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Neighborhood Conservation Districts; A New Planning Tool Demands the Evolution of the Covenant Against Encumbrances

Dorothy D. Nachman

RNEIGHBORHOOD CONSERVATION DISTRICTS: A NEW PLANNING TOOL DEMANDS THE EVOLUTION OF THE COVENANT AGAINST ENCUMBRANCES

DOROTHY D. NACHMAN[1]

INTRODUCTION

Imagine you have found the perfect house to buy: the right size, in the right neighborhood, in the right price range. The seller has agreed to convey marketable title and has disclosed that there are no restrictive covenants limiting the use of the property consistent with a home and neighborhood of that age. You hire a closing attorney whose title search and opinion of title does not disclose any encumbrances of record in the chain of title. All appears to be perfect and you execute the closing as scheduled and receive a general warranty deed containing all the standard warranties of title. All seems well until you decide to renovate your home to accommodate your growing family. When your contractor files the building plans with the municipal authorities in order to get the building permit, she is advised that the addition, as represented in the building plans, violates existing zoning rules and the permit is denied. You were never aware of any limitations imposed by the zoning regulations that would prohibit your contemplated addition. The restriction at issue is not the base zoning limitations but rather a zoning overlay. When you contact the closing attorney to find out why these limitations were not discovered, you are advised that records of the zoning office are not routinely included in an examination of title. When you inquire about what remedies you may have against the sellers for the failure to disclose these limitations you are met with equally upsetting news: the

1. The author is an Associate Professor of Law at North Carolina Central University School of Law, Durham, N.C., where she teaches in the areas of Property and Trusts and Estates. She would like to thank her students who daily demand her best and, in particular, Hayley Blythe Lampkin and Kyle Sherard, who chased down sources and edited footnotes with diligence, competence and, most importantly, a sense of calm. Lastly, to my colleagues, Susan Hauser and Kia Vernon, for whose endless encouragement and support I am forever grateful.

presence of zoning regulations are generally not an encumbrance that would justify a claim under the deed warranties. It appears you have no recourse against the closing attorney, no recourse against the seller and no ability to renovate your home as desired. Your dream home has become your nightmare all because traditional ideas about encumbrances have not kept time with new and innovative land use regulations.

This paper will explore whether zoning regulations, and more specifically, zoning overlays which may have substantial similarities to restrictive covenants, should be recognized as encumbrances, thereby imposing the obligation on title searchers to discover their existence and disclose them to their buyer-clients.

I. THE COVENANT AGAINST ENCUMBRANCES

A. COVENANT AGAINST ENCUMBRANCES

At common law, title covenants were the sole means of providing assurances to the buyer of property that he was receiving good and marketable title to the property.[2] Today, many of those assurances are encapsulated in the warranties and covenants made by the grantor at the time a deed is executed. [3]The covenant against encumbrances binds the grantors and their successors in interest[4] to the promise that the property is not subject to any rights or interests existing in a third party that "diminishes the value of the estate to the grantee."[5] If this covenant is violated, it does not affect the validity of the conveyance of the fee estate but the presence of an encumbrance will decrease the property's value or "clouds" an otherwise valid title.[6] "Notice or knowledge of an encumbrance does not bar an action for breach of the covenant against encumbrances, which is executed for protection and indemnity against known and unknown encumbrances."[7] This is based on "the well-established rule of law that the purchaser's knowledge of a prior encumbrance is not a defense to an action for the breach of the

2. Richard R. Powell, *Powell on Real Property* § 81A.06[1], at ## (Patrick J. Rohan ed., 1988).

3. *Booker T. Washington Const. & Design Co. v. Huntington Urban Renewal Auth.*, 181 W. Va. 409, 411, 383 S.E.2d 41, 43 (1989).

4. *Marathon Builders, Inc. v. Polinger*, 263 Md. 410, 415, 283 A.2d 617, 620 (1971).

5. Create 21 Chuo, Inc. v. Sw. Slopes, Inc., 81 Haw. 512, 525, 918 P.2d 1168, 1181 (Haw. Ct. App. 1996).

6. Powell, *supra* note 2, § 81.03[6](d)(iii).

7. *Tammac Corp. v. Miller-Meehan*, 643 A.2d 370, 371 (Me. 1994); *see* War Eagle, Inc. v. Belair, 204 N.C. App. 548, 549, 694 S.E.2d 497, 498 (2010).

covenant."[8] An exception to this rule can be found in some jurisdictions when the encumbrance is "of an open, notorious and visible physical condition."[9]

When an encumbrance exists at the time of the conveyance, the grantor has breached the covenant. [10] Although the purchaser's title in the property is valid, the presence of the encumbrance is a breach of the covenant, and the purchaser is entitled to an appropriate remedy.[11]

B. BREACH OF WARRANTY

When there is a breach of the covenant against encumbrances, the remedy available for the breach is "the loss actually sustained by the grantee."[12] In the case of an encumbrance which is "extinguishable of right" or otherwise "presently about to expire by their own limitation," the measure of damages is nominal.[13] The measure of damages is different, however, when the encumbrance is "permanent in their nature;" in that event, the measure of damages is the "difference in value between the estate if un[e]ncumbered, and the same estate with the burden upon it."[14] Rescission of the contract to purchase based on the failure to convey marketable title, is a contract remedy which is only available so long as performance of the contract is outstanding.[15] Once the contract has been executed by delivery of the deed, rescission is no longer an available remedy, and relief must be sought under the deed warranties.

C. PROTECTION AGAINST A BREACH OF THE COVENANT AND THE PROFESSIONAL RESPONSIBILITY IN THE TITLE SEARCH

To protect against a breach of the covenant against encumbrances and other deed warranties, the purchaser will typically obtain title insurance. Title insurance assures the purchaser that they are vested in title and that the property is free from all defects, liens and encumbrances except those that

8. *Lockhart v. Phenix City Inv. Co*., 549 So. 2d 48, 51 (Ala. 1989).

9. *Ford v. White*, 179 Or. 490, 495–96, 172 P.2d 822, 824 (1946); *accord* McKnight v. Cagle, 76 N.C. App. 59, 66, 331 S.E.2d 707, 712 (1985) (quoting Hawks v. Brindle, 51 N.C. App 19, 24, 275 S.E.2d 277, 281 (1981) ("The rule in North Carolina appears to be that a covenantee may not recover for breach of the covenant against encumbrances where the encumbrance he alleges is a public highway or railroad right of way and *either* (1) the covenantee purchased the property with *actual knowledge* that it was subject to the right-of-way or (2) the property was "*obviously and notoriously* subjected at the time to some right of easement or servitude [...]")).

10. Jessica P. Wilde, Violations of Zoning Ordinances, the Covenant Against Encumbrances, and Marketability of Title: How Purchasers Can Be Better Protected, 23 Touro L. Rev. 199, 200 (2007).

11. *Monti v. Tangora,* 99 Ill.App.3d 575, 54 Ill.Dec. 732, 737, 425 N.E.2d 597, 602 (1981).

12. *Aczas v. Stuart Heights*, Inc., 154 Conn. 54, 60, 221 A.2d 589, 593 (1966).

13. *Mitchell v. Stanley*, 44 Conn. 312, 314–15 (Conn. 1877).

14. *Id*. at 315.

15. *See* Wilde, *supra* note 9, at 201–02.

are disclosed; the title policy indemnifies the purchaser for any losses associated with such defects.[16] The basis for title insurance is an examination of title and issuance of an opinion of title by an attorney. A title search of the real property includes confirmation of ownership and other matters concerning the property that are of public record (i.e., mortgages, judgments, public utility assessments, real estate taxes). Not all of these items are located in the offices of recorders or register of deeds and the title searcher must expand the title search to include courts, estate divisions and other governmental and administrative agencies.[17]

An attorney must use reasonable care to "ensure that the title meets the parties' expectations."[18] This duty does not extend to ensuring that the title is perfect but that title is marketable.[19] It is not a common practice in the ordinary course of a title search to search the records of the planning department or other municipal office since these offices do not routinely contain records associated with encumbrances.[20] In meeting this duty, the attorney must "make a reasonably diligent and zealous investigation of the public records and to impart to his client all of the observable defects, deficiencies, and imperfections of the title," and in this duty, the lawyer is "under a professional duty to exercise ordinary care, knowledge, and skill."[21] If an attorney fails to discover encumbrances relevant to the marketability of title, the attorney is liable to the buyer for "all losses proximately caused"[22] by the failure which, in the case of a removable encumbrance would be the "cost of removing" the encumbrance but in the event of a total loss of the property, the buyer would be entitled to "recover its value."[23]

Having established that existing encumbrances on the property can render title unmarketable and cause a breach of the deed warranties, the next question is whether all land use restrictions - both public and private - are encumbrances.

16. Title Insurance Policies and Surveys: Overview, Practical Law Practice Note Overview 1-566-0349.

17. Commercial Real Estate Loans: Due Diligence, Practical Law Practice Note 8-513-3350; *see also* Thomas W. Hyland, Legal Malpractice and the Real Estate Practitioner 28 (Practicing L. Instit. 1985).

18. Kenneth M. Turnipseed, *Legal Malpractice and the Real Estate Lawyer*, 27 J. Legal Prof. 247, 251 (2003).

19. *Id.*

20. Patrick J. Rohan, 5A Real Estate Financing § 9.02 (2018).

21. Turnipseed, *supra* note 16 at 251 (citing Toth v. Vasquez, 65 A.2d 778 (N.J. Super. Ct. Ch. Div. 1949)).

22. Hyland, *supra* note 15, at 29.

23. *Id.*

II. PRIVATE LAND USE REGULATIONS

A. PRIVATE RESTRICTIONS

Most private land use restrictions are in the form of real covenants and equitable servitudes whose primary goal is to control permitted uses of property and to otherwise restrict the exercise of the bundle of rights traditionally associated with ownership of property. Common restrictions found in real covenants or equitable servitudes include both restrictions on use and restrictions on form.[24] Use restrictions may include residential use only,[25] single family occupancy,[26] and restrictions on accessory buildings and storage units.[27] Restrictions on form address all types of aesthetic limitations including, in some cases, the requirement that the design modifications get prior approval from a neighborhood architecture committee.[28] In addition to

24. Kenneth Regan, *You Can't Build That Here: The Constitutionality of Aesthetic Zoning and Architectural Review*, 58 Fordham L. Rev. 1013, 1030 (1990).

25. *Santa Monica Beach Prop. Owners Ass'n, Inc. v. Acord*, 219 So. 3d 111, 113 (Fla. Dist. Ct. App. 2017), reh'g denied (May 12, 2017) (restrictive covenants required that the property "shall be used only for residential purposes"); *see also* Grasso v. Thimons, 384 Pa. Super. 593, 596, 559 A.2d 925, 927 (1989) ("restrictive covenants which restrict the use of property, although not favored by the law, are legally enforceable.").

26. *Slaby v. Mountain River Estates Residential Ass'n, Inc.*, 100 So. 3d 569 (Ala. Civ. App. 2012) (upholding a restrictive covenant which limited use of a parcel to single family residential purposes only, and further finding that commercial rental did not violate the covenant); *see also* Martellini v. Little Angels Day Care, Inc., 847 A.2d 838, 843–45 (R.I. 2004) (finding that a valid restrictive covenant that limited use of property "solely and exclusively for single family private residence purposes" thereby restricted the property's use as a family daycare).

27. *Turner v. Sellers,* 878 So. 2d 300, 302–3 (Ala. Civ. App. 2003) (Upholding a restrictive covenant providing that "any building including but not limited to a pump house, or storage area must be of a permanent nature, and must be kept in good repair. Approval as to the materials and placement of said buildings must be granted by the Architectural Control Committee. No roll-type roofing or tin may be used for exterior finish. All such outbuildings, including detached garages, shall be located to the rear of any residential buildings located on the lot. No trailer, basement, tent, shack, garage, barn, or other outbuilding of a temporary character shall be erected or used on any lot unless first approved in writing by the Architectural Control Committee.").

28. *Hawthorne Ridge Homeowners Ass'n v. Yan Wang*, No. 336077, 2017 WL 6598177, at 2 (Mich. Ct. App. Dec. 26, 2017) ("Any exterior painting of an owner's dwelling or other structure must be approved by the Association prior to commencement of any preparation work. An owner desiring to paint the exterior of a dwelling must first submit to the Association the Alteration/Modification Form for Exterior Painting, except if the color chosen is the original color of the structure. Any requests must be accompanied by two color chips for each color to be applied. As a general guideline, only light earth-tone colors are permitted for exterior painting. If any owner violates this Section, the Association may request that the owner change his choice of exterior color(s) and re-paint the dwelling at the owner's expense. [Emphasis added.]"); *Sea Pines Plantation Co. v. Wells*, 294 S.C. 266, 269, 363 S.E.2d 891, 893 (1987) (finding that a homeowner was required to "remove the flagpole, jacuzzi and satellite antenna...wrought iron fence, gate, beach walkway, shower, and the no trespassing sign" as well as other unapproved landscaping features*"); Palmetto Dunes Resort, Div. of Greenwood Dev. Corp. v. Brown*, 287 S.C. 1, 3, 336 S.E.2d 15, 16 (Ct. App. 1985) (upholding covenants created by a neighborhood subdivision's Architectural Review Board, which regulated "all elements of aesthetics," with "major considerations" on

elements that clearly touch and concern the real property, some servitudes work to restrict the age, familial status or religion of its property owners[29] all in an attempt to resolve conflict among potential neighbors and provide a compatible living environment among like-minded homeowners.

It has long been recognized that "leases, mortgages . . . judgment liens, mechanics' liens, and tax liens, easements, covenants running with the land, equitable servitudes, party wall agreements, contracts, and options"[30] are encumbrances because in each of these instances, there is an interest in the subject property vested in a third party non-owner. A covenant running with the land was traditionally understood to be a negative easement: prohibiting a landowner from doing something on her property she would otherwise be entitled to do.[31] Courts were historically unwilling to recognize negative easements and thus the birth of covenants running with the land[32]. In order for the covenant to run with the land, there must be privity, an intent to bind successors in interest, and the covenant must touch and concern the property.[33] The beneficiary of the covenant has an interest in the servient property to the extent he/she has a reciprocal ability to enforce the covenant against a breaching property owner.[34] Covenants that run with the land are enforceable against successors in interest and are commonly treated as encumbrances whether they operate as affirmative or negative obligations.[35]

"(1) how the house will look to the neighbors (2) color of stain (3) roof line (4) window treatments and exposure (5) general harmony with area and natural surroundings (6) landscaping plans.").

29. James L. Winokur, *The Mixed Blessings of Promissory Servitudes: Toward Optimizing Economic Utility, Individual Liberty, and Personal Identity*, 1989 Wis. L. Rev. 1, 53–54 (1989) ("promissory servitudes administered by residential associations have not merely restricted lots to residential uses only; they have also restricted the age and childbearing practice, religious practice, financial and social compatibility, and the family or marital status of residents. Some associations have also restricted commercial and political speech within the developments they regulate. Large scale servitude regimes typically grant owners association architectural review boards—or the original subdivision developers—veto power over major structural changes, as well as over many seemingly minor details of personal behavior and aesthetic judgment. Such review may be guided by standards ranging from extremely intricate technical guidelines, to sweepingly broad criteria, to no limiting criteria at all.").

30. *See* Powell, *supra* note 5, § 81.03[6](d)(iii) at 18.

31. *See Tracy v. Klausmeyer*, 305 S.W.2d 84, 88 (Mo. Ct. App. 1957) (stating that the effect of the negative easement is "not to authorize the doing of an act by the person entitled to the easement, but merely to preclude the owner of the land subject to the easement from the doing of an act which, if no easement existed, he would be entitled to do.").

32. *Myers v. Salin*, 431 N.E.2d 233, 237-38 (Mass. App. Ct. 1982).

33. *City of Tucson v. Superior Court of Pima Cty.*, 116 Ariz. 322, 324, 569 P.2d 264, 266 (Ct. App. 1977); *see also* Copelan v. Acree Oil Co., 249 Ga. 276, 277–78, 290 S.E.2d 94, 96 (1982) (noting that a covenant runs with the land when "either the liability for its performance or the right to enforce it passes to the assignees of the land itself" and the covenant's performance or nonperformance affects the "nature, quality, or value of the property demised, independent of collateral circumstances, or it must affect the mode of enjoyment, and there must be a privity between the contracting parties.").

34. Winokur, *supra* note 25, at 25 ("Each neighbor can control the other's use in a regime of reciprocal servitudes").

35. *See* Powell, *supra* note 2, § 81.03[6](d)(iii), at ##.

An equitable servitude, like a real covenant, runs with the land[36] but is created without the need for establishing privity between the original covenanting parties, and is enforceable against successors in interest who took title to the property with notice of the equitable servitude[37].

Given the prohibitive nature of many covenants and restrictions, the requirement of notice is essential in ensuring that buyers enter into restricted neighborhoods willingly and informed. Notice is an essential element is binding successors in interest to the original promises and, in turn, subjecting sellers to potential liability under the covenant against encumbrances.

B. NOTIFICATION (FILED WITH REGISTER OF DEEDS)

In order to bind successors in interest to the encumbrance, the successor must have notice of the encumbrance. [38] The type of notice required can vary with some jurisdictions requiring evidence of the encumbrance in the grantee's deed, or from the record contained in a prior chain of title even if it is not in the grantee's deed.[39] Notice has also been found to exist if the purchaser has actual notice even though it is not of record[40] or the purchaser has notice of a verbal agreement.[41] Additionally, a lot in a subdivision created

36. 62 Am. Jur. Proof of Facts 3d 1 § 10 (Originally published in 2001) (". . . the right of enforcement of a negative easement . . . of a third party.").

37. 62 Am. Jur. Proof of Facts 3d § 10 (Originally published in 2001) ("the right to sue under . . . principles").

38. *BM-Clarence Cardwell, Inc. v. Cocca Dev., Ltd.*, 2016-Ohio-7751, ¶ 36, 65 N.E.3d 829, 835

39. 34 Am. Jur. Proof of Facts 3d 339 § 9 ("a purchaser is chargeable with notice from the record contained in a prior chain of title"); Oliver v. Hewitt, 191 Va. 163, 163, 60 S.E.2d 1, 1 (1950) (noting that constructive notice was adequate in the absence of actual notice when an earlier deed with a covenant was properly recorded).

40. 34 Am. Jur. Proof of Facts 3d 339 § 9 ("If a purchaser has actual notice of an agreement providing for restrictive covenants, the restrictions are enforceable even though the agreement is not of record"); Newbold v. Peabody Heights Co., 70 Md. 493, 17 A. 372, 374 (1889) ("whoever purchases land upon which a former vendor or lessor has imposed an easement, charge, or restriction in the manner of its use, such as would be enforced by a court of equity as against his vendee or lessee, the party purchasing the land with notice will take it subject to such easement, charge, or restriction, however created").

41. 34 Am. Jur. Proof of Facts 3d 339 § 9 (Originally published in 1995) ("Notice of a verbal agreement also binds the purchaser to comply with the restrictions*"); Hayward Homestead Tract Ass'n v. Miller*, 6 Misc. 254, 258–59, 26 N.Y.S. 1091, 1093 (Sup. Ct. 1893) (noting that the terms of a restriction were made clear to the defendant-owner of a parcel when the plaintiff-seller orally informed the defendant-owner that no structure could be erected within fifteen feet of the street); *see also* 3 Tiffany, Real Property § 860 (3d ed.) ("it need not be...an agreement under seal, and it has usually been regarded as sufficient although oral merely, or merely inferred from the acceptance of a conveyance containing such a stipulation, or from representations made upon the sale of land"). Verbal agreements relating to restrictions on land use have a long and dense history of being upheld throughout the United States; *see Edwards v. W. Woodridge Theater Co.*, 55 F.2d 524 (D.C. Cir. 1931); *Whitney v. Union Ry. Co.*, 77 Mass. 359 (1860); *Whittenton Mfg. Co. v. Staples*, 164 Mass. 319, 41 N.E. 441 (1895); *Allen v. City of Detroit*, 167 Mich. 464, 133 N.W. 317 (1911); *Lennig v. Ocean City Ass'n,* 41 N.J. Eq. 606, 606, 7 A. 491 (1886); *Tallmadge v. E. River Bank*, 26 N.Y. 105 (1862); *Lewis v. Gollner*, 129 N.Y. 227, 29 N.E. 81 (1891); *Equitable Life Assur. Soc. v. Brennan*, 148 N.Y. 661, 43 N.E. 173 (1896); *McCullough v. Urquhart*, 248

pursuant to a common scheme of development is also sufficient to impute notice to the purchaser of a lot in the subdivision of the existence of restrictive covenants.[42]

C. ENFORCEMENT

Since a servitude that runs with the land originates in an agreement between individual parties, a private cause of action is the mechanism for enforcement – whether the suit is brought by a neighboring homeowner or a homeowners' association.[43] In such actions, injunctive relief is the most common form of remedy sought for violation of a restrictive covenant or equitable servitude. "Whether injunctive relief will be granted to restrain the violation of a restrictive covenant is a matter within the sound discretion of the trial court to be determined in light of all the facts and circumstances."[44]

In determining whether to enjoin the servient tenant, the courts will engage in a balancing test between the violations by the servient tenant and the damage to the dominant tenant.[45] In addition to injunctive relief, damages may also be available for the breach of a restrictive covenant. The common measure of damages would be the difference in value of the property as warranted (without the breach) and the property's value in its violative

S.C. 348, 149 S.E.2d 909 (1966); *Wilson Co. v. Gordon*, 224 S.W. 703 (Tex. Civ. App. 1920), writ dismissed w.o.j. (Feb. 9, 1921); *Black v. Evergreen Land Developers*, Inc., 75 Wash. 2d 241, 450 P.2d 470 (1969).

42. 34 Am. Jur. Proof of Facts 3d 339 § 9 (Originally published in 1995) ("a deed to a lot in a subdivision which contains restrictions imposed under a general plan is sufficient to charge a subsequent purchaser of the lot with notice of such restrictions"); *see also Hayes v. Gibbs*, 110 Utah 54, 169 P.2d 781 (1946).

43. *See* Winokur, *supra* note 25, at 3; *see also* James L. Olmsted, *The Invisible Forest: Conservation Easement Databases and the End of the Clandestine Conservation of Natural Lands*, 74 Law & Contemp. Probs. 51, 52 (2011) (describing a conservation easement as a negative covenant which convey to a third party the right to enforce the restrictions contained in the conservation easement against the landowner granting the conservation easement).

44. *Linn Valley Lakes Prop. Owners Ass'n v. Brockway*, 250 Kan. 169, 171, 824 P.2d 948, 950 (1992) (quoting *Holmquist v. D-V, Inc.,* 1 Kan.App.2d 291, 296, 563 P.2d 1112, 1117 (1977)); *Fed. Point Yacht Club Ass'n, Inc. v. Moore*, 233 N.C. App. 298, 310, 758 S.E.2d 1, 8 (2014) (stating that a "mandatory injunction is the proper remedy to enforce a restrictive covenant...and to restore the status quo"); *Wrightsville Winds Townhouses Homeowners' Ass'n. v. Miller,* 100 N.C.App. 531, 536, 397 S.E.2d 345, 347 (1990*); Buie v. High Point Assocs. Ltd. P'ship*, 119 N.C. App. 155, 161, 458 S.E.2d 212, 216 (1995) ("[w]hether injunctive relief will be granted to restrain the violation of such restrictions is a matter within the sound discretion of the trial court...and the appellate court will not interfere unless such discretion is manifestly abused.").

45. *Wimberly v. Caravello*, 136 Wash. App. 327, 340–41, 149 P.3d 402, 410 (2006) ("The court may withhold even a mandatory injunction if it believes the injunction would be oppressive, if it finds the offending party "did not simply take a calculated risk, act in bad faith, or negligently, willfully or indifferently locate the encroaching structure"); Arnold v. Melani, 75 Wash. 2d 143, 152, 449 P.2d 800, 806 (1968) (noting that a court may also consider (1) whether the damage is slight and the benefit of removal is equally small, (2) whether it is feasible to modify the structure as built, and (3) whether there is an "enormous disparity in resulting hardships").

condition. [46]The theory of enforcement of negative easements is based on the belief that to allow a subsequent owner of the property burdened by the servitude, who took title with notice of the servitude, to avoid enforcement would be unfair to the dominant tenement on whose behalf the servitude was originally sought and negotiated. [47]Because private land use restrictions recognize a right in a third party to enforce the restriction against a violating land owner, such restrictions constitute encumbrances against title.

III. PUBLIC LAND USE REGULATIONS

A. PUBLIC REGULATIONS

Public land use regulations refer to municipal-born restrictions affecting private landowners in the form of zoning ordinances, building codes and official map regulations.[48] The determination of whether such public use regulations are encumbrances that can render title unmarketable depends, in part, on (i) when the regulation went into effect, and (ii) when, if ever, a violation of the regulation occurred.[49] The general rule is that a contract to purchase property is subject to any existing zoning ordinances placing the burden on the buyer to ensure that the property is appropriately zoned for the use the buyer intends to make of the property.[50] When, however, the appearance of the property has the ability to deceive the buyer as to the true state of the zoning status, courts have split on the appropriate remedy.[51] When the zoning ordinance is adopted between the date of the contract to purchase and the closing date, and the zoning change would impact the use of the property, the buyer bears the burden of the zoning change absent contractual

46. 34 Am. Jur. Proof of Facts 3d 339 § 9 (Originally published in 1995) ("A covenantee may seek damages for the breach of a restrictive covenant. There are various rulings on what the measure of damages should be in an action for such a breach. The difference in value of the property protected by the restrictive covenant, and the property's value not protected by the restrictive covenant, is one method of calculating damages. The value of the plaintiff's premises with and without the structure which violates the restriction is another measure of damages. One court has refused to consider an increase in value of the restricted property resulting from the removal of the restrictive covenants").

47. See § 861.Theory of enforcement, 3 Tiffany Real Prop. § 861 (3d ed.)

48. *See* Powell, *supra* note 5, § 81.03[6][e][i], at 20.

49. *Id.*

50. *See* Powell, *supra* note 5, *Id.* § 81.03[6][e][ii][A] at 21.

51. *Id.*; *see also Hartman v. Rizzuto*, 123 Cal. App. 2d 186, 189, 266 P.2d 539 (1954) (holding that the "imposition of similar restrictions by municipal ordinance does not of itself create 'encumbrances' which entitle a purchaser to rescind upon the ground that the seller's title is not 'marketable.' The parties are deemed to have contracted in the light of applicable restrictions imposed by law."). Affirming the buyer's right to rescind the contract for lack of marketable title where the dwelling comported to zoning ordinances at the time it was built but a subsequent subdivision of the property created a violation of existing ordinances for yard depth and the buyer was unaware of the details surrounding the subdivision of the property.

terms to the contrary.[52] When, however, the property in question is in *violation* of a zoning ordinance at the time of the contract, the majority view is that such violation renders the title unmarketable.[53]

Zoning ordinances were first recognized as an appropriate power of municipalities in the control of land use in the seminal case of *Village of Euclid v. Ambler Realty Co*.[54] In *Euclid*, the Supreme Court recognized that zoning ordinances must "find their justification in some aspect of the police power, asserted for the public welfare."[55] At that time, these powers were understood to include public safety, health and welfare.[56] The attorneys for the landowner argued that such police powers could not be exercised in order to control aesthetic differences which are otherwise safe uses[57] because to do so would elevate beauty over personal freedoms.[58] At the time of *Euclid*, however, the Court found that dictating the types of uses that may coexist within a zoning district had a sufficient relationship to public health, safety, morals and general welfare, and therefore properly within the exercise of the municipality's police power.[59]

Since that time, zoning districts have been widely adopted nationwide.[60] In their most basic form, zoning districts distinguish between major uses:

52. *See* Powell, *supra* note 5, § 81.03[6][e][ii][B] at 21.

53. *See* Powell, *supra* note 5, § 81.03[6][e][ii][C] at 21.

54. *Vill. of Euclid, Ohio v. Ambler Realty Co.*, 272 U.S. 365, 386–87 (1926) ("Building zone laws are of modern origin. They began in this country about 25 years ago. Until recent years, urban life was comparatively simple; but, with the great increase and concentration of population, problems have developed, and constantly are developing, which require, and will continue to require, additional restrictions in respect of the use and occupation of private lands in urban communities").

55. *Id.* at 387.

56. *See Id.* at 391. (That municipalities have power to regulate the height of buildings, area of occupation, strengths of building materials, modes of construction, and density of use, in the interest of the public safety, health, morals, and welfare, are propositions long since established; that a rational use of this power may be made by dividing a municipality into districts or zones, and varying the requirements according to the characteristics of the districts, is, of course, equally well established.).

57. *See Id.* Even if the world could agree by unanimous consent upon what is beautiful and desirable, it could not, under our constitutional theory, enforce its decision by prohibiting a land owner, who refuses to accept the world's view of beauty, from making otherwise safe and innocent uses of his land. The case against many of these zoning laws, however, is much stronger than this. The world has not reached a unanimous judgment about beauty, and there are few unlikelier places to look for stable judgments on such subjects than in the changing discretion of legislative bodies, moved this way and that by the conflict of commercial interests on the one hand, and the assorted opinions of individuals, moved by purely private concerns, on the other.

58. That our cities should be made beautiful and orderly is, of course, in the highest degree desirable, but it is even more important that our people should remain free. Their freedom depends upon the preservation of their constitutional immunities and privileges against the desire of others to control them, no matter how generous the motive or well-intended the control which it is sought to impose.

59. *See Id.* at 395.

60. Hannah Wiseman, *Public Communities, Private Rules*, 98 Geo. L.J. 697, 715 (2010) (citing Francesca Ortiz, *Zoning the Voyeur Dorm: Regulating the Home-Based Voyeur Web Sites Through Land Use Laws*, 34 U.C. Davis L. Rev. 929, 939 n.44 (2001) ("All states have adopted enabling acts modeled after the Standard State Zoning Enabling Act, delegating the state's police power to local governmental subdivisions.").

residential, business, commercial, industrial, etc.[61] Many cities, however, have dozens of zoning districts limiting the use in each district to particular activities.[62] Separating uses by zoning districts is believed to enhance property values by providing for compatible uses.[63] Traditionally, zoning ordinances have been primarily focused on regulating the use of property and not the form, design or aesthetics of property.[64] In the case of *Berman v. Parker*, decided twenty-four years after affirming the use of zoning ordinances to benefit public welfare, the Court expanded the scope of the zoning police power to include standards of "beauty."[65]

B. NOTIFICATION

The determination of what zoning districts apply to a parcel of property is based on the municipality's zoning maps which must clearly describe and "must appear upon the zoning map with definiteness in order that landowners can rely upon predictable content" [66] Therefore, municipalities have the "duty to create a zoning map" that identifies the applicable zoning boundaries.[67] When changes to an area's zoning requirements are desired, a public hearing is a necessary part of the process to ensure that existing landowners are given adequate notice of the proposed change and an opportunity to be heard.[68]

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61. Wiseman, *supra* note 51, at 714.

62. *See Id.*

63. Wiseman, *supra* note 51, at 728.

64. *See generally* Anika Singh Lemar, *Zoning As Taxidermy: Neighborhood Conservation Districts and the Regulation of Aesthetics*, 90 Ind. L.J. 1525, 1526 (2015).

65. *Berman v. Parker*, 348 U.S. 26, 33 (1954) ("We do not sit to determine whether a particular housing project is or is not desirable. The concept of the public welfare is broad and inclusive. The values it represents are spiritual as well as physical, aesthetic as well as monetary. It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled.").

66. *Tohickon Valley Transfer, Inc. v. Tinicum Twp. Zoning Hearing Bd.*, 97 Pa. Cmwlth. 244, 260, 509 A.2d 896, 904 (1986).

67. *C & C Marine Maint. Corp. v. Zoning Hearing Bd. of Georgetown Borough*, 686 A.2d 896, 898 (Pa. Commw. Ct. 1996) (providing that a municipality has a "duty to create a zoning map which clearly delineates zoning district boundaries"); *citing Jacquelin v. Zoning Hearing Bd. of Hatboro Borough*, 126 Pa. Cmwlth. 20, 24, 558 A.2d 189, 191 (1989) (petition for allowance of appeal denied).

68. Charlotte Mun. Code §§ 4.106(2)(2018); 53 Pa. Stat. Ann. §§ 10609(b) (2018) (procedural due process requires notice to persons interested in zoning changes); *see also Am. Oil Corp. v. City of Chicago*, 29 Ill. App. 3d 988, 991, 331 N.E.2d 67, 70 (1975); *Harris v. County of Riverside*, 904 F.2d 497, 499 (9th Cir.1990); *Passalino v. City of Zion*, 237 Ill. 2d 118, 125, 928 N.E.2d 814, 819 (2010) ("Accordingly, due process requires that plaintiffs be apprised of the pendency of the zoning map amendment and afforded the opportunity to present their objections"); *Jones v. Flowers*, 547 U.S. 220, 220 (2006) (*citing Mullane v. Cent. Hanover Bank & Tr. Co.*, 339 U.S. 306, 314 (1950) ("An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.").

C. ENFORCEMENT

When there is a breach of a zoning ordinance, the municipality, in the exercise of its police power has the authority to enforce the ordinance using either civil or criminal remedies. Criminal remedies range from fines to imprisonment.[69] Criminal remedies are less suited for enforcement because violations can happen at numerous places by multiple parties along the "supply chain" in the development, building and maintenance or property.[70] Therefore, enforcement is more commonly sought through a series of applications, permits, appeals processes and inspections that seek to ensure compliance with the zoning requirements to avoid an enforcement issue. The primary goal in zoning enforcement is in preventing the violation as opposed to punishing the violation.[71]

D. BREACH OF WARRANTY

Unlike restricted covenants and equitable servitudes which are encumbrances that cause a breach of the covenant against encumbrances if they are not disclosed prior to closing, zoning ordinances are treated differently. For purposes of encumbrances, a distinction is made between the *existence* of a zoning ordinance and an existing *violation* of a zoning ordinance, with the former usually not getting encumbrance status and the latter qualifying as an encumbrance. This distinction is well-settled in the literature.[72] The determination that the existence of a zoning ordinance, standing alone, does not encumber real property has several bases: 1) that the exercise of a municipality's police power in designating and enforcing zoning ordinances does not affect marketable of title; 2) an encumbrance, in

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69. Zoning Ordinance of City of Albany § 375-10 (2018) ("fine not to exceed $1,000 or by imprisonment not to exceed 15, days, or both, for each offense."); 53 Pa. Stat. Ann. § 10617.2 (2018) ("a judgment of not more than $500 plus all court costs, including reasonable attorney fees incurred by a municipality"); N.J. Stat. Ann. § 40:49-5 (2018)("The governing body may prescribe penalties for the violation of ordinances it may have authority to pass, by one or more of the following: imprisonment in the county jail or in any place provided by the municipality for the detention of prisoners, for any term not exceeding 90 days; or by a fine not exceeding $2,000; or by a period of community service not exceeding 90 days"); N.H. Rev. Stat. Ann. § 676:17 (violator "shall be subject to a civil penalty of $275 for the first offense, and $550 for subsequent offenses, for each day that such violation is found to continue").

70. § 39:1 The unique problem of zoning administration, 4 Am. Law. Zoning § 39:1 (5th ed.) (*citing Pascack Ass'n, Ltd. v. Mayor and Council of Washington Tp., Bergen County*, 131 N.J. Super. 195, 329 A.2d 89 (Law Div. 1974), modified, 74 N.J. 470, 379 A.2d 6 (1977) ("The traditional method of enforcing judicial decrees through contempt proceedings is singularly inappropriate in resolving a zoning controversy"); *Town of McCandless v. Bellisario*, 551 Pa. 83, 709 A.2d 379 (1998)(A town's zoning enforcement action against a property owner was properly commenced by civil complaint under the Pennsylvania Municipalities Planning Code, rather than by criminal complaint).

71. § 47:1.Criminal penalties for zoning and planning offenses, generally, 5 Am. Law. Zoning § 47:1 (5th ed.).

72. *See generally Lincoln Tr. Co. v. Williams Bldg. Corp*., 229 N.Y. 313, 128 N.E. 209 (1920).

its traditional sense, is an interest in the property held by a third party which is not the case of the government's interest in a zoning ordinance and 3) adding zoning ordinances to the list of things that encumber property would cause confusion in the law of conveyances since neither a title search nor an examination of the property would necessarily reveal the zoning ordinance.[73] Since the existence of a zoning ordinance does not encumber real property and does not impact marketable title, it is not customary for a closing attorney to search the zoning records as part of a title search.

E. PROFESSIONAL RESPONSIBILITY IN THE TITLE SEARCH

Since it is not customary for a closing attorney to search zoning records, can there be a breach of a closing attorney's professional responsibility for the failure to discover zoning conditions? In the case of *Bianchi v. Lorenz*, the court held that a violation of a building code which was not discovered until after closing could constitute an encumbrance, even though it was not discoverable through a title search.[74] The Bianchi court said that even though the violation could not be found in the public records it can still constitute an encumbrance.[75] After Bianchi, there was much confusion in Vermont about the obligation of the title searcher to review records other than those traditionally filed in the land records registry. The Vermont Supreme Court stated that title examiners had to search not only the land registries maintained by the town but the records of the zoning and planning offices as well. In response to the Bianchi decision, the Vermont legislature enacted a statute providing that, despite the ruling in Bianchi to the contrary, that "no encumbrance on record title to real estate or effect on marketability shall be created by the failure to obtain or comply with the terms or conditions of any required municipal land use permit."[76] Although the Vermont legislature clarified that even *violations* of municipal codes would not be encumbrances, it still required town clerks and registries to record notices of violations relating to land use and maintained a duty in title examiners to search

73. *Frimberger v. Anzellotti*, 25 Conn. App. 401, 407, 594 A.2d 1029, 1033 (1991) (*citing Fahmie v. Wulster*, 81 N.J. 391, 397, 408 A.2d 789, 792 (1979) (To expand the concept of encumbrance as urged by plaintiffs would create uncertainty and confusion in the law of conveyancing and title insurance)). The *Frimberger c*ourt ultimately concluded that "the concept of encumbrances cannot be expanded to include latent conditions on property that are in violation of statutes or government regulations."

74. *Bianchi v. Lorenz*, 166 Vt. 555, 556, 701 A.2d 1037, 1038 (1997) ("an encumbrance exists when the seller can determine from municipal records that the property is in violation of local zoning law at the time of conveyance and the violation substantially impairs the purchaser's use and enjoyment of the property").

75. *See generally Bianchi*, 166 Vt. at 563, 701 A.2d at 1042 (Allen, C.J., concurring).

76. Vt. Stat. Ann. tit. 27, § 612 (2018); *New England Fed. Credit Union v. Stewart Title Guar. Co*., 171 Vt. 326, 332, 765 A.2d 450, 454 (2000) (recognizing the new statute as superseding *Bianchi); see also* Jeremy I. Farkas*, Bianchi II/S.144,* Vt. B. J. 57, 58 (2009).

municipal permit records in order to satisfy their professional responsibility to their clients.[77]

In addition to the title search, a buyer protects himself against title defects and breaches of deed warranties through a policy of title insurance. A typical title insurance policy excludes losses that arise from governmental police powers.[78] Title insurance policies will not cover landowners who claim lack of notice of violations of municipal ordinances. Although the existence of zoning ordinances has not been recognized as an encumbrance, the *violation* of zoning ordinances that exists at the time of closing has, in some instances, been found to be encumbrances. One of the primary obstacles in finding that zoning ordinances or violations constitute encumbrances is the lack of notice provided in a public record. In what appears to be a classic case of circular reasoning, zoning ordinances are not encumbrances, in part, because they cannot be found in the public record and, because they cannot be found in the public record, the harm to an unsuspecting buyer resulting from the ordinance or violation thereof cannot be mitigated by a policy of title insurance. If the lack of notice is the reason that buyers cannot be protected under the warranties of title, and the covenant against encumbrances specifically, and the reason the buyer cannot seek redress from the title insurance provider, it is time to expand the types of records subject to mandatory recordation in the land records.

Several scholars have suggested the creation of a new remedy to address the harm that befalls a buyer who, without notice or warning, purchases property that may be subject to an ordinance that restricts the use and enjoyment of the property or an existing violation of an ordinance. The implied warranty of lawful use would shift the burden of ensuring that buyer's intended use of the property does not violate the existing land use ordinances to the seller.[79] It would also protect the buyer in the event there is an existing violation of the land use ordinances. The theory behind the implied warranty of lawful use is that there is no better party in a real estate transaction to be aware of the existing zoning ordinances and whether there are any violations of said ordinances than the seller.[80] It is true that a seller is aware of conditions on the property in violation of zoning ordinances that the seller has caused but whether or not the seller is aware of the mere *existence*

77. Farkas, *supra* note 67, at 57–58 (noting that the Vermont Legislature, in response to the *Bianchi* decision, created a series of "bright line" recording rules and requirements for the state's clerks).

78. *See* Beverly J. Quail; Gwendolyn C. Allen, *Title Insurance Treatment of Zoning-Related Regulations and the ALTA Zoning Endorsement*, 30 Colo. Law., June 2001, at 89.

79. *See* Wilde, *supra* note 9, at 214–15; Adam Forman, *What You Can't See Can Hurt You: Do Latent Violations of A Restrictive Land Use Ordinance, Existing Upon Conveyance, Constitute A Breach of the Covenant Against Encumbrances?*, 64 Alb. L. Rev. 803, 818–19 (2000); *see also* Eric T. Freyfogle, *Real Estate Sales and the New Implied Warranty of Lawful Use*, 71 Cornell L. Rev. 1, 43 (1985).

80. Wilde, *supra* note 9, at 204.

of zoning ordinances that limit certain land uses or form is less certain. Likewise, the seller cannot reasonably warrant to the buyer that any future modifications that the buyer may make will not run afoul of the ordinances. Whether the seller or the buyer is charged with the duty to investigate the zoning requirements, the issue remains that discovering the land use restrictions is not a straightforward proposition and certainly increases the costs of real estate transactions.

III. NEW PLANNING TOOL: NEIGHBORHOOD CONSERVATION DISTRICTS

Currently, there are two primary sources of land use restrictions - private covenants and servitudes and public ordinances - with two contrary outcomes for purposes of encumbrances and warranties of title: private restrictions constituting encumbrances that can result in unmarketable title and a breach of the deed warranties and public ordinances whose existence has been traditionally held not to be an encumbrance rendering title unmarketable or breaching the covenant against encumbrances. It is on this backdrop that a new planning tool - the zoning overlay - has been adopted by many neighborhoods and approved by their municipality. The question that arises is whether these overlays should be treated like private covenants or public ordinances for encumbrance purposes.

A. NEIGHBORHOOD CONSERVATION DISTRICTS

Neighborhood Conservation Districts (NCD) are zoning overlay districts which supplement underlying zoning ordinances to more fully and comprehensively regulate neighborhood use and design placing stricter limitations on property owners.[81] First used as a planning tool in the early 1980's, it is estimated that over 100 cities nationwide have adopted one or more such conservation districts.[82] Zoning overlay districts became an option for neighborhoods that were not subject to restrictive covenants at the time of their development but wanted the benefit of imposing certain standards—beyond those provided by traditional zoning—on redevelopment, renovation

81. *See* Adam Lovelady, *24th Smith-Babcock-Williams Student Writing Competition Runner-Up: Broadened Notions of Historic Preservation and the Role of Neighborhood Conservation Districts*, 40 Urb. Law. 147, 154–55 (2008) (discussing the basic concepts and history of NCDs).

82. *See* Moderator: Mr. Anthony Wood et. al., *2011 Fitch Forum: Part Four*, 18 Widener L. Rev. 267, 289 (2012) (Speaker Carol Clark discussing the proliferation of local ordinances authorizing neighborhood conservation districts).

and redesign that threatened to change the fundamental nature of the neighborhoods.[83]

Zoning overlays in the form of historic districts have been around since the late 1970's[84] and are a way for homeowners to protect their neighborhoods from unwanted change without the transactional costs and procedural challenges of adopting covenants and forming homeowner associations retroactively on previously established neighborhoods.[85] A NCD was desired when a neighborhood wanted some of the protections offered by an historic designation overlay but the communities did not actually meet the historic designation or did not want to excessively control the aesthetics of a neighborhood to the extent of an historic district designation.[86] The motivations of homeowners to control and limit future development within established neighborhoods are varied but can be tied to a desire for stability[87] and a protection against perceived threats resulting from development pressure.[88]

In his 2014 thesis, Max Abraham Yeston's research observed that:

> "The number of municipalities with NCDs has increased dramatically over the past two decades in reaction to what is referred to as "the Teardown Trend" – the practice of demolishing a small house on a valuable lot and supplanting it with a significantly bulkier home. The result is oversized houses that distort a neighborhood's architectural character, reduce livability, and decrease an area's economic and social diversity."[89]

Neighborhood Conservation Districts are more common among older, established neighborhoods and the age of the neighborhood seeking protection can be a precondition of seeking NCD protection.[90] Older neighborhoods, often located closer to historical town centers and situated on

83. *See* William A. Fischel, *Neighborhood Conservation Districts: The New Belt and Suspenders of Municipal Zoning*, 78 Brook. L. Rev. 339, 345 (2013) ("A threatened neighborhood in a larger polity is less secure for several reasons. Neighborhood residents are less likely to know people elsewhere in a larger city or county. Development interests are more likely to hold sway in city councils and planning commissions.31 And the overall size of government makes it less likely that government officials will know much about their constituents and vice versa. To counter this, cities have some institutions that specifically protect neighborhoods").

84. *See* Wiseman, *supra* note 54, at 716–17.

85. Fischel, *supra* note 77, at 346.

86. Fischel, *supra* note 77, at 346.

87. *See* Lemar, *supra* note 58, at 1535.

88. *See* Lemar, *supra* note 58, at 1560.

89. Max Abraham Yeston, *Neighborhood Conservation Districts: An Assessment of Typologies, Effectiveness and Community Response* (May 2014) (unpublished M.S. thesis, Columbia University) (on file with Columbia Academic Commons).

90. NCD is authorized for use in neighborhoods that have been platted for at least 40 years in Chapel Hill and Topeka, KS, and 25 years in Greensboro, NC.

larger lots, are increasingly attractive to buyers[91] who also want the amenities associated with newer, upscale housing more modernly available resulting in out-of-scale development evidenced by the "McMansion".[92] Alternatively, the geographic proximity to downtown, urban areas, also makes these lots particularly attractive to large scale mixed use development targeting young professionals which can significantly impact the value of surrounding single-family homes.[93] In fact, many enabling ordinances and land use policies clearly identify these development threats as the bases for neighborhoods seeking NCD protection.[94]

Zoning overlay districts have been the route many existing neighborhoods have chosen because they are easier to adopt and implement than restrictive covenants: the latter requiring unanimous consent from each landowner whereas the former typically may be established with the consent of only a majority of homeowners ranging anywhere from 51% of homeowners to 80%. [95] The process is designated by local ordinance, which in turn is authorized by enabling authority from the state.[96] The process includes notice, public information meetings, community meetings, planning board recommendations, and zoning commission recommendations.[97] Once the

91. *See* Lemar, *supra* note 58, at 1553 (Lemar notes that "empty nesters" are increasingly interested in "walkable neighborhoods proximate to downtown commercial districts, public transit, and-in some towns-colleges and universities).

92. *See* Lemar, *supra* note 58, at 1557–58 ("McMansions are a newer form of a supposed nuisance").

93. Lemar, *supra* note 58, at 1555.

94. *See* Topeka, Kan., https://www.topeka.org/planning/neighborhood-conservation-districts/ (last visited Nov. 11, 2018) (Topeka allows for adoption of a NCD to "address appropriateness of design of new construction . . . and concerns about new residential construction and additions."); See also Steubenville, Oh., http://cityofsteubenville.us/planning-and-zoning/ (last visited Nov. 11, 2018) (Steubenville, OH allows adoption of an NCD to address rental use of single family homes); see also, Stillwater, Minn., https://www.ci.stillwater.mn.us/neighborhoodconservation (last visited Nov. 11, 2018) (and in Stillwater, MN "to conserve traditional neighborhood fabric" and "to regulate and provide guidance for new infill development and discourage unnecessary demolition of structures that contribute to the district's character.").

95. *See* Land Chapel Hill, N.C., Use Mgmt. Ordinance Town of Chapel Hill Plan. Dep't (Enacted January 27, 2003) (requires a petition and approval of 51% of landowners); See also Topeka, Kan., Neighborhood Conservation Districts, https://www.topeka.org/planning/neighborhood-conservation-districts/ (last visited Nov. 11,2018) (requires a petition and approval of 51% of landowners); See also Greensboro, N.C., City of Greensboro Plan. Dep't, Neighborhood Conservation Overlays, https://www.greensboro-nc.gov/home/showdocument?id=22544 (last visited Nov. 11, 2018) (requiring a petition of 25% of homeowners and final approval by 51% of homeowners); See also Wellesley, Mass., Town Bylaws & Reg. art. 46A (2007) (Wellesley, MA requiring approval of 80% of property owners); See also Steubenville, Ohio, Plan. and Zoning Code § 1175.04 (a)(4) (2015) (requiring ⅔ of parcel owners to consent to the adoption of an NCD).

96. Lovelady, *supra* note 75, at 155–56.

97. *See* City of Greensboro, N.C., Neighborhood Conservation Overlay District Process, https://www.greensboro-nc.gov/home/showdocument?id=17796 (last visited Nov. 11, 2018) (for Greensboro, N.C.'s Process); see also Chapel Hill, N.C., Land Use Mgmt. Ordinance 3.6.5 Neighborhood Conservation District (Enacted January 27, 2003) (Chapel Hill, N.C. process includes a feasibility study by the planning department).

stakeholders reach consensus on the terms and conditions of the overlay district, it is subject to approval by the city council[98] or other governing body.[99]

The protections afforded a neighborhood by the adoption of an overlay district include the types of uses that may be made in the neighborhood, the size and scale of buildings which may be built, the construction of outbuildings[100], and environmental standards for the neighborhood. With even more specificity, some overlays can impose rules about exterior design features and off-street parking[101], window size and garage door locations [102]and the requirement that homes have front porches[103]. It has been noted by others that "[T]he covenants in a hybrid community are similar to the covenants in a suburban private covenanted subdivision, but they are often influenced by the unique urbanized vision of the public overlay."[104]

Because the overlay districts rely on zoning ordinances it seems consistent with the discussion in section two above that their mere presence would not be an encumbrance on the property subject to disclosure or the covenant against encumbrances. The restrictions imposed by overlay districts, however, act more like restrictive covenants in their scope and effect suggesting that, perhaps, they are better treated as encumbrances in order to protect a buyer from purchasing property subject to such restrictions without notice.

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98. *See* City of Greensboro Plan. Dep't, Neighborhood Conservation Overlays, https://www.greensboro-nc.gov/home/showdocument?id=22544 (last visited Nov. 11, 2018).

99. *See Topeka, Kan., Mun. Code 18.270.06 (Oct. 2, 2018).*

100. https://www.denvergov.org/content/dam/denvergov/Portals/646/documents/Zoning/text_amendments/legislativehistory/DZC_AMENDMENT_2_REDLINE_7_10_15.pdf Section 9.4.3.7.E. showing the restrictions on accessory buildings in the Curtis Park Conservation Overlay District, Denver, Colorado.

101. *See* Town of Chapel Hill Office of Planning and Sustainability, Questions and Answers about Neighborhood Conservation District, https://www.townofchapelhill.org/home/showdocument?id=29900 (last visited Nov. 11, 2018) ("A Neighborhood Conservation District can address physical characteristics and features of all property (public and private) such as: Building height, Lot size, Front and side yard building setbacks, Off-street parking,
Roof line and pitch, Paving or hardscape covering, Building orientation, Allowable floor area, Landscaping, Entrance Lighting").

102. *See* Galveston, Tex., Land Dev. Regulations of 2015 art. 10 § C (April 2018) ("The NCDs may also include but shall not be limited to the following elements: a. Common architectural style and details; b. Building materials; c. Building orientation; d. Density; e. Driveways, curbs, and sidewalks; f. Entrance lighting; g. Fences and walls; h. Floor area ratio; i. Garage entrance location; j. General site planning; k. Landscaping; l. Right-of-way; m. Signage; n. Street furniture; o. Solar systems, components; p. Utility boxes and trash receptacles; and q. Window/dormer size and location.").

103. Brewers Hill and Harambee NCD requiring all homes to have front porches with a minimum size of 6' by 6' further dictating the minimum dimensions of columns, hand rails and bottom rails. https://city.milwaukee.gov/ImageLibrary/Groups/cityDCD/planing/plans/NC/BrewersHillHarambee/C.pdf

104. Wiseman, *supra* note 54, at 704.

Although there are numerous points at which a buyer can discover the presence of a restrictive or private covenant on the property, the same is not true for an overlay district. In new, private covenanted neighborhoods, the common aesthetics of development put the buyer on constructive notice of the presence of restrictive covenants; the fact that covenants traditionally must touch and concern the property can also signal a buyer of the presence of the restrictions; finally, the requirement that covenants be of record in the chain of title is an additional opportunity for the buyer to become aware of the limitations on the property. In the case of overlay districts, none of those protections may be present.

Overlay districts are most commonly used in older (though not old enough to constitute historic), established neighborhoods built at a time when uniformity of design was not the prevailing feature of the neighborhood.[105] As such, reliance on common design features is not a viable method of putting a buyer on notice that the neighborhood may be subject to an overlay plan. In fact, in some instances, it is exactly the lack of uniformity that is the characteristic of the neighborhood for which protection is sought through an NCD process.[106] Additionally, as a zoning overlay, it is not subject to the same level of disclosure by the seller at the time the contract for sale is entered. Nor is the overlay in the chain of title which would be found in a standard title search.[107] Thus, absent some change, unsuspecting buyers can purchase property in traditional neighborhoods that are subject to a comprehensive set of rules about which the buyer knows nothing at the time of purchase.

Since an NCD is administered as part of the zoning ordinances, the traditional zoning enforcement mechanisms noted above are available. More specifically, the enforcement of zoning overlay districts lies primarily in the municipal body which oftentimes lacks the time, financial incentive, and motivation to enforce the types of regulations found in NCDs.[108] The lack of

105. Topeka and Chapel Hill NCDs require that the property be platted at least 40 years prior to application; Greensboro, NC NCDs require plats at least 25 years old.

106. https://www.townofchapelhill.org/town-hall/departments-services/planning-and-sustainability/resources/neighborhood-conservation-district-ncd-zoning-overlays providing that the area subject to an NCD petition must at least one "cohesive identifiable . . . character" which is worth preserving one of which can be "mixed or unique uses or activities."

107. Wiseman, *supra* note 54, at 749 ("Overlay communities...offer none of the three notice protections—whether those protections are real or merely theoretical—associated with private communities. There is no formal recording requirement for the rules contained within the overlay zone. Nor must the seller provide formal disclosure of the rules to the buyer at or before closing. Even those who actively attempt to learn of community rules before purchasing a home in overlay communities will have trouble identifying them. A quick visit to the city code will not reveal the neighborhood-specific zoning overlay absent vigilant research").

108. Dorothy D. Nachman, *When Mixed Use Development Moves in Next Door: Finding A Home for Public Discourse and Input*, 23 Fordham Envtl. L. Rev. 55, 67–68 (2012).

notice a buyer may have of the overlay restrictions also contributes to the difficulty in enforcement insomuch as the buyers are less likely to comply with restrictions to which they do not feel obligated to conform exacerbating the difficulty in enforcement.[109] Finally, that the NCD cannot be unilaterally enforced by another land owner means that there is not an interest of a third party in the property that is usually the foundation of an encumbrance.

THE NEIGHBORHOOD CONSERVATION CONUNDRUM

This paper has established that NCDs are increasingly being used to regulate the design features of predominantly older neighborhoods to retain their character into the future. Additionally, NCDs, by virtue of being zoning overlays, do not provide adequate notice to buyers about the existence of such restrictions and limitations: neither by requiring that sellers disclose their existence or be held accountable through a deed warranty. Even if a buyer finds the presence of an NCD prior to closing, it may be too late for the buyer to rescind the contract without significant financial penalty as most contracts for the sale of property provide that the buyer will take subject to all existing laws and ordinances.[110] A number of solutions have been suggested to close the gap between maintaining the historical integrity of nonrecognition of zoning ordinances as encumbrances and protecting buyers from restrictions on property use and design from unsuspecting places: zoning overlays.

Signage and Visual Clues

Like many historic districts whose perimeters are designated by signs, Wiseman recommends providing better visual cues through signage at prominent entrances to an overlay district in order to alert a potential buyer to look deeper into the zoning regulations to determine if the property will meet their needs.[111] Although many historic districts identify their boundaries through signs at major entrances, many municipal ordinances do not require that such signs be erected.[112] Perhaps if enabling statutes mandated boundary markers and signs then this would be sufficient to put the potential buyer on notice that the property is subject to additional design guidelines. The

109. Wiseman, *supra* note 54, at 706.
110. Lemar, *supra* note 58, at 1572.
111. Wiseman, *supra* note 54, at 762.
112. https://library.municode.com/nc/chapel_hill/codes/code_of_ordinances?nodeId=CO_APXALAUSMA_ART3ZODIUSDIST_3.6OVDI and https://library.municode.com/va/alexandria/codes/zoning?nodeId=ARTXHIDIBU_10-102DIES providing that the designation of historic districts shall be evidenced on the zoning maps and made available to the public but not requiring any signs at the boundaries of the districts.

absence of such requirements, however, renders this method of notice ineffective.[113]

Notations in the Register of Deeds

Additionally, a symbol added to properties in the office of the deed register that a property is subject to zoning-based restrictions would motivate a buyer or their closing attorney to persistently seek the zoning rules in the land use office which may otherwise be atypical for a title search.[114] Instead of relying on merely a symbol directing the title examiner to search the zoning records, there is no reason that the actual NCD document cannot be filed with the register of deeds and made a part of the land record. In addition to a zoning map, most NCDs are evidenced by a written document outlining the terms and conditions of the NCD[115] which, much like a promissory note, deed of trust or power of attorney, could be filed within the registry. In a grantor/grantee index of records, the NCD document would not show up in a title search but in a parcel identification number (PIN) search the NCD document could be referenced to each parcel within the NCD boundary and subject to the NCD. Thereafter, the NCD would show up in a search of the PIN. Title searches based on a tract or PIN are increasingly recommended in the age of computerized title records.[116] A tract or PIN system of property registration depends on comprehensive mapping and many counties have engaged in such as a means to ensure that all parcels were on the tax rolls. These identification numbers that are unique to each parcel can be easily searched and retrieved as part of a title search process.[117] Likewise, an NCD document that identifies the PIN of all affected properties can make searching for the neighborhood restrictions easy and straightforward and should not overly increase the cost of a traditional title search.

113. Lack of notice of overlay districts is not confined to the newer NCD district but has been found to be true in historic districts as well with one survey of historic districts in New Haven, Connecticut finding that only about half of the homeowners purchasing in historic districts were aware that they were doing so. (Lemar at 1571 citing to Tad Heuer survey located at 116 Yale L. J. 768 at 790). If this is true of historic districts that are typically identified with entrance signage, then one could expect home buyers purchasing property in NCD's to be more frequently misinformed about purchasing with the NCD overlay district.

114. Wiseman, *supra* note 52, at 762.

115. Chapel Hill, NC currently has 10 NCDs whose written district plans range from 3 - 86 pages. The district plans can be found at https://www.townofchapelhill.org/town-hall/departments-services/planning-and-sustainability/resources/neighborhood-conservation-district-ncd-zoning-overlays.

116. John L. McCormack, *Torrens and Recording: Land Title Assurance in the Computer Age*, 18 Wm. Mitchell L. Rev. 61, 73–74 (1992).

117. Dale A. Whitman, *Digital Recording of Real Estate Conveyances*, 32 J. Marshall L. Rev. 227, 243–44 (1999).

Seller Disclosures

Putting the burden on the seller to disclose, at the time of contract, the existence of a zoning overlay would alert the buyer early in the transaction that the property may have limitations on the buyer's intended use and design of the property. Allocating the cost of discovering and disclosing the zoning overlay on the seller allows the seller to incorporate the cost of this inquiry into the sales price as well as any value reductions as a result of imposed restrictions.[118] Imposing a burden of disclosure on the seller would have a corresponding claim for relief in the buyer if the seller failed to disclose the presence of a conservation overlay on the property.[119]

Associated with a new implied duty to disclose by the seller, would be a zoning due diligence clause entered into the contract of sale by the buyer's attorney which would allow the buyer a period of time to conduct a review of the applicable zoning ordinances and overlays.[120] During the due diligence period, if restrictions are discovered that would prevent the buyer from making use of the property or aesthetic changes the buyer has planned, the buyer could terminate the contract for sale.[121]

Implied Warranty of Lawful Use

A new implied warranty of lawful use would work like traditional warranties of title to better protect the expectations of buyers.[122] As envisioned, the new warranty would ensure that the existing property uses and other uses described by the seller comply with the applicable land use restraints.[123] The warranty would place the risk of loss for unlawful uses (both existing uses and future intended uses that are disclosed) on the seller who is better able to make the needed inquiries than the buyer.[124] This type of implied warranty would protect an unsuspecting buyer of restrictions on uses that the buyer might envision at the time of entering into the sales contract; it would not, however, protect the buyer from design modifications or renovations not yet imagined which might be prohibited by the terms of the NCD. The implied warranty of lawful use has been criticized as placing too heavy a burden on title examiners.[125]

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118. Lemar, *supra* note 71, at 1573.
119. Wiseman, *supra* note 52, at 762.
120. Diana Bunin Kolev & Megan K. Collins, *The Importance of Due Diligence Real Estate Transactions in A Complex Land Use World*, 84-APR N.Y. St. B.J. 24, 27–29 (March/April 2012).
121. Kolev *supra* note 108, at 27–29.
122. Freyfogle at 5.
123. *Id.* at 33
124. *Id.* at 34.
125. Michael J. Garrison and J. David Reitzel, *Zoning Restrictions and Marketability of Title*, 35 Real Est. L.J. 257, 285 (2006).

Expanding the Covenant Against Encumbrances to Capture NCDs

While a number of novel theories discussed above have been offered in response to the harm that befalls a buyer who buys in a neighborhood subject to a zoning overlay district, the most obvious option is to expand the definition of encumbrances to include not only *violations* of zoning ordinances but the existence of *applicable* zoning ordinances that are not disclosed by the seller thus treating the zoning overlay as a covenant for purposes of the warranty against encumbrances. One of the underlying rationales for the general rule that the existence of zoning ordinances are not encumbrances, despite their similarity to private restrictions, is based on the fact that the existence of the zoning ordinance does not create an interest in a third party sufficient to bring the ordinance into the definition of an encumbrance. [126] And yet, what is the third party interest in a real covenant? In a lien, mortgage or easement, it is easy to see the third party interest in property (to sell the property in a mortgage default or use the property of another for some limited purpose) that causes such interests to be an encumbrance. In the case of a restrictive covenant, the interest in a third party is only in the ability to enforce the covenant against the defaulting landowner and therefore obtain the benefit of the bargain arising from the original promise. A real covenant does not give the beneficiary of the covenant the right to enter or use the property of another, there is no security interest in the beneficiary as in a lien or mortgage, there is only a right to enforce the restriction and that right gives rise to a third party interest that creates the encumbrance. In the case of a zoning overlay, the municipality (or its appointee) has a right to enforce the restriction which, by analogy, should create an interest in the municipality in the servient estate. If this right to enforce, when held by another landowner, constitutes an encumbrance, no distinction should be made when the right to enforce is held by a municipality. If no distinction exists, then the way is paved for finding that a zoning overlay is an encumbrance that must be disclosed in order for a seller to convey marketable title. Alternatively, if the law recognizes a right in a private citizen to bring an action for enforcement of a public zoning ordinance[127] then the enforcing private owner has the same property interest as a private owner enforcing a restrictive covenant and, by extension, the mere right to enforce a private restriction which gives rise to an encumbrance should also exist with the right to enforce a public restriction.

126. Michael J. Garrison and J. David Reitzel (FNaa1), *Zoning Restrictions and Marketability of Title*, 35 Real Est. L.J. 257, 265 (2006)

127. Nachman, D. *When Mixed-Use Development Moves In Next Door: Finding a Home for Public Discourse and Input Fordham Environmental Law Review*, Volume XXIII Spring 2012 pg 55 at pg 68.

CONCLUSION

Given the proliferation of zoning overlays that impact both the use and the aesthetics of a neighborhood a more effective method of protecting buyers must exist. Full disclosure of the NCD by the Seller allows buyers to make informed choices about whether the property can suit the buyer's needs today and in the future. To motivate the disclosure of the NCD by the Seller, municipalities should move to the use of PIN number references in recorded documents, require as part of the NCD process that the NCD document be filed with parcel references in the register of deeds, make a search of zoning overlays part of a standard title search and expand the covenant against encumbrances to cover zoning overlays. Only then will our commitment to marketable title catch up to new planning tools that otherwise fall outside the standard property inquiry.