15-04 (West, Westlaw through 2019 Reg. Sess.); OHIO REV. CODE ANN. § 5301.63 (2019); OKLA. STAT. ANN. tit. 60, §49.1 (2019); 34 R.I. GEN. LAWS ANN. §§ 34-39.1 et seq. (West, Westlaw through 2019 Reg. Sess. Ch. 310); TENN. CODE ANN. § 66-9-301 (2019); UTAH CODE ANN. § 57-18-1 (West, Westlaw through 2019 Gen. Sess.); VT. STAT. ANN. tit. 27 § 610 (West, Westlaw through 2019 Gen. Sess.); WASH. REV. CODE ANN. §§ 64.4.130 & 76.09.040 (West, Westlaw through 2019 Reg. Sess.).

185. *See supra* note 21 and accompanying text.

186. *Privately Held Conservation Servitudes*, *supra* note 23, at 461.

187. *See generally* Alexander von Hoffman, *History Lessons for Today's Housing Policy: The Political Process of Making Low-Income Housing Policy* 26 (Joint Center for Housing Studies, Harvard Univ. 2012).

publicly subsidized but privately owned housing.[188] While affordability covenants are generally used as private land use control devices to secure public investment, they oftentimes fail to satisfy the requirements for enforceability according to common law property rules. The limited case law on the enforceability of these covenants suggests that courts are inclined to overlook these common law deficiencies and enforce the covenants on public policy grounds, at least for the time being.

Indeed, the valid public purpose and furtherance of public policy objectives belie a formal characterization of these covenants as private land use restrictions. They are better characterized as a hybrid of public and private land use restrictions, like environmental servitudes, contingent zoning, and development agreements. State legislatures and localities often overcome the shortcoming of conservation easements, contingent zoning, and development agreements as *private* land use devices by bolstering the instruments as *public* land use devices. In other words, legislatures and localities legitimize the exercise of state police and contract power through specific enabling legislation and regulations intended to institute substantive and procedural due process safeguards. Such bolstering of affordability covenants as public land use devices is uncommon; without it, covenants intended to secure billions of dollars of public investment may be found unenforceable. The next part of this Article analyzes the six existing affordability covenant enabling statutes, together with the UCEA, to address some of the basic substantive concerns that an affordability covenant enabling statute should address.

III. ENABLING LEGISLATION IS ESSENTIAL TO SECURE THE VALIDITY OF AFFORDABILITY COVENANTS

Part II of this Article takes a critical look at what enabling legislation, as a tool of public land use restriction, must do to achieve its purpose in creating valid and enforceable perpetual affordability covenants. It begins with an analysis of the six existing affordability covenant enabling statutes and the UCEA. This Article concludes that although the existing affordability covenant enabling acts are certainly better than nothing, mere codification may defer (but not resolve) the legitimate problems that affordability covenants create as private land use restrictions. Rather, enabling legislation should first distinguish the state contract and police power being implemented and then provide procedural and substantive due process to support the valid use of these state powers. The parameters of these powers are first sketched by looking to zoning and regulatory takings jurisprudence. Finally, this Article considers two different fundamental policy goals within the parameters of enforceability that

188. *Id.* at 46.

policymakers should choose between. One goal is aimed at suppressing the value of affordability-covenant-restricted properties to essentially remove those properties from the mainstream real estate market. The other goal is to not necessarily remove affordability covenant restricted properties from the mainstream market, but instead to carve off and capture the market value of the covenant for the benefit of the municipality.

A. The UCEA Provides a Framework for Affordability Covenant Enabling Statutes

The UCEA has been enormously influential in educating and mobilizing states about the need for state enabling statutes to ensure the enforceability of conservation easements. It has been so successful, in fact, that at least one state has looked to the UCEA as a model for affordability covenant enabling legislation.[189] The UCEA provides some useful guidance to states and localities in legitimizing the public land use aspect of hybrid land use devices, first and foremost, by confronting the fact that these hybrid devices are vulnerable to judicial findings of invalidity at common law and remedying that problem with enabling legislation.[190] In attempting to design a model statute that can be easily adopted by all states, the UCEA drafters followed several guiding principles. First, they limited the act to achieving one limited, but most essential, goal[191] (namely curing deficiencies of conservation easements at common law via enabling legislation). Second, the uniform act is short and simple. The first principle makes the second principle possible. Everything in the UCEA is necessary to achieve the first principle but goes no further.[192] Third, to the extent that the uniform act must define terms, it does so only in furtherance of the first principle. The intent behind the second and third principles is to encourage states to adopt the law with few revision and to insert it, specifically, into the state's property laws[193] so that there is uniformity between state laws and, hopefully, greater interstate judicial conformity of interpretation.[194]

189. *See* M.R.S. 33 §§ 121–26 (1991).

190. *See* UNIF. CONSERVATION EASEMENT ACT, prefatory note (UNIF. LAW COMM'N 1980) (amended 2007).

191. *Id.* ("The Act has the relatively narrow purpose of sweeping away certain common law impediments which might otherwise undermine the easements' validity, particularly those held in gross.")

192. *Id.* ("The Act does not address a number of issues which, though of conceded importance, are considered extraneous to its primary objective of enabling private parties to enter into consensual arrangements with charitable organizations or governmental bodies to protect land and buildings without the encumbrance of certain potential common law impediments.")

193. *Id.* § 3. ("[T]he Act is intended to be placed in the real property law of adopting states . . . .")

194. *Id.* § 6.

The UCEA does not explicitly address the public land use aspects of conservation easements, but treats conservation easements as private agreements where the holder of the covenant happens to be limited to charitable organizations and governmental bodies who must consent to any obligations or duties related to the benefit of the easement.[195]

In commentary, the drafters of the UCEA explained that a public process was intentionally omitted so as not to create a chilling effect on the creation of conservation easements through a mandated governmental approval process.[196] The drafters rationalized their decision and explained that any eligible beneficiary of a conservation easement would likely have an administrative process related to accepting obligations contained in an easement.[197] Nevertheless, the drafters of the UCEA implicitly assumed that the justification for the validity of these easements was to serve the public interest.[198]

Though conservation easements and affordability covenants both seem to fit into the new constellation of hybrid public/private land use devices, there are some notable differences between the tools. For example, the drafters of the UCEA were concerned that a public process would have a chilling effect on the creation of conservation servitudes.[199] In contrast, affordability covenants are created as a precondition to something a developer seeks from a public body (land, financing, zoning or permitting approval) in accordance with a public processes pre-existing the affordability covenants. The concern that a public process related to the affordability covenant would have a chilling effect on the creation of affordability covenants is unfounded. However, precisely because affordability covenants are a product of the public contract and police powers, they may be more likely attacked as regulatory takings or as unconscionable.

At least two jurisdictions, Maine and Massachusetts, are aware of the similarities between conservation servitudes and affordability covenants. Maine's affordability covenant statute closely tracks the UCEA and appears to have used the UCEA as its template.[200] For example, the statute has a mere six sections that match the titles of the UCEA sections,[201] it is located in Maine's property law,[202] it is limited in scope to defining certain

195. *Id.* § 2(b).

196. *Id.* at prefatory note.

197. *Id.*

198. *Id.* § 2 ("[E]asements may be created only for certain purposes intended to serve the public interest . . . .")

199. *Id.* at prefatory note.

200. *See* M.R.S. 33 §§ 121–26 (1991); UNIF. CONSERVATION EASEMENT ACT, prefatory note (UNIF. LAW COMM'N 1980) (amended 2007).

201. M.R.S. 33 §§ 121–26 (1991).

202. *Id.*

key terms and to enabling affordability covenants by overriding common law impediments to enforcement,[203] and it limits "qualified holders" of the benefit of a covenant to certain kinds of governmental bodies and nonprofit organizations.[204] Likewise, Massachusetts acknowledges the similarities between affordability covenants and conservation, preservation, and agricultural servitudes by defining them together in the same statute as "restrictions."[205] Massachusetts has also exempted them from the validity requirements of more traditional servitudes,[206] legislated over common law impediments to enforcement,[207] instituted due process safeguards to protect the public interest,[208] and created a combined recording index for these public interest restrictions.[209]

Other jurisdictions with affordability covenant enabling legislation also seem to have recognized the similarities between these covenants and the UCEA. For example, when the Oregon legislature passed its affordability covenant enabling act in 2007, it recognized that although affordability covenants are being implemented in the state, without specific enabling legislation, the covenants were vulnerable to judicial challenge.[210] The Oregon statute, along with Rhode Island's affordability covenant enabling act, seems to be modeled after the UCEA. Specifically, the Oregon and Rhode Island acts are inserted in the state housing laws,[211] define affordability covenants,[212] address who has standing to enforce affordability covenants,[213] and specifically declare affordability covenants valid despite inconsistences with common law requirements.[214]

California's affordability covenant enabling act is tied to the creation of its Low and Moderate Income Housing Trust Fund[215] and simply makes the affordability covenants required in the section binding on the covenanter and all successors "[n]otwithstanding any other law."[216] Vermont's enabling act is almost as simple as California's. It is located in

203. *See* ME. STAT. tit. 33, §§ 121, 122, 124 (1991).
204. *See* ME. STAT. tit. 33, § 121(3) (1991).
205. MASS. GEN. LAWS ANN. ch. 184, § 31 (West 1990).
206. MASS. GEN. LAWS ANN. ch. 184, § 26 (West 1990).
207. MASS. GEN. LAWS ANN. ch. 184, § 32 (West 1990).
208. *See id.*
209. *See* MASS. GEN. LAWS ANN. ch. 184, § 33 (West 1990).
210. *See* H.R. 3485c, 74th Leg. Assemb., Reg. Sess. (Or. 2007).
211. *See* OR. REV. STAT. ANN. §§ 456.270–.295 (West 2010); 34 R.I. GEN. LAWS ANN. § 34-39.1-1 *et seq.* (West 1991).
212. *See* OR. REV. STAT. ANN. § 456.270 (West 2010); 34 R.I. GEN. LAWS ANN. § 34-39.1-3 (West 1991).
213. *See* OR. REV. STAT. ANN. § 456.280–285 (West 2010); 34 R.I. GEN. LAWS ANN. § 34-39.1-3 (West 2006).
214. *See* OR. REV. STAT. ANN. § 456.290 (West 2010); 34 R.I. GEN. LAWS ANN. § 34-39.1-4 (West 2006).
215. *See* CAL. GOV'T CODE § 62101(f).
216. CAL. GOV'T CODE § 62101(f)(7).

Vermont's marketable title act.[217] After defining what an affordability covenant is,[218] it simply states that the covenant shall be enforceable according to its terms.[219]

Unquestionably, the six states that have passed affordability covenant enabling legislation have taken a significant step in shoring the enforceability of their states' affordability covenants. Interestingly, there has been virtually no litigation involving these six enabling acts.[220] While two of the enabling acts include legislative findings or purpose sections to establish the public purpose that justifies the use of the state police power in creating the act,[221] only one jurisdiction seems to have followed the example of the UCEA in eschewing creation of a public processes in their enabling acts and treating these enabling acts as essentially legislative inoculation for private land use agreements.[222]

The fear of chilling the creation of conservation easements, the reason the UCEA drafters avoided discussion of a public process as discussed above, is inapplicable to affordability covenants where participation in a public process antecedes the covenant. Public land use jurisprudence suggests that rather than ignoring the public process involved in the creation of affordability covenants, jurisdictions should articulate a public process that establishes substantive and procedural due process safeguards to assist the judiciary in upholding the acts should they be challenged in court. [223]

B. Parameters of the Public Police and Contract Powers

In her excellent essay, "Moving Toward the Bargaining Table: Contract Zoning, Development Agreements, and the Theoretical Foundations of Government Land Use Deals," Professor Wegner takes her readers on a deep dive into the theoretical underpinnings of public/private land use arrangements.[224] Professor Wegner considers two kinds of public/private land use arrangements, or "deals," contingent zoning, and

217. *See* VT. STAT. ANN. tit. 27, § 610 (West 1995).

218. *See id.* § 610(a).

219. *See id.* § 610(e).

220. There are two Vermont cases related to property tax assessed values of restricted properties. *See generally* Franks v. Town of Essex, 87 A.3d 418 (Vt. 2013); Laterre House Ltd. v. Town of Wilmington, No. 2001–341, 2002 WL 34423628, at *1 (Vt. 2002). Of the 35 cases related to Massachusetts's restriction enabling statute, only one is tangentially related to affordability covenants. *See* City of Boston v. Roxbury Action Program, Inc., 862 N.E.2d 763, 766–67 n. 8, 9 (Mass. App. Ct. 2007).

221. OR. REV. STAT. ANN. § 456.275 (West 2010); 34 R.I. GEN. LAWS ANN. § 34-39.1-2 (West 2006).

222. OR. REV. STAT. ANN. § 456.275 (West 2010)

223. *See* Board of Cty. Comm'rs of Brevard Cty. v. Snyder, 627 So.2d 469, 474–75 (Fla. 1993).

224. *See* Wegner, *supra* note 28, at 957.

development agreements.[225] She insightfully notes that in entering into these public/private deals, jurisdictions are exercising a blend of contract power and police power.[226] Professor Wegner looks to the reserved powers doctrine of the Contracts Clause of the United States Constitution to define the parameters of legitimate state contract/police action in land use deals.[227] She notes that where state action is found to violate the reserved powers doctrine, there is (1) the absence of reasonably clear government authority, (2) marginal or unwarranted private expectations (for example, about the role of the public body and its regulatory duties or authority to contract), and (3) a strong, circumstance- and time-dependent public interest that has been affected adversely.[228] In parsing judicial reception of contingent zoning and development agreements, Professor Wegner finds that when these public/private deals have been upheld, they have satisfied the test outlined above with procedural and substantive safeguards. For example, procedural safeguards for contingent zoning and development agreements include procedures defined by statutes or ordinances, notice and hearing requirements, super-majority voting, recordation, and an independent legislative body.[229] Substantive safeguards include conformity with a comprehensive plan and other legitimate public land use goals.[230]

Professor Wegner's delineation of the parameters of the legitimate exercise of the public contract and police powers in public/private land use deals is further informed by the United States Supreme Court development exactions cases of the late 1980s and early 1990s, *Nollan v. California Coastal Commission,*[231] and *Dolan v. City of Tigard*.[232] *Nollan* and *Dolan* are both cases where property owners were asked by local permitting authorities to give up an interest in their land in exchange for building permit approval.[233] In holding the easement requirement in *Nollan* an unconstitutional taking, the Supreme Court explained that there must be a nexus between the condition or property interest sought by the government authority and the problem caused by the proposed development that must

225. *Id.*
226. *See id.* at 965.
227. *See id.* at 965–68.
228. *See id.* at 967.
229. *See id.* at 986–88, 1009.
230. *See* Wegner, *supra* note 28, at 989.
231. *See generally* Nollan v. Cal. Coastal Comm'n, 483 U.S. 825 (1987).
232. *See generally* Dolan v. City of Tigard, 512 U.S. 374 (1994).
233. The Nollans were asked to grant a public easement along their private beachfront parallel with the ocean as a condition to getting a residential building permit. *Nollan*, 483 U.S. at 828. Similarly, Ms. Dolan was asked to dedicate part of her land to the city for flood control and a public bike path as a condition to getting a commercial building permit. *Dolan*, 512 U.S. at 379–80.

be alleviated.[234] *Dolan* extends *Nollan* one more logical step—not only must there be a qualitative relationship between the condition sought by the governmental body and the problem caused by the proposed development that must be alleviated, but there must be a quantitative nexus, or "rough proportionality," between the condition sought and the harm created by the development.[235] For example, in *Dolan,* the Supreme Court found the city failed to demonstrate that the public greenway it demanded from Dolan in exchange for a building permit would proportionally off-set or alleviate the amount of increased traffic that Dolan's development was projected to cause.[236]

The existing affordability covenant enabling acts accurately describe the covenants as interests in land granted to either governmental bodies or certain non-profit housing organizations in exchange for zoning or permitting approval or public funds. In addition to Professor Wegner's observation that public/private land deals should be supported by procedural and substantive safeguards, affordability covenant enabling legislation should also include safeguards to ensure that the conditions and restrictions imposed by affordability covenants are qualitatively and quantitatively justifiable in relation to the impact of the development. Although courts have rejected the assertion that mandated production of deed-restricted affordable housing pursuant to an Inclusionary Zoning statute is subject to *Nollan/Dolan* analysis,[237] Justice Thomas has made clear his dissatisfaction with what he considers an arbitrary distinction between legislative action and executive action in classifying takings.[238]

After considering how enabling legislation should legitimize the combined public contracting and police powers at play in affordability covenants, the final sections of this Article explore two different fundamental policy goals for creating a perpetual affordability covenant land use regime.

C. Affordability Covenant Enabling Statutes Face a Unique Question Regarding Their Essential Policy Goal

For conservation easements, the essential goal underlying the creation of this public/private land use tool is to enable the creation of a stock of privately owned, permanently restricted parcels of real estate that

234. *See Nollan,* 483 U.S. at 837.

235. *Dolan*, 512 U.S. at 395–96.

236. *See id.* at 395.

237. 2910 Ga. Ave., L.L.C. v. District of Columbia et al., 234 F. Supp. 3d 281, 299, 305 (D.D.C. 2017); Cal. Bldg. Indus. Ass'n. v. City of San Jose, 351 P.3d 974, 991 (Cal. 2015), *cert. denied,* 136 S. Ct. 928 (2016).

238. *See Cal. Bldg. Indus. Ass'n.*, 136 S. Ct. at 928–29.

preserves open green space or natural habitat in perpetuity.[239] This "real estate stock" approach is baked into federal tax incentives, which only apply to lands subject to perpetual conservation easements.[240] It is also baked into the UCEA, which assumes that a conservation easement is "unlimited in duration" unless otherwise specified.[241] For the handful of jurisdictions currently imposing permanent affordability covenants on privately owned but publicly subsidized affordable housing property, the underlying purpose seems similarly oriented toward creating a permanent stock of real estate that will be limited to use as affordable housing forever.[242] Under this view, the jurisdiction's goal is long-term suppression of the value of the property subject to the covenant.[243] This Article will refer to this as the "value suppression approach." However, there is another essential policy goal that can serve as the foundation for perpetual affordability restrictions. That is, creating a portfolio of fungible interests in land to be owned by the municipality as capital assets.[244] This Article will refer to this second approach as the "value capture approach." This section explores the benefits and drawbacks of each essential policy goal and their ramifications for enabling statutes.

1. Value Suppression Approach

a. Benefits of the Value Suppression Approach

There are many benefits associated with the value suppression approach to perpetual affordability covenants. By effectively removing a piece of real estate from the general market, a jurisdiction need not

239. There are legal scholars who question the wisdom of allowing conservation easements in perpetuity. *See* Owley, *supra* note 23, at 121. However, the clear trend is that conservation easements are created with perpetual terms to qualify for the federal tax deduction.

240. I.R.C. § 170(h)(5)(A) (2017).

241. UNIF. CONSERVATION EASEMENT ACT, § 2(c) (UNIF. LAW COMM'N 1980) (amended 2007).

242. *See* COAL. FOR SMARTER GROWTH, LONG-TERM HOUSING AFFORDABILITY FOR THE DISTRICT OF COLUMBIA 4–10 (2017), https://bit.ly/2QEVg2X (discussing Boston's long-term capital reinvestment approach to its perpetually restricted, privately owned affordable housing stock); *see also* Stephanie Sosa, *HPD Takes An Important Step Forward for "Permanent Affordability,"* ASS'N FOR NEIGHBORHOOD & HOUS. DEV., INC. (Nov. 1, 2017), https://bit.ly/2JOwVHf; *see also* PHIL MENDELSON, REPORT ON PR21-125, "965 FLORIDA AVE., N.W., DISPOSITION APPROVAL RESOLUTION OF 2015," P.R. Doc. No. 21–125, at 6–7 (2015), https://bit.ly/2Wce62i.

243. *See Permanent Affordability: Practical Solutions*, ASS'N FOR NEIGHBORHOOD & HOUS. DEV., INC. WHITE PAPER 8 (2015), https://bit.ly/2IficSv ("[U]p to 30% of . . . subsidy is spent on preserving the affordability of existing projects. And much of this subsidy is . . . put toward compensating the property owners for the increased property values, in order to compete with the private market.").

244. *See* MASS. GEN. LAWS ANN. ch. 184, § 32 (West, Westlaw through 2019 Sess.); *see also* OR. REV. STAT. ANN. § 456.280(6) (West, Westlaw through 2018 Sess.).

compete in a gentrifying market merely to preserve existing housing stock.[245] The Chinatown preservation conundrum at the beginning of this Article is averted.[246] By locking in specific pieces of real estate as perpetually affordable, maintaining housing for low-income residents in perpetuity, economic and (potentially) cultural diversity is preserved.

A perpetual affordability covenant's effectiveness at suppressing market value of the burdened real estate will be dependent upon the likelihood of release of the covenant. At common law, covenants are released upon merger, formal release, expiration, laches, estoppel, abandonment, acquiescence, prescription, unclean hands, or upon a finding of changed conditions.[247] A covenant may also be terminated due to a marketable title act.[248] Creating an affordability covenant with a perpetual term obviously eliminates the possibility of termination by expiration of term. Legislation enabling perpetual affordability covenants should seek to limit these common law and statutory methods of releasing to the greatest extent practicable. For example, the UCEA and the Maine Affordable Housing Covenant Act, which is based on the UCEA, both provide that the easement or covenant enabled by the act can be terminated in the same ways as other easements or covenants,[249] and that courts are empowered to modify or terminate covenants in accordance with the principles of law and equity.[250] This language preserves the ability for covenants to be terminated in all ways except expiration of term.

A jurisdiction adopting a value suppression model should design its statute to make covenant termination difficult. This can be done directly, by eliminating accidental forms of termination, such as prescription and laches, and by placing high procedural hurdles on termination by release. For example, in Massachusetts, an affordability covenant can only be released by the Department of Housing following a public hearing, a determination of the public interest and accordance with the comprehensive plan, and payment by the burdened party to repurchase the property interest created by the covenant.[251]

245. *See Permanent Affordability: Practical Solutions*, *supra* note 243, at 8.

246. *See* Phil Mendelson, *supra* note 242, at 6–7.

247. *See* DUKEMINIER ET AL., *supra* note 27, at 927.

248. *See* STOEBUCK & WHITMAN, *supra* note 27, at 900 (eighteen states have "marketable record title" acts that simply make void any recorded document older than a statutorily defined number of years, typically between 20 and 40 years).

249. UNIF. CONSERVATION EASEMENT ACT, § 2(a) (UNIF. LAW COMM'N 1980) (amended 2007). ; ME. REV. STAT. ANN. tit. 33, §122.1 (West, Westlaw through 2018 Sess.).

250. UNIF. CONSERVATION EASEMENT ACT, §3(b) (UNIF. LAW COMM'N 1980) (amended 2007); ME. REV. STAT. ANN. tit. 33, § 123.3 (West, Westlaw through 2018).

251. MASS. GEN. LAWS ANN. ch. 184, § 32 (West, Westlaw through 2019 Sess.).

Termination of a covenant can also be made more difficult indirectly by granting broad standing for enforcement. For example, in *Nordbye v. BRCP/GM Ellington*, the local housing agency and all past, present, and future tenants of the housing complex who met income criteria for residency in the affordable housing complex had standing to enforce the affordability restrictions applicable to the housing complex.[252] The court concluded that the housing agency's written consent to release the affordability covenant did not prevent income eligible past, present, or future tenants from enforcing the covenant.[253]

b. Value Suppression Approach Drawbacks

There are numerous costs or potential problems associated with the value suppression approach. The first problem is potentially chilling private investment. The shift from publicly owned to privately owned affordable housing in the latter half of the twentieth century sprung from a desire to encourage private financing as much as possible so that public funds merely leverage private investment and fill funding gaps between project costs and what private financial institutions are willing to finance.[254] Today, most private financing of affordable housing is privately underwritten assuming that unrestricted, market rate rents, or resale values will be available upon foreclosure or certain other extraordinary scenarios.[255] If permanent affordability covenants are intended to permanently move real estate into a separate, value restricted class of property, the amount of private funding available per project may reflect this change and result in the need for greater public subsidy. Indeed, advocates for perpetual restrictions and affordable housing providers in Boston have confirmed that perpetual covenants reduce the amount of private financing available for initial construction as well as capital replacements–requiring greater public subsidy at initial construction and throughout the life of the project.[256] This results in the creation and preservation of fewer units of affordable housing in the jurisdiction, overall.

252. Nordbye v. BRCP/GM Ellington, 246 Or. App. 209, 215–16 (2011).

253. *Id.* at 222.

254. *A Brief Historical Overview of Affordable Rental Housing*, NAT'L LOW INCOME HOUS. COAL. 1–6 (2015), https://bit.ly/2JPFWQe.

255. The affordability restrictions imposed by the federal Low-Income Housing Tax Credit Program terminate upon foreclosure or, in lieu of foreclosure, deed. 26 U.S.C.A. § 42; I.R.C. § 42(h)(6)(E)(i)(I). Federal regulation authorizes states to allow termination of HOME Program affordability covenants upon foreclosure as well. 24 C.F.R. § 92.252(e)(1)(ii).

256. *See* COAL. FOR SMARTER GROWTH, *supra* note 242, at 9; *see also Permanent Affordability: Practical Solutions, supra* note 243, at 11–14.

The availability of private, permanent financing may be particularly affected for perpetually restricted affordable housing because the covenant restricts the value of the property as collateral for the loan. To address this problem, jurisdictions should consider increasing public loan amounts, committing to capital improvement loans at some future date, making guarantees or other forms of credit enhancement, or releasing the affordability covenant under certain circumstances.[257] The value limiting approach of perpetual affordability covenants eliminates the possibility of funding capital improvements by converting to market rate and increasing income. Federal, state, and local anti-deficiency statutes that prevent governmental agencies from creating financial obligations in excess of actual or budgeted funds available eliminates the possibility of long-term public funding commitments.[258]

Thus, in taking the value suppression approach to perpetual affordability covenants, a jurisdiction must anticipate that the amount of initial and on-going public subsidy needed per unit will be greater than in jurisdictions aiming to maximize private investment in affordable housing. Legislators might look to rent control statutes—which limit a landlord's ability to charge rents less than market rate and therefore, like affordability covenants, suppress the market value of the real estate as a capital asset—for ideas in ameliorating this problem. Rental properties subject to rent control sometimes have similar challenges in obtaining loans for capital improvements.[259] Some rent control statutes contain conditions and parameters for offering relief to landlords in need of private financing without releasing the rent controls altogether. For example, in the District of Columbia, the owner of a rent-controlled property can petition the District Housing Administrator for a temporary rent increase of up to 20% per unit, spread out over a certain number of years to pay for certain capital

257. *See* COAL. FOR SMARTER GROWTH, *supra* note 242, at 13–14; *see Permanent Affordability: Practical Solutions, supra* note 243, at 11.

258. For example, the federal government, at least six states, and many county, city, and local governments have anti-deficiency statutes. *See* Limitations on Expending and Obligating Amounts, 31 U.S.C. § 1341 (2019), ALA. CODE § 11-43C-67 (1975), ALA. CODE § 11-44C-67 (1975), DEL. CODE ANN. tit. 29, § 6519 (West 2005), MICH. CONST. srt. V § 18 (West, Westlaw through Nov. 2018 amendments), MICH. COMP. LAWS ANN. § 18.1371 (West 2007), MISS. CODE ANN. § 21-35-15 (West 1950), MISS. CODE ANN. § 19-11-15 (West 1950), OKLA. STAT. ANN. tit. 11, § 17-211 (West 2019), OKLA. STAT. ANN. tit. 19 § 1416 (West 2019), R.I. GEN. LAWS ANN. § 35-16-1 (West 2019), D.C. CODE ANN. §§ 47-355.01 (West 2019).

259. Housing units subject to affordability covenants remain limited in value whether they are rental or homeownership units. *See* 24 CFR §92.254(a)(4) –(6); 24 CFR §92.252(e)(1); *see also* District of Columbia Dep't of Hous. & Comty. Dev. Template, Affordable Hous. Covenant, https://bit.ly/2kL7Y4p. (last visited Aug. 30, 2019).

improvements or repairs.[260] At the end of the specified time period, rents return to pre-petition levels.[261]

As mentioned above, one reason a covenant can be released at common law is the so-called changed condition doctrine.[262] At common law, this means that conditions surrounding the burdened or benefited property have changed to such a degree that the purpose of the covenant is defeated.[263] A jurisdiction pursuing the value suppression approach to perpetual affordability covenants should limit the availability of the changed conditions doctrine while remaining cognizant of shifting state and federal initiatives and priorities. For example, the United States Department of Housing and Urban Development ("HUD") requires all construction, acquisition, and siting projects funded by public housing authorities to undergo site and neighborhood review and environmental justice review.[264] These reviews evaluate several criteria to ensure that HUD-funded affordable housing projects are not further concentrating poverty or minority residents and that projects are not located in places that are less environmentally healthy than unsubsidized housing.[265] Not only do demographics and area land uses change over time, but HUD requirements do as well. For example, at times, HUD has favored locating affordable housing in inner-city areas with the highest need for decent, safe, affordable housing.[266] More recently, there has been a push toward smart growth and transit oriented design, intended to ensure that residents of subsidized housing have access to public transportation, jobs, retail, and community amenities.[267] A jurisdiction adopting a value suppression model of perpetual affordability covenant should anticipate the possibility of a parcel falling out of sync with HUD location requirements and should have a plan for how to manage the problem.

Another consideration for jurisdictions pursuing the value suppression approach is the risk that a court will recast the perpetual covenant as a taking without just compensation or an unconscionable loan. For example, the Supreme Court has found that when a permit approval is

260. D.C. CODE ANN. § 42-3502.10 (West 2011).

261. *Id.*

262. DUKEMINIER ET AL., *supra* note 27, at 927.

263. STOEBUCK & WHITMAN, *supra* note 27, at 488.

264. *See Guidance on Non-discrimination and Equal Opportunity Requirements for PHAs*, U.S. DEP'T OF HOUS. & URB. DEV., FAIR HOUS.AND EQUAL OPPORTUNITY & PUB. & INDIAN HOUS. 10–15 (2011), https://bit.ly/2HORHUQ.

265. *See id*.

266. *See* von Hoffman, *supra* note 187, at 7–10.

267. From 2011 to 2015, HUD sponsored the Sustainable Communities Initiative, which included the Community Challenge Grant Program, which is a grant program designed to promote mixed-use, mixed-income (including affordable housing), transit oriented, higher density community planning, and development. *See Community Challenge Grants*, HUD, https://bit.ly/2HOkpFj (last visited Aug. 28, 2019)

conditioned on an exaction,[268] there must be rough proportionality between the impact of the development and the exaction demanded.[269] When affordability covenants are imposed as part of a zoning or permitting requirement, for example, as a part of a Planned Unit Development approval, a jurisdiction should be cognizant of *Dolan* jurisprudence and the rough proportionality test.[270] At least with regard to Inclusionary Zoning statutes, case law suggests courts' disinclination to find long-term affordability requirements takings. In *2910 Georgia Avenue v. District of Columbia*, where a developer challenged the District of Columbia's Inclusionary Zoning statute as a regulatory taking, the federal district court found that the statute did not constitute a regulatory taking because only two of 22 units in the development were affected and the economic impact of the regulation did not deprive the owner of a reasonable rate of return.[271] Furthermore, the California Supreme Court has held that long-term, deed-restricted affordable housing units required pursuant to a city's Inclusionary Zoning statute are not exactions to be evaluated under the *Nollan/Dolan* unconstitutional conditions test, but rather are merely land use restrictions within a jurisdiction's general police power and are entitled to deferential treatment.[272]

c. Drafting Legislation for the Value Suppression Approach

In drafting legislation to enable the creation of a portfolio of value suppressed real estate permanently dedicated to use as affordable housing via perpetual affordability covenants, a jurisdiction will want to first broadly define affordability covenants so that all covenants required by state and local programs will be covered by the statute. Second, drafters should include a validation statute modeled on the UCEA and expressly intended to validate affordability covenants despite inconsistencies with common law requirements.[273] Third, jurisdictions should ensure due process but limit the means of terminating the covenant to the greatest extent possible by granting expansive standing to enforce as well as third

268. *Land-use Exaction*, BLACK'S LAW DICTIONARY (11th ed. 2019) ("A requirement imposed by a local government that a developer dedicate real property for a public facility or pay a fee to mitigate the impacts of the project, as a condition of receiving a discretionary land-use approval.").

269. Dolan v. City of Tigard, 512 U.S. 374, 391 (1994).

270. For discussion of *Dolan*, *see* Section III.B.

271. 2910 Ga. Ave., L.L.C. v. District of Columbia et al., 234 F. Supp. 3d 281, 299 (D.D.C. 2017).

272. *Cal. Bldg. Indus. Ass'n.*, 351 P.3d at 991.

273. UNIF. CONSERVATION ACT § 3(b) (UNIF. LAW COMM'N 1980) (amended 2007); ME. REV. STAT. ANN. tit. 33, § 123(3) (1991).

party beneficiary status.[274] Finally, jurisdictions pursuing the value suppression approach should be careful to satisfy substantive and procedural due process requirements of public land use law by first clearly articulating the public need and interest served by the legislation,[275] making decisions related to affordability covenants in accordance with a comprehensive plan,[276] and making available to landlords methods of case-by-case assistance short of release.

2. Value Capture Approach

An alternative paradigm for understanding perpetual affordability covenants is to view the covenants themselves as the assets to be managed by the municipality. In this view, the jurisdiction does not aim to suppress the value of real estate, rather, it attempts to capture the difference between the real estate as use-restricted and at market rate and exclusively control when to release a covenant and for what consideration. To illustrate the difference between the value suppression and the value capture models, assume that the Chinatown low-income senior housing building from the hypothetical in the introduction was subject to a perpetual affordability covenant. The appraised value of the property, assuming its use is perpetually limited to providing low-income housing to seniors, based on the limited income-stream from rents, is valued at $65 million. The appraised value of the property without restricting its use to affordable residential housing is $265 million. In the value suppression approach, the municipality would essentially ignore the unrestricted value of the property and attempt to limit means of terminating the covenant as much as possible. Under the value capture approach, the jurisdiction would recognize $200 million as the value of the covenant and would put in place parameters and procedures for deciding when, whether, and for what consideration the jurisdiction would agree to terminate the covenant.

a. Benefits of Value Capture Approach

In some senses, the benefits and shortcomings of the value capture approach to perpetual affordability covenants are the inverse of the value suppression approach. For example, in the value capture model, it is possible for everyone—the jurisdiction, the jurisdiction's consumers of affordable housing, the landlord and the prospective buyer—to benefit financially from the unsuppressed value of real estate restricted by a

274. *E.g.*, CAL. GOV'T CODE § 62101(f)(7) (West 2016) (granting enforcement authority to various public bodies; qualified past, present, and future tenants; and the tenants association).

275. OR. REV. STAT. ANN. § 456.275 (West 2010).

276. MASS. GEN. LAWS ANN. ch. 184, § 32 (West 2009).

perpetual affordability covenant. The jurisdiction and affordable housing consumers of rental housing benefit in at least two ways. First, if a covenant's term is viewed not as permanent, but rather as indeterminate, conditional, or subject to release in the jurisdiction's reasonable discretion, there is less cause for a chill on private investment in affordable housing. The more leverage each subsidy dollar is able to secure in private financing, the more affordable housing the jurisdiction will be able to produce. Second, if a jurisdiction agrees to release a covenant in exchange for the market rate value of the covenant,[277] or some value rough equivalent of value, the jurisdiction may be able to replace the same number or even more units elsewhere by reinvesting the proceeds from the released covenant into new affordable housing transactions subject to new covenants. In addition to more liquid assets, by not having permanently fixed affordable housing stock tied to specific pieces of real estate, a jurisdiction may be better able to change its affordable housing priorities in accordance with market factors, the comprehensive plan, or HUD requirements. For example, if a jurisdiction notes an increase in demand for housing near transit hubs, the jurisdiction may decide to release a covenant on valuable, downtown property in exchange for three times the number of affordable units being restricted in buildings near transit stations in less expensive neighborhoods.

b. Drawbacks of the Value Capture Approach

As is apparent in the hypothetical above, the obvious downsides of the value capture model are that it does not necessarily preserve specific pieces of real estate for affordable housing use. When an affordability covenant is terminated or released, there is a reasonable chance that the residents who live in the building will have to move, disrupting personal and community stability.[278] Additionally, as with zoning amendments,

277. The Massachusetts and Oregon affordability covenant enabling acts require, as a precondition of release, that the burdened landowner repurchase the covenant for a price equal to the difference between the restricted and unrestricted value of the burdened property. *See* MASS. GEN. LAWS ANN. ch. 184, § 32 (West 2009); OR. REV. STAT. ANN. § 456.280(6) (West 2010).

278. When affordability covenants are terminated because a property opts out of the project-based Section 8 program or prepays its HUD-subsidized Section 236 or 221(d)(3) mortgage, residents of the property are issued enhanced tenant protection vouchers. These vouchers are intended to enable the tenant to afford market rate rents in the building, depending on whether the property will continue to be a rental property and on the cost of the market-rate rents. *See Guidance on Eligibility for Tenant Protection Vouchers Following Certain Housing Conversion Actions,* U.S. DEP'T OF HOUS. & URB. DEV. (2012), https://bit.ly/2JQEq0d. When restrictions under the LIHTC and HOME programs terminate, state and local law will determine whether and how quickly rents can be raised to market rate and what, if any, assistance is available to low income property residents. Additionally, the tax code provides tenants in LIHTC properties a three-year buffer after

when the door is opened for a locality to release covenants or make individualized zoning amendments, there is great potential for corruption and bias. Legislation enabling the use of perpetual affordability covenants for the value capture approach affords the government body the discretion and authority to make "deals" regarding the release of covenants while simultaneously providing sufficient procedural safeguards to ensure transparency and decisions that are truly in the public interest. For example, Massachusetts's affordability covenant enabling act allows only the governmental body or nonprofit entity who holds the benefit of the covenant to release the covenant. Prior to releasing a covenant, however, (1) the department of housing must hold a public hearing, (2) the department of housing must find that releasing the covenant is in accordance with the comprehensive plan, and (3) if the covenant was initially imposed in exchange for a public loan or grant, the burdened land owner must pay the difference between the value of the land as restricted and the value of the land unrestricted to purchase the property interest represented by the covenant.[279]

c. Drafting Legislation for the Value Capture Approach

As with the value suppression model, the most important tasks for affordability covenant enabling legislation in furtherance of the value capture model is to define affordability covenants broadly enough to capture all varieties of affordability covenants in use in the jurisdiction and validate these covenants despite their shortcomings at common law. Enabling legislation for affordability covenants pursuing the value capture model must also seek to control the circumstances of covenant termination as much as possible, ideally so that termination decisions are in the sole discretion of a governmental body. As with the value suppression model this means directly invalidating prescription, laches, estoppel, and acquiescence as means of terminating a covenant. The legislature should also limit beneficiary status and standing to enforce the covenant to a single governmental body, to the greatest extent possible. A jurisdiction's decision whether to release a perpetual affordability covenant will likely be controversial and enabling legislation may secure the jurisdictions authority and discretion in making this decision. However, jurisdictions must be mindful of federal law in attempting to secure their own discretion. For example, under the federal tax code, not only the municipality but also all income qualifying *former, current, and future*

the termination of the covenant, during which time rents for existing tenants cannot be raised by an amount more than would be allowed under the LIHTC program. Further, existing tenants in LIHTC properties cannot be evicted except for cause. 26 U.S.C.A. §42(h)(6)(E)(ii) (West 2018).

279. MASS. GEN. LAWS ANN. ch. 184, § 32 (West 2009).

occupants[280] of a LIHTC project have standing to enforce the affordability covenant in state court.[281] In *Nordbye,* the Oregon Court of Appeals held that a former tenant of a LIHTC property had standing to enforce an affordability covenant even though the owner of the property and the jurisdiction had executed and recorded a release of the covenant.[282]

IV. CONCLUSION

For the billions of dollars of public affordable housing investment presumably secured in the United States today by affordability covenants, there has been shockingly little analysis of the validity of this tool. This Article demonstrates how perpetual affordability covenants, like conservation servitudes, environmental covenants, contingent zoning, and development agreements, are a "hybrid" public/private land use servitude and zoning. Most jurisdictions employing real covenants and equitable servitudes to secure their affordable housing investments blindly rely on common law principles for the enforceability of these instruments. However, these instruments have several glaring flaws that should prevent their enforceability at common law. Specifically, the benefit of the covenant is held in-gross, there is often no horizontal privity, and they are almost always unreasonable restraints on alienation. Despite these common law shortcomings, courts to date often enforce the covenants on tenuous public policy grounds. This Article strongly recommends that state legislators should take heed of those six states that have acknowledged the need for affordability covenant enabling legislation to secure the enforceability of these instruments and provides suggestions about what such enabling legislation should contain. This Article also serves to build on the small body of scholarly literature defining public/private land use devices and mapping the contours of legitimate state action therein.

280. Granting standing to income eligible former or future occupants of a LIHTC project is tantamount to granting any private citizen the right to enforce the affordability covenant because of the relatively high income limits allowed in LIHTC projects.

281. 26 U.S.C.A. § 42(h)(6)(B)(ii) (West 2018).

282. Nordbye v. BRCP/GM Ellington, 246 Or. App. 209, 222 (2011).