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INFLECTION POINT: PRIVATE LAND USE COVENANTS, THE HOUSING CRISIS AND THE WARMING PLANET

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Two major problems have brought us to what should be an inflection point in the ways we use land in the United States: the housing crisis¹ and the warming planet.² They will require significant changes in residential, industrial, and agricultural patterns and practices, both public and private. To alleviate the housing crisis, it will be necessary to increase land use density and reduce costs. To cope with a warming climate, it will be necessary to change designs, materials, and energy sources. In this paper, I will consider some of the ways that private land use covenants may interfere with needed changes in residential developments and how they could be modified or terminated.

The housing crisis arises from a severe shortage of housing,³ which has been exacerbated by the natural disasters that have accompanied a warming climate.⁴ As of 2017, an estimated 554,000 people in the United States were homeless and as of 2016, an additional 34 million were burdened by housing costs that exceeded thirty percent of household income.⁵ In recent years hurricanes, tornadoes, floods, and wildfires have taken many lives and destroyed hundreds of thousands of homes. Natural disasters are likely to destroy many more homes in the future.

To build enough housing to provide reasonable accommodations for the United States' population, it will be necessary to increase density and reduce costs. To protect communities from the ravages of wildfires, hurricanes, floods and

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1. Michael Hobbes, *America's Housing Crisis is a Ticking Time Bomb*, HUFF POST (June 19, 2018), www.huffingtonpost.com/entry/housing-crisis-inequality-harvard-report_us_5b27c1f1e4b056b2263c621e; Bryce Covert, *The Deep, Uniquely American Roots of Our Affordable Housing Crisis*, THE NATION (May 24, 2018), www.thenation.com/article/give-us-shelter/.

2. See *Fourth National Climate Assessment*, U.S. GLOB. CHANGE RES. PROGRAM, www.globalchange.gov/nca4 (last visited Aug. 17, 2019); see also *The Intergovernmental Panel on Climate Change*, www.ipcc.ch/ (last visited Aug. 17, 2019).

3. See Benjamin Schneider, *How to Make Americans Understand the New Housing Crisis*, CITYLAB (May 16, 2018), www.citylab.com/equity/2018/05/is-housing-americas-next-big-political-issue/560378/ (discussing a report which estimates that the U.S. produced 7.3 fewer homes than needed to meet demand and population growth between 2000 and 2015).

4. See *Weather Disasters and Costs*, NAT'L OCEANIC AND ATMOSPHERIC ADMIN. (May 9, 2019), coast.noaa.gov/states/fast-facts/weather-disasters.html (reporting damage from natural disasters).

5. J. CTR. FOR HOUS. STUD. OF HARV. UNIV., *THE STATE OF THE NATION'S HOUSING 2018* 31, 34 (2018), www.jchs.harvard.edu/sites/default/files/Harvard_JCHS_State_of_the_Nations_Housing_2018.pdf.

other natural disasters, it will be necessary to change the way communities are designed and the kinds of materials used in construction and landscaping. Widely used private land use covenants will complicate the process in many areas.

Use restrictions limit the housing available to many people. For example, land in many residential areas is restricted to use for single-family dwellings only and may be further restricted to use by a single family and only for residential purposes. These kinds of restrictions reduce the housing available to people who might otherwise be able to afford it if they could share or rent out space or run a business out of the home.⁶ They also may limit the amount of housing available to non-traditional living groups that do not meet the definition of a single family.⁷

Many covenants increase the cost of housing. Common covenants require large minimum lot sizes, prohibit subdividing lots, and only allow single-family dwellings. These covenants produce low-density use that increases the costs of the housing. Low-density development increases the cost of providing infrastructure and reduces the feasibility of providing public transit. These kinds of restrictions also prohibit the creation of auxiliary dwelling units, the so-called “granny flats,” which can increase the supply of affordable housing. Design and landscaping requirements can also raise costs. Manufactured homes could reduce costs but are often prohibited by covenants.

Design and landscaping requirements, often accompanied by architectural controls that require approval from a homeowners association, can interfere with the use of drought-tolerant landscaping, heat-repelling roofing, solar panels, clothes lines, rain barrels, and other methods of reducing energy and water use. They can also interfere with changes needed to provide protection against wildfires, severe storms, and floods. Design and material changes will be needed at the level of individual lots and at the community level. To protect against wind-driven wildfires, for example, houses should be built with fire-resistant materials, fire-resistant landscapes, and without eaves that can trap embers. To protect

6. To address its housing crisis and combat racial segregation, the Minneapolis City Council voted on Dec. 7, 2018 to eliminate single family zoning and allow residential structures with up to three dwelling units in every neighborhood. See Sarah Mervosh, *Minneapolis, Tackling Housing Crisis and Inequity, Votes to End Single-Family Zoning*, N.Y. TIMES (Dec. 13, 2018), www.nytimes.com/2018/12/13/us/minneapolis-single-family-zoning.html; Celeste M. Hammond, *Repurposing Golf Courses and Other Amenities that Burden the Land: Covenants Running Forever- A Transactional Perspective* 52 J. MARSHALL L. REV. 603 (2019).

7. To the extent restrictions prevent handicapped people from occupying a dwelling, they run afoul of the federal Fair Housing Act. 42 U.S.C.A. § 3604 (West 2019); See e.g., *Hill v. Community of Damien of Molokai*, 911 P.2d 861 (N.M. 1996) (applying single-family-residence restrictions to exclude a group home for people with AIDS would violate FHA).

against floods, houses should be elevated above likely water levels. Even these measures may not be enough to avoid disasters in some areas and entire neighborhoods may need to be reconfigured into more defensible patterns and to create viable escape routes.⁸ It may not be feasible to reconfigure a community until it has been largely destroyed. Afterwards, however, it can be done but only if existing covenants can be modified or terminated.

Private land use covenants have contributed to the desirability and stability of many residential communities, but they raise costs, lock in land uses, and may prevent use of materials and designs that can reduce energy and water consumption or provide protection against natural disasters. The current housing crisis and natural disasters that accompany our warming planet demand that developers and public authorities rethink the ways we use land and the kinds of restrictions that are imposed. If the political will is there and the housing market will support it, changes can be made in future development practices on land that is not subject to existing covenants. Where existing covenants interfere with needed changes, they will need to be modified or terminated. Unlike zoning and other public land use restrictions, private restrictions can usually be changed only with the consent of the land owners who hold the benefit of the covenants.

Obtaining the consent of covenant beneficiaries may be possible,⁹ particularly if the applicable covenants require less than unanimous consent to make changes, but the difficulty of locating and obtaining the required signatures and the likelihood of dissenters and hold-outs means that other ways of modifying or terminating covenants will be necessary. There are several other ways. The changed conditions doctrine of covenants law¹⁰ can be used if the covenants no longer serve the purpose for which they

8. See Wade Graham, *Can California Learn to Love its Fires?*, L.A. TIMES (Dec. 9, 2018), www.latimes.com/opinion/op-ed/la-oe-graham-fire-community-20181209-story.html.

9. Hammond, *supra* note 6.

10. RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 7.10 (2000) states the doctrine as follows:

(1) When a change has taken place since the creation of a servitude that makes it impossible as a practical matter to accomplish the purpose for which the servitude was created, a court may modify the servitude to permit the purpose to be accomplished. If modification is not practicable, or would not be effective, a court may terminate the servitude. Compensation for resulting harm to the beneficiaries may be awarded as a condition of modifying or terminating the servitude.

(2) If the purpose of a servitude can be accomplished, but because of changed conditions the servient estate is no longer suitable for uses permitted by the servitude, a court may modify the servitude to permit other uses under conditions designed to preserve the benefits of the original servitude.

were created or if it has become impractical or dangerous to comply with them. This could be used to allow changes in materials and landscaping requirements. The changed conditions doctrine could also be applied to allow reconfiguration and redesign of areas where significant amounts of housing have been damaged or destroyed by natural disasters. Although the doctrine has some potential for allowing needed changes, its utility is limited.

Instead of seeking consent from landowners, statutes and regulations can be adopted that target undesirable restrictions. Many states have statutes invalidating restrictive covenants that prevent use of solar panels.¹¹ Several states limit the effect of covenants preventing use of low-water landscaping.¹² At least one allows residents to use external rain barrels, despite restrictive covenants.¹³ Other states require compliance with fire-prevention plans that require clearing vegetation around homes or invalidate covenants that prevent use of fire-retardant roofing materials.¹⁴ Fair housing acts prevent enforcement of covenants that discriminate against potential residents on the basis of race, religion, national origin, sex and other grounds.¹⁵ If there is political will, statutes could limit enforcement of other private restrictions that prevent adaptation to changing social, physical, or environmental conditions. Zoning and building permit requirements can also override private restrictions by mandating use of materials or designs prohibited by covenants or architectural control committees. For example, statutes can override restrictions prohibiting auxiliary dwelling units.¹⁶

Another type of statutory solution might follow the approaches taken by Massachusetts¹⁷ and New York,¹⁸ which more generally limit the enforcement of restrictions that are obsolete or lack substantial value to the person seeking enforcement. In those cases,

11. *See, e.g.*, ARIZ. REV. STAT. § 33-439 (LexisNexis 2019), CAL. CIV. CODE § 714 (West 2015), COLO. REV. STAT. ANN. § 38-30-168 (West 2008), FLA. STAT. ANN. § 163.04 (West 2008), 765 ILL. COMP. STAT. ANN. 165/20 (West 2012), NEV. REV. STAT. ANN. § 111.239 (West 2009), DEL. CODE ANN. tit. 25, § 318 (West 2010), MASS. GEN. LAWS ANN. ch. 184, § 23C (West 2019), N.C. GEN. STAT. ANN. § 22B-20 (West 2009), N.J. STAT. ANN. § 45:22A-48.2 (West 2007), TEX. PROP. CODE ANN. § 202.010 (West 2015), UTAH CODE ANN. § 17-27a-610 (West 2005), VT. STAT. ANN. tit. 27, § 544 (West 2009).

12. *See, e.g.*, COLO. REV. STAT. ANN. § 37-60-126 (West 2019), OR. REV. STAT. ANN. § 100.023 (West 2018), FLA. STAT. ANN. § 166.048 (West 2009), FLA. STAT. ANN. § 373.185 (West 2009), FLA. STAT. ANN. § 720.3075 (West 2013).

13. COLO. REV. STAT. ANN. § 37-96.5-103 (West 2016).

14. *See, e.g.*, KAN. STAT. ANN. § 31-171 (West 2006).

15. *See, e.g.*, Federal Fair Housing Act, 42 U.S.C.A. § 3604 (West 2019); *see also* California Fair Employment & Housing Act, CAL. GOV'T CODE §§ 12955-12956.2 (West 2012).

16. *See, e.g.*, CAL. GOV'T CODE § 65852.2 (West 2018), OR. REV. STAT. ANN. § 197.312 (West 2018).

17. MA GEN. LAWS ANN. ch. 184, § 30 (West 1979).

18. N.Y. REAL. PROP. LAW § 1951 (McKinney 2018).

enforcement may be limited to a damages remedy or the restriction may be terminated. Massachusetts also allows consideration of whether the restriction is inimical to development of the municipality, an approach that might prove particularly useful in cases involving covenants that obstruct changes needed to deal with climate change or the housing crisis.¹⁹

A final approach to removing covenants that obstruct needed changes is to use eminent domain to condemn particular servitude benefits, to acquire title to areas for redevelopment, or in extreme cases, to remove entire communities from areas subject to fire, flooding or other disasters.

The housing crisis and climate change have brought us to what should be an inflection point in the way we use land in the United States. Common law doctrines requiring consent or changed conditions will not be sufficient to allow needed changes in private land use covenants. Public action will be necessary.

19. MA GEN. LAWS ANN. ch. 184, § 30 (West 1979).

