

STRAWBERRY FIELDS FOREVER? SOME OBSERVATIONS ABOUT RESTRICTIVE COVENANTS AND ZONING

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Restrictive covenants and statutory land use controls are both capable of promoting private or public interests, but there is tension surrounding their use. This article explores the relationship between the two devices and discusses the courts' evolving approach to resolving conflicts between restrictive covenants and restrictive land use controls that apply to the same property. Controversy arises with these devices when they are used to restrict land use for undesirable exclusionary practices, such as limiting access to property ownership based on socioeconomic status or race, or when covenants conflict with municipal planning schemes. The author examines specific restrictive covenants and statutory land use controls used in Albertan cities to discuss a potential change in attitude toward large-scale restrictive covenants that impede municipal policies.

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I. INTRODUCTION

As in other areas of property law, Bruce Ziff's scholarship on restrictive covenants does more than explicate the doctrinal aspects and situates covenants in their policy context.¹ In "Scorched Earth: The Use of Restrictive Covenants to Stifle Competition"² and in "Bumble Bees Cannot Fly, and Restrictive Covenants Cannot Run,"³ Professor Ziff highlighted the tensions created by particular covenants (the Carruthers Caveat and the Safeway Supermarket covenants in Edmonton) and sounded the alarm bells to warn against the proliferation of covenants that have the potential to "skew the relationship between private property rights and overriding public interest concerns."⁴ Similarly, this article, too, is meant to focus on the relationship between covenants and land use regulations, but to demonstrate that both are capable of promoting private or public ends depending on the context. The article begins with two examples from Edmonton and concludes with an example from

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¹ Bruce H Ziff, "Restrictive Covenants: The Basic Ingredients" in *Special Lectures 2002: Real Property Law: Conquering the Complexities* (Toronto: Irwin Law for the Law Society of Upper Canada, 2003) 293 [Ziff, "Restrictive Covenants"].

² Bruce Ziff & Ken Jiang, "Scorched Earth: The Use of Restrictive Covenants to Stifle Competition" (2012) 30:2 Windsor YB Access Just 79.

³ Bruce Ziff, "Bumble Bees Cannot Fly, and Restrictive Covenants Cannot Run" in Anneke Smit & Marcia Valiante, eds, *Public Interest, Private Property: Law and Planning Policy in Canada* (Vancouver: UBC Press, 2016) 59 [Ziff, "Bumble Bees Cannot Fly"].

⁴ *Ibid* at 78.



Calgary. But the tensions and controversies surrounding covenants and statutory land use controls (especially zoning) are hardly unique to Alberta.

II. THE AMBIVALENCE TOWARD RESTRICTIVE COVENANTS

In April 2017, Doug Visser, a third-generation Edmonton farmer announced that he wished to protect his 230 acre property from suburban encroachment by means of a conservation easement (a covenant by other name) to be granted to and enforceable by a local trust.⁵ The gift was celebrated in the local media.⁶ The newspapers reported that the Visser lands produced many different varieties of vegetables and that they included a community garden for the benefit of vulnerable persons and 75 acres of old-growth forest used by Indigenous groups for traditional ceremonies.⁷ “The land has been really good to us,” Doug Visser was quoted.⁸ “Of course, the land has been here for a lot longer than our family, we are only here for a moment in time.”⁹ His father added, “[w]e’re here by the grace of God.... When you look at land the way the First Nations traditionally have looked at it, land belongs to the [C]reator.... We felt the land should continually be available.”¹⁰ The public was encouraged to donate half of the \$140,000 required to prepare a management plan for the land and to cover the legal costs of registering the covenant.¹¹

Just days later, the newspapers put a different covenant initiative in the spotlight. Homeowners in the Greater Hardisty area in Edmonton were invited to join their neighbours in signing a covenant that the *Edmonton Journal* called the “largest, most restrictive covenant yet on the table.”¹² The call came as a backlash to the city’s planning efforts to increase residential densities in mature neighbourhoods. The proposed covenant would prohibit the subdivision of residential lots, the construction of duplexes and row houses, home-based businesses, and relaxation of parking requirements contemplated by city council.¹³ The covenant could be modified every 10 years with the consent of 75 percent of the owners.¹⁴ But city administration was apprehensive. The ward councillor warned residents that signing the covenant is “not in their best interest,” and Edmonton’s Director of Planning cautioned Hardisty homeowners: “One hundred years from now, what if 75 percent never got it together in all these decade check-ins and we were stuck with caveats that insisted on parking stalls and we’re not even using cars? ... That’s why the zoning bylaw, it’s a living thing and it constantly adapts.”¹⁵ The Director cited the Carruthers Caveat, the 1911 covenant that still governs the Glenora neighbourhood: “We have

⁵ Wallis Snowdon, “‘The Land Has Been Good to Us’: Edmonton Man Fights to Protect his Farm,” *CBC News* (4 April 2017), online: [perma.cc/E8E5-H8ZB]; Elise Stolte, “Farmer Forgoes Millions to Preserve Agricultural Gift for Edmonton,” *Edmonton Journal* (3 April 2017), online: [perma.cc/DLD2-BZG3] [Stolte, “Farmer Forgoes Millions”].

⁶ Snowdon, *ibid*; Stolte, “Farmer Forgoes Millions,” *ibid*

⁷ Snowdon, *ibid*.

⁸ *Ibid*.

⁹ *Ibid*.

¹⁰ Stolte, “Farmer Forgoes Millions,” *supra* note 5.

¹¹ Snowdon, *supra* note 5.

¹² Elise Stolte, “Largest, Most Restrictive Covenant Yet on the Table in Greater Hardisty,” *Edmonton Journal* (8 April 2017), online: [perma.cc/BH22-57VR] [Stolte, “Most Restrictive Covenant Yet”].

¹³ Tim Querengesser, “In Edmonton’s ‘First’ Suburbs, a Battle to Restrict Lot Splitting,” *The Globe and Mail* (30 June 2017), online: [perma.cc/5PER-UEAN].

¹⁴ Stolte, “Most Restrictive Covenant Yet,” *supra* note 12.

¹⁵ *Ibid*.

community members who are suing each other. I wouldn't characterize this as a positive development."¹⁶

The two vignettes above reveal inconsistent attitudes, to say the least, toward private covenants and about their relationship to public regulations. A covenant is welcome when deployed to freeze undeveloped and agricultural lands but regarded as a source of mischief when intended to fix the existing character of a residential area.¹⁷ Planning regulations are proffered as the preferred path to promoting the long-term public interest in the latter case, but not mentioned in the former case.¹⁸

This ambivalence is not new. Restrictive covenants are typically described as private instruments in contrast with public land use controls such as zoning.¹⁹ The distinction is accurate as far as the mechanisms of creation and enforcement, but less so in terms of the ends. Although zoning has been justified in its early days by reference to the health, safety, and welfare of the community,²⁰ its success and ubiquity are widely attributed to its dominant purpose of protecting private interests.²¹ Historic and economic accounts in the literature draw a direct link between zoning and covenants and suggest a “demand-side” explanation for both.²² A restrictive covenant provides a nexus of durable, reciprocal restrictions that honour the autonomy and proprietary freedom of participating owners and guarantees a stable set of amenities.²³ Zoning is even better: it overcomes collective action problems associated with the creation, modification, and discharge of covenants, and its territorial ambit is greater. Homeowners will opt for zoning or covenants — whichever one suits them best.²⁴

Zoning and restrictive covenants are alternative (or complementary) devices not only for securing desirable amenities, but also for undesirable exclusionary practices.²⁵ Racial zoning ordinances were common in the United States until 1917, when the Supreme Court held that

¹⁶ Querengesser, *supra* note 13.

¹⁷ *Ibid*; Stolte, “Most Restrictive Covenant Yet,” *supra* note 12.

¹⁸ *Alberta Land Stewardship Act*, SA 2009, c A-26.8, s 37 (contemplates the use of a conservation directive under a regional plan to permanently protect, conserve, manage and enhance environmental, natural scenic, esthetic or agricultural values; e.g. a plan for the North Saskatchewan Region, which includes the Edmonton area, is not yet adopted), ss 39 – 40 (the owner of lands made subject to a conservation directive is entitled to compensation).

¹⁹ Ziff, “Bumble Bees Cannot Fly,” *supra* note 3 at 78.

²⁰ Raphaël Fischler, “Health, Safety, and the General Welfare: Markets, Politics, and Social Science in Early Land-Use Regulation and Community Design” (1998) 24:6 *J Urban History* 675.

²¹ Eran Kaplinsky, “The Zoroastrian Temple in Toronto: A Case Study in Land Use Regulation, Canadian-Style” in Eric Tucker, James Muir & Bruce Ziff, eds, *Property on Trial: Canadian Cases in Context* (Toronto: Irwin Law for The Osgoode Society for Canadian Legal History, 2012) 223.

²² See e.g. A Dan Tarlock, “Toward a Revised Theory of Zoning” [1972] *Land-Use Controls Annual* 141; Robert C Ellickson, “Alternatives to Zoning: Covenants, Nuisance Rules, and Fines as Land Use Controls” (1973) 40:4 *U Chicago L Rev* 681; William A Fischel, “A Property Rights Approach to Municipal Zoning” (1978) 54:1 *Land Econ* 64; Herbert Hovenkamp, “Bargaining in Coasian Markets: Servitudes and Alternative Land Use Controls” (2002) 27:4 *J Corp L* 519; Carol M Rose, “Servitudes” in Kenneth Ayotte & Henry E Smith, eds, *Research Handbook on the Economics of Property Law* (Cheltenham, UK: Edward Elgar, 2011) 296.

²³ Rose, *ibid* at 297.

²⁴ *Ibid*.

²⁵ See e.g. *Bell v R* (1978), [1979] 2 SCR 212 (unsuccessful use of zoning to control who may occupy residential premises); *Szymanski v Excel Resources Society*, 2004 ABQB 89 (unsuccessful use of covenant to exclude a group home). See also Bruce Ziff, *Principles of Property Law*, 7th ed (Toronto: Thomson Reuters, 2018) at 450–56; Ian Skelton, *Keeping Them at Bay: Practices of Municipal Exclusion* (Winnipeg: Canadian Centre for Policy Alternatives, 2012).

they were unconstitutional.²⁶ Property owners then turned to racial covenants instead until 1948, when such covenants were also held to be unenforceable.²⁷ Explicit discrimination is no longer tolerated, but both zoning bylaws and covenants are still relied on to prescribe development standards in certain neighbourhoods or municipalities in order to limit access on the basis of socioeconomic status.²⁸

The point at any rate is that both zoning and restrictive covenants can be explained by private interest. The ideal restrictive covenant presumes a homogenous group whose members consent to a set of restrictions that advances their own ends. The ideal zoning scheme assumes a homogenous group that entrusts the restrictions to elected officials who are expected to exercise their authority to advance the group's interest. Not that zoning can't advance public ends. Of course it can. But so can restrictive covenants: just ask Doug Visser.²⁹

III. A SHIFT IN THE BALANCE OF PRIVATE AND PUBLIC INTERESTS

Whether or not the private interest served by zoning is aligned with societal objectives is an empirical as well as political question. Typically, the question is whether the benefit of the covenant or the zoning scheme to the owners outweighs the cost to the users excluded by it. In the 1920s, planners firmly believed it did.³⁰ Nowadays they do not. Since its early years, zoning has been characterized by two central features: (a) hyper segregation of uses, and especially the segregation of residential from non-residential uses; and (b) the sanctity of the single household detached residential district, in which no other use or development are welcome.³¹ Both of these features were questioned sharply toward the turn of the century.³² Most planners today advocate for mixed use, mixed income, walkable, and transit oriented neighbourhoods. Some Canadian municipalities were receptive to these ideals and accommodated them in new, mostly suburban development.³³ But councils were generally reluctant to interfere with existing single family zoning designations for fear of voters' reactions. More recently, however, single family zoning has come under heavy attack in the

²⁶ *Buchanan v Warley*, 245 US 60 (1917). Although racism and discrimination in housing was not alien to Canada, Canadian municipalities never adopted explicitly racial zoning bylaws.

²⁷ *Shelley v Kraemer*, 334 US 1 (1948). A racial and discriminatory covenant was declared invalid by the Supreme Court of Canada in the case of *Noble v Alley* (1950), [1951] SCR 64, on the grounds that it was uncertain and that it restricted not the use of the property but who may own or occupy it and was therefore incapable of being annexed to the land.

²⁸ See e.g. *Amar Developments Ltd v Jaswal*, 2016 ABQB 636 at para 13 (the primary purpose of the covenants was to ensure "an elite neighbourhood with upscale aesthetics"). See also Canada Mortgage and Housing Corporation, *The Impact of Restrictive Covenants on Affordable Housing and Non-Single-Family Uses of Homes: A Waterloo Region Case Study*, by Pierre Filion, Catalogue No NH15-734/199EPDF (Ottawa: CMHC, 1993) (finding that covenants may undermine local housing policies by restricting the supply of land for affordable housing).

²⁹ Stolte, "Farmer Forgoes Millions," *supra* note 5.

³⁰ Expert opinion in support of zoning was cited at length in the seminal case of *Village of Euclid v Ambler Realty Co*, 272 US 365 (1926).

³¹ See generally Sonia Hirt, *Zoned in the USA: The Origins and Implications of American Land-Use Regulation* (Ithaca, NY: Cornell University Press, 2014).

³² Andres Duany, Elizabeth Plater-Zyberk & Jeff Speck, *Suburban Nation: The Rise of Sprawl and the Decline of the American Dream* (New York: North Point Press, 2000). See also Canada Mortgage and Housing Corporation, *Resettling Cities: Canadian Residential Intensification Initiatives, Main Report*, by Engin Isin & Ray Tomalty, Catalogue No NH15-551/1993E-PDF (Ottawa: CMHC, 1993) (1993) online: *Government of Canada Publications* [perma.cc/7FJD-AELA] (in Toronto and Vancouver, planners advocated for mixed uses and greater density as early as the 1970s).

³³ Jill Grant, "Mixed Use in Theory and Practice: Canadian Experience with Implementing a Planning Principle" (2002) 68:1 J American Planning Assoc 71.

US, and not without good cause. Most metropolitan areas in the US are fragmented and consist of many smaller suburban municipalities dominated by single detached homeowners.³⁴ In many such communities virtually all land is restricted to detached single-household dwellings on large lots. The result is an extreme crisis of affordable housing.³⁵ The collateral displacement of would-be residents is associated with sprawl, carbon emissions, and distressed water supply systems.³⁶ Recent events in the US and the Black Lives Matter movement have also recalled zoning's association with racial exclusion.³⁷

The need for zoning reform may be less pressing in Canada. Zoning policies in Canada are less stringent by comparison, with modest lot sizes and adequate supply of land designated for medium and high-density residential use being the norm.³⁸ Except in parts of Canada hemmed in by green belts and growth boundaries, home prices are relatively affordable.³⁹ Whether or not zoning is the cause of sprawl continues to be debated, but it is increasingly recognized that more compact, less car dependent development forms are desirable in view of the threat of climate change.⁴⁰ At any rate, many Canadian municipalities are busy rewriting their zoning codes to accommodate a greater range of uses and densities in residential areas.⁴¹ In several major cities there are no longer any residential districts exclusively reserved for single detached dwellings. The Government of British Columbia has even announced its intentions to abolish single family zoning in the province altogether.⁴²

As it turns out, covenants can frustrate densification policies. This is true for Edmonton and Calgary, where large-scale covenants (or "building schemes")⁴³ imposed by private developers, the Hudson's Bay Company, the Canadian Pacific Railway, and even the City

³⁴ William A Fischel, *The Homevoter Hypothesis: How Home Values Influence Local Government Taxation, School Finance, and Land-Use Policies* (Cambridge, Mass: Harvard University Press, 2001).

³⁵ Robert C Ellickson, "Zoning and the Cost of Housing: Evidence from Silicon Valley, Greater New Haven, and Greater Austin" (2021) 42:5 *Cardozo L Rev* 1611 [Ellickson, "Zoning and the Cost of Housing"]; Robert Ellickson, "The Zoning Straitjacket: The Freezing of American Neighborhoods of Single-Family Houses" (2021) 96:2 *Ind LJ* 395 [Ellickson, "The Zoning Straitjacket"].

³⁶ Ellickson, "Zoning and the Cost of Housing," *ibid*; Ellickson, "The Zoning Straitjacket," *ibid*.

³⁷ For discussion, see Allison Shertzer, Tate Twinam & Randall P Walsh, "Zoning and Segregation in Urban Economic History" (2022) *Regional Science & Urban Economics* 1.

³⁸ See generally Andrew H Whittemore & William Curran-Groome, "A Case of (Decreasing) American Exceptionalism: Single-Family Zoning in the United States, Australia, and Canada" (2022) 88:3 *J American Planning Assoc* 335.

³⁹ There is no denying the housing shortage and affordability crisis in Canada, especially in the Vancouver and Toronto metropolitan areas. However, zoning for low density, single-household dwellings is not among the key contributors to the problem: Canada Mortgage and Housing Corporation, *Canada's Housing Supply Shortages: Estimating What is Needed to Solve Canada's Housing Affordability Crisis by 2030*, Catalogue No NH21-14/2022E-PDF (Ottawa: CMHC, 2022).

⁴⁰ Michael Lewyn, "Sprawl in Canada and the United States" (2012) 44:1 *Urban Lawyer* 85; Raphaël Fischler, "The Problem, or Not, of Urban Sprawl" *Policy Options* (February 2004), online (pdf): [perma.cc/A3WS-U6MP].

⁴¹ See e.g. May Warren, "'Ambitious' New Housing Plan Proposed for Toronto Calls for Major Zoning Changes," *Toronto Star* (9 December 2022) online: [perma.cc/P4N4-46J4]; Elise Stolte, "Pushing Beyond an Ugly History. There Is Now No 'Single-Family' Zone in Edmonton," *Edmonton Journal* (14 January 2019) online: [perma.cc/U2V5-YPKF]; Frances Bula, "Vancouver City Planners Propose Zoning Changes to Cope with Housing Crisis," *The Globe and Mail* (18 January 2023) online: [perma.cc/GN7D-66F6].

⁴² Jon Hernandez, "Why Some B.C. Municipalities Are Split over Proposal to End Single-Family Zoning," *CBC News* (4 April 2023), online: [perma.cc/L3XZ-SDQW].

⁴³ See e.g. *Potts v McCann*, 2002 ABQB 734 at para 27 [Potts]; *Gubbels v Anderson*, [1994] 91 BCLR (2d) 379 (SC) at para 19 [Gubbels], aff'd (1995) 8 BCLR (3d) 193 (CA).

of Calgary itself, fix certain neighbourhoods in low densities.⁴⁴ Discharging a covenant by unanimous consent is difficult, especially in the case of a building scheme: “Under a building scheme all landowners share similar burdens and enjoy benefits relating to these limitations on property use. Purchasers of property within areas covered by building schemes do so with knowledge of the restrictions and often because they seek the specific benefits provided by the building scheme.”⁴⁵ If there is even one holdout, only the courts have the power to modify or discharge a covenant, but the discretion to do so is limited.⁴⁶ In British Columbia, the court may make an appropriate order if the covenant or scheme is obsolete because of changes in the character of the land, the neighbourhood or other circumstances the court considers material.⁴⁷ The equivalent provision in Ontario has been interpreted narrowly to confer on the court the power “to get rid of a condition or restriction which is spent or so unsuitable as to be of no value and under circumstances when its assertion would be clearly vexatious.”⁴⁸

The Alberta *Land Titles Act*⁴⁹ authorizes the courts to discharge or modify a covenant if satisfied that doing so will be beneficial to the persons principally interested in its enforcement.⁵⁰ In Professor Ziff’s view, the court’s power is intended to overcome “a small rump of unreasonable holdouts.”⁵¹ Further, the courts have refrained from exercising this discretion in paternalistic fashion.⁵² In addition, the courts in Alberta can modify or discharge a covenant if: (a) the covenant conflicts with a zoning bylaw or a statutory plan under the *Municipal Government Act*;⁵³ and (b) to do so is in the public interest.⁵⁴ The question of conflict can arise when the applicable zoning and restrictive covenant prescribe different development standards (for example, building setback or height) or uses. The traditional interpretation of conflict in this context is illustrated by *Grieve’s Application*.⁵⁵ In that case

⁴⁴ See e.g. *Potts, ibid* (private developer imposing a covenant); *Moyen (Re)*, 2018 ABQB 1023 (private developer imposing a covenant); *Seifeddine v Adventurers of England* (1980), 11 Alta LR (2d) 229 (CA) (Hudson’s Bay Company imposing a covenant) [*Seifeddine*]; *Re S 51 Land Titles Act (Grieve’s Application)* (1953), [1954] 1 DLR 301 (ABQB) (Canadian Pacific Railway imposing a covenant) [*Grieve’s Application*]; *Crump v Kernahan* (1995), 32 Alta LR (3d) 192 (QB) (the City of Calgary imposing a covenant) [*Crump*]. See also Helén Elvestad & Terje Holsen, “Negative Covenants and Real-Estate Developers’ Modus Operandi: The Case of Suburban Densification in Oslo, Norway” (2020) 91:3 *Town Planning Rev* 325 (the phenomenon is not limited to Alberta, or even Canada).

⁴⁵ *Gubbels, supra* note 43 at para 19. See also *Moyen (Re)*, *ibid* at para 10 (“Restrictive covenants, in a sense, begin with a despot; being the developer, who imposes the restrictive covenant upon the lots in the development to attract a higher price and a more uniform class of purchasers: they buy in to the development on this basis.”)

⁴⁶ *Moyen (Re)*, *ibid* at para 10 (refers to the court’s power to modify or discharge a covenant); Eran S Kaplinsky, Malcolm Lavoie & Jane Thomson, *Ziff’s Principles of Property Law*, 8th ed (Toronto: Thomson Reuters Canada, 2023) at 490–92 (limited discretion for courts to use power to modify or discharge a covenant).

⁴⁷ *Property Law Act*, RSBC 1996, c 377, s 35.

⁴⁸ *Re Ontario Lime Co, Ltd* (1926), [1927] 1 DLR 765(CA) at 768 (interprets Ontario’s *Conveyancing and Law of Property Act*, RSO 1990, c C.34, s 61).

⁴⁹ RSA 2000, c L-4.

⁵⁰ *Ibid*, s 48(4).

⁵¹ *Ziff, Principles of Property Law, supra* note 25 at 481.

⁵² *Grieve’s Application, supra* note 44 at 306 (“It seems to me that it was never intended that the Court should act the part of a benevolent despot and say to this latter class, ‘A modification of this covenant is in your interest whether you think so or not; and you are going to have it whether you want it or not.’”). See also *Seifeddine, supra* note 44; *Fleischaker v Scott*, 2007 ABQB 330; *Moyen (Re)*, *supra* note 44; *Ukrainian Senior Citizens Home of St John v Torres*, 2009 ABQB 725.

⁵³ RSA 2000, c M-26, s 616(dd) (defines “statutory plan” as “an intermunicipal development plan, a municipal development plan, an area structure plan and an area redevelopment plan adopted by a municipality”).

⁵⁴ *Ibid*, ss 616(dd) (defines statutory plans), 616(k) (defines zoning bylaws, which are referred to as “land use bylaws” in the *Municipal Government Act*).

⁵⁵ *Supra* note 44.

subdivided land in Calgary was sold by the Canadian Pacific Railway subject to a building scheme that restricted development to no more than one single dwelling on any lot. Subsequently, the City of Calgary zoned the lands to allow for multi-family development. The Court found that no conflict existed between the zoning and the covenant:

[I]n so far as the city of Calgary is concerned, its zoning by-laws or regulations have been altered so as to permit of multiple-family dwellings being erected in an area where only single family dwellings might have been erected before. There is nothing whatsoever to suggest that the present classification is obligatory, that only multiple-family dwellings may be erected in the area, and that the erection of further single-family dwellings is prohibited. How then can it be said that a covenant enforceable by and against each individual owner in the area conflicts with a provision which is merely permissive and not obligatory? The city has said, “In this area you may, at your discretion, build either multiple or single family dwellings”, to which the owners promptly reply, “We have already agreed among ourselves that we will build only single-family dwellings.”⁵⁶

The courts have maintained since that conflict between a covenant and municipal land use regulations exists only if compliance with one would necessarily entail noncompliance with the other.⁵⁷ Thus defined, conflicts should rarely be found. Only restrictive (negative) covenants are enforceable in Canadian common law, namely, those that can be complied with by doing nothing.⁵⁸ Zoning bylaws, too, are restrictive in the sense that they prohibit certain uses and specify minimum standards, but do not impose any positive obligations on the owner to use or develop the land in any prescribed manner.⁵⁹

But in the recent decision in *Howse v. Calgary (City)*,⁶⁰ the Court of Queen’s Bench of Alberta discharged in part an existing covenant for conflict with the city’s land use bylaw. The legal dispute arose from, in the words of Justice Labrenz, “substantially different visions for the future of Banff Trail, a residential neighbourhood in the northwest quadrant of Calgary. One group of litigant[s] desires to maintain the *status quo* — a neighbourhood comprised primarily of single-family detached homes. Another group of advocates seeks strategic densification.”⁶¹

The lands in dispute are located immediately to the east of the University of Calgary and close to the Foothills Medical Centre and Southern Alberta Institute of Technology. The neighbourhood is conveniently served by a CTrain light rail station and houses a high percentage of students and renters.⁶² The lands were originally subdivided in the 1950s and sold subject to a restrictive covenant providing, *inter alia*, that no more than “one Single or

⁵⁶ *Ibid* at 307.

⁵⁷ *Seifeddine*, *supra* note 44; *Tanti v Gruden*, 1999 ABCA 150; *GA Developments Ltd v Girard*, 1999 ABQB 719; *Crump*, *supra* note 44; *Barker v Palmer*, 2005 ABQB 815.

⁵⁸ *Amberwood Investments Limited v Durham Condominium Corp No 123* (2002), 58 OR (3d) 481 (CA); *Owners, Strata Plan LMS 3905 v Crystal Square Parking Corp*, 2020 SCC 29. See also Ziff, “Restrictive Covenants,” *supra* note 1.

⁵⁹ Stanley M Makuch, Neil Craik & Signe B Leisk, *Canadian Municipal and Planning Law*, 2nd ed (Toronto: Thomson Carswell, 2004) at 190, 196, 213.

⁶⁰ 2022 ABQB 551 [*Howse*].

⁶¹ *Ibid* at para 1.

⁶² Useful information about the neighbourhood and its history can be found in an episode of “The Sprawl” podcast: Jeremy Klaszus, “The Battle of Banff Trail: A Struggle Over Transit-Oriented Development,” (6 November 2022), online (podcast): *The Sprawl* [perma.cc/5L2H-N8JH].

Two Family dwelling house and a private garage attached or unattached to such dwelling house may be erected on any one lot.”⁶³

As early as 2016, Calgary’s planning authorities identified the neighbourhood as a target for densification and began the process for implementing the requisite land use policies. In 2019, the administration reported that the restrictions contained in the covenant “are now outdated and no longer conform to the long-term planning vision”⁶⁴ articulated in the city’s planning instruments.⁶⁵ Subsequently, council amended its land use bylaw in 2021 to redesignate part of the lands in dispute as a direct control district. A feature of Alberta planning law, a direct control district designation authorizes council, subject to any applicable statutory plan, to regulate and control the use or development of land or buildings in the district in any manner it considers necessary.⁶⁶ The effect of the direct control bylaw was chiefly to prescribe a minimum density for development.

Justice Labrenz concluded that there is clear conflict between the direct control zoning designation and the existing covenant: “The former requires a minimum density that exceeds the maximum permitted under the latter. It is impossible to comply with both; compliance with one necessarily entails non-compliance with the other.”⁶⁷ He therefore ordered the covenant discharged against the properties subject to the bylaw.⁶⁸

The Court’s conclusion as to the existence of a conflict is not entirely persuasive. On the one hand, council’s explicit purpose in adopting the regulation was to flout the covenant and transform the character of the neighbourhood in accordance with the new public planning vision. On the other hand, although the covenant restricted development to single family dwellings, and the city’s regulations no longer allow it, existing single homes are unaffected by the new bylaw.⁶⁹ And while the city’s regulation now requires that any development of the lands in question meet the minimum density requirement, it does not (nor can it) compel the owner to develop.

At any rate, *Howse v. Calgary* may signal a change in attitude toward large-scale covenants that can impede local policies. Municipalities have turned their attentions to covenants lately, not only those which are the legacy of twentieth century planning (such as the Carruthers Caveat or the Banff Trail Restrictive Covenant), but also those covenants which are routinely attached in new subdivisions and those proposed in mature areas (for example, Greater Hardisty). Covenants and zoning are substitutes. When property owners lose confidence in their ability to rely on zoning to protect their interests, they turn to covenants instead. If the ruling in *Howse v. Calgary* is followed, property owners’ sphere of

⁶³ *Howse*, *supra* note 60 at para 5.

⁶⁴ *Ibid* at para 13.

⁶⁵ *Ibid* at paras 13–17.

⁶⁶ Alberta’s *Municipal Government Act*, *supra* note 53, s 641. See also Frederick A Laux & Gwendolyn Stewart-Palmer, *Planning Law and Practice in Alberta*, 4th ed (Edmonton: Juriliber, 2019).

⁶⁷ *Howse*, *supra* note 60 at para 67.

⁶⁸ Justice Labrenz rejected the finding of conflict between the covenant and the applicable statutory plan *generally* and limited the order only to those parcels subject to the direct control district designation (*ibid* at paras 86–92).

⁶⁹ The general law in Canada is that new zoning does not affect the right to lawful, existing uses and buildings: see generally Makuch, Craik & Leisk, *supra* note 59 at 239–43. The relevant provision in Alberta is in the *Municipal Government Act*, *supra* note 53, s 643.

control will now be limited strictly to their own property boundaries. That may not be an entirely positive development. Without dismissing the importance and urgency of the objectives of densification, the part played by planning experts and local governments in shaping the current landscape — which they now seek to overhaul — should also be acknowledged. The co-existence of zoning and covenants allows appropriate decentralization of planning authority and provides opportunities for competing planning ideals.

There is another argument against being too quick to interfere in private covenants,⁷⁰ at least in Alberta, where landowners like Doug Visser play a vital role in private conservation and stewardship. Covenants are the foundation of cluster development and transferable development credit schemes. They are relied on for conservation of farmlands, woodlands, wetlands, and protection of ecosystems where governments fall short.⁷¹ Covenants have untapped potential to protect the urban forest and even the supply of affordable housing. If policymakers continue to undermine zoning, the result will be more covenants. Undermine covenants, and we may see less conservation.

⁷⁰ Another argument against intervention should be mentioned but will not be discussed here: that the modification of covenants can be injurious to the economic interests of some stakeholders, but the courts have no authority to award compensation. See Kaplinsky, Lavoie & Thomson, *supra* note 46 at 491.

⁷¹ Arlene J Kwasniak, “Conservation Easements: Pluses and Pitfalls, Generally and for Municipalities” (2009) 46:3 *Alta L Rev* 651.

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