THE IMPACT OF RESTRICTIVE COVENANTS ON AFFORDABLE HOUSING AND NON-SINGLE-FAMILY USES OF HOMES: A WATERLOO REGION CASE STUDY

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Abstract

Restrictive covenants are contractual obligations that bind successive owners of specified lots for a given period of time. In an urban context, they are generally adopted by developers to enhance property values within a subdivision or a portion of a subdivision. Restrictive covenants often contain obligations that prohibit affordable housing and non-single-family uses of houses. In the past, they shared a common purpose with zoning by-laws -- the protection of single-family housing districts from land uses that threaten property values. Tensions appear inevitable, however, between, on the one hand, emerging planning objectives that promote affordable housing and inclusionary zoning, which permits a greater mix of housing types, and an increasing use of restrictive covenants, on the other. A Waterloo Region case study confirms both the existence of such a shift in planning objectives and a growing reliance on restrictive covenants. While interviewed planners, provincial government officials and affordable housing advocates have not as yet been frustrated in the pursuit of their goals by restrictive covenants, current tendencies point to a crisis in the making. A widespread use of restrictive covenants will inevitably hinder affordable housing and inclusionary zoning policy objectives. Among its recommendations, the report calls for provincial legislation that would extinguish restrictive covenants that impede such planning objectives.

Executive Summary

The report discusses the impact of restrictive covenants on location possibilities of affordable housing and non-single-family uses of homes such as an apartment in a house and group homes. Restrictive covenants are contractual obligations that bind successive owners of specified lots. In an urban context, they are generally adopted by developers and affect all lots within a development plan for a specified period. As a rule, the purpose of such covenants is to enhance the attractiveness of a sector, and hence property values, by excluding land uses that are perceived as potential sources of negative externalities for surrounding properties. Restrictive covenants are independent of the planning process and are enforceable through the legal system. When legal challenges surface, court rulings reflect in most cases a commitment to the enforcement of restrictive covenants, a concern for the benefits of the parties to the covenants, and a lack of regard for broad public interest issues.

The report centres on a crisis in the making. In the past, tensions rarely arose between restrictive covenants and zoning by-laws because these two forms of land use control were essentially aiming towards the achievement of similar objectives. They both endeavoured to protect residential areas from the adverse impact on property values of non-residential land uses and of forms of housing that were deemed to be incompatible with single-family homes. Over recent years, two emerging tendencies have undermined this accommodation. One is a gradual change in land use planning objectives at both the provincial and municipal level, which is favourable to affordable housing and inclusionary zoning. This type of zoning promotes the blending of different land uses including various forms of housing. The other tendency is a growing reliance on restrictive covenants preventing the location of affordable housing and non-single-family uses within new residential developments.

A case study focusing on Waterloo Region in the Province of Ontario has identified a change of approach to land use planning at the municipal level, which reflects a greater provincial emphasis on affordable housing and municipalities' own inclusionary zoning objectives. The case study has also revealed a sharp rise in the use of restrictive covenants in recent years, to the extent that in two of the three Waterloo region cities, such restrictions affect most newly developed residential areas. In these circumstances, survey results indicating a lack of awareness of, and concern towards, restrictive covenants on the part of planners, provincial government officials and affordable housing activists appear surprising. This situation was related to planners' task definition which limits their activity sphere to public sector regulations, the recent and partial nature of the shift away from traditional forms of zoning, and the availability of alternative sites for affordable housing and non-single-family land uses. But if current trends affecting planning and the use of restrictive covenants persist, major tensions appear inevitable in the future.

The report identifies restrictive covenants' exclusive concern with property values within the sectors they cover as a major

source of planning difficulties. This is because the aggregate effect of an ever growing reliance on covenants is to exclude types of land uses that are essential to the meeting of society's equity objectives and the operation of urban areas from a large proportion of a city's residential areas. An extensive use of restrictive covenants will thus frustrate affordable housing and inclusionary zoning objectives by limiting the sites available for affordable and non-single-family housing and forcing a concentration of such land uses.

The report argues that affordable housing and inclusionary zoning objectives should take precedence over restrictive covenants. It suggests three ways of achieving this purpose. The first is to rely on the Canadian Charter of Rights and Freedoms and the Ontario Human Rights Code to challenge certain aspects of these covenants. Another approach would involve a requirement on the part of municipal planners that restrictive covenants attached to a development plan conform to official plan policies as a condition for planning approval. A final recommendation calls for provincial legislation that would extinguish without compensation restrictive covenants that obstruct affordable housing developments and non-single-family uses of houses. This final proposal would be most effective in lifting restrictive covenants' obstacles to these types of land use.

Les clauses restrictives en tant qu'obstacles au logement abordable : étude de cas dans la région de Waterloo

Résumé

Le rapport a pour objet l'étude des effets des clauses restrictives sur les possibilités de trouver des emplacements convenables pour les logements abordables et les habitations individuelles à usage collectif, comme les maisons qui comportent un appartement et les foyers de groupe. Les clauses restrictives sont des obligations qui lient les acquéreurs subséquents du bien-fonds concerné. Dans un contexte urbain, elles sont généralement acceptées par les promoteurs et touchent, pour une période déterminée, l'utilisation de tous les terrains dans le schéma d'aménagement. Habituellement, les clauses restrictives visent à augmenter l'attrait du secteur et, par conséquent, la valeur du bien-fonds, en interdisant les utilisations de terrains perçues comme des sources possibles de désagréments pour les propriétés avoisinantes. Conçues indépendamment du processus de planification, les clauses restrictives ont force exécutoire. À cet effet, la jurisprudence démontre que les tribunaux tranchent habituellement en faveur des clauses restrictives, favorisant ainsi les intérêts des parties concernées, au détriment des questions d'intérêt public.

La présente étude met en lumière une crise potentielle. En effet, par le passé, les clauses restrictives allaient rarement à l'encontre des règlements de zonage, ces deux mesures de contrôle visant pratiquement les mêmes objectifs, soit de protéger les quartiers résidentiels contre l'utilisation non résidentielle des terrains dans leur territoire, et l'implantation de logements jugés comme étant incompatibles avec les maisons individuelles, deux facteurs qui affaiblissent la valeur des propriétés. Au cours des dernières années, cependant, deux nouvelles tendances sont venues altérer la situation. D'abord, les objectifs établis aux échelons provincial et municipal, en ce qui concerne la planification et l'utilisation éventuelle des terrains, ont progressivement évolué, et favorisent maintenant la production de logements abordables, ainsi que le zonage d'inclusion, qui encourage diverses utilisations du terrain, y compris plusieurs catégories d'habitation. Ensuite, une deuxième tendance consiste à vouloir utiliser davantage les clauses restrictives pour empêcher la construction de logements abordables et l'usage collectif d'habitations individuelles dans les nouveaux lotissements.

Une étude de cas portant sur la région de Waterloo en Ontario a révélé que les nouveaux projets d'aménagement élaborés par les municipalités reflètent la tendance provinciale et mettent davantage l'accent sur le logement abordable, ainsi que sur les objectifs du zonage d'inclusion. L'étude de cas a également révélé l'utilisation beaucoup plus fréquente des clauses restrictives au cours des dernières années, de sorte que la majorité des secteurs résidentiels dans deux des trois municipalités de la région de Waterloo y ont maintenant recours. Il est donc étonnant que les sondages démontrent un manque de sensibilisation et de préoccupation au sujet des clauses restrictives de la part des promoteurs, des fonctionnaires provinciaux et des intervenants qui préconisent le logement abordable. Cette situation s'explique en partie d'après les facteurs suivants : la sphère d'activité des urbanistes se limite aux règlements du secteur public,

l'évolution des règlements de zonage vers des utilisations non traditionnelles de terrains constitue un phénomène récent et limité et, enfin, la possibilité d'utiliser actuellement d'autres terrains pour la production de logements abordables et d'habitations individuelles à usage collectif. Toutefois, si les tendances actuelles à la modification des schémas d'aménagement et les clauses restrictives persistent, des tensions importantes se feront inévitablement sentir à l'avenir.

Selon le rapport, le fait que les clauses restrictives ne visent qu'à protéger la valeur du bien-fonds constitue une source majeure de difficultés pour la planification urbaine. En effet, l'usage croissant des clauses restrictives aboutit globalement, à empêcher certaines utilisations de terrains qui sont essentielles à l'aménagement du territoire urbain et à l'atteinte des objectifs fixés par la société en matière d'équité dans le logement. L'usage répandu des clauses restrictives freinera donc la production de logements abordables et ira à l'encontre des objectifs du zonage d'inclusion, puisque les emplacements convenant aux logements abordables et aux habitations individuelles à usage collectif seront limités et ces habitations concentrées dans certains secteurs.

L'auteur soutient que le logement abordable et le zonage d'inclusion devraient avoir préséance sur les clauses restrictives. Il propose trois moyens d'atteindre ce but. D'abord, les clauses restrictives pourraient être contestées en vertu de la Charte canadienne des droits et libertés et le Code des droits de la personne de l'Ontario. Ensuite, les urbanistes municipaux pourraient exiger que des clauses restrictives respectent les lignes de conduite officielles avant d'approuver les projets d'aménagement. Enfin, des lois provinciales pourraient être adoptées pour abroger, sans droit compensatoire, les clauses restrictives qui obstruent la production de logements abordables et à l'usage collectif d'habitations individuelles. Cette dernière mesure serait la plus efficace pour enrayer les obstacles à certaines utilisations de terrains ainsi créés.

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The Impact of Restrictive Covenants on Affordable Housing and Non-Single-Family Uses of Homes: A Waterloo Case Study

Introduction

Restrictive covenants are a private form of land use control. They are contractual obligations that run with the land for a given period and restrict uses that can be made of one or more pieces of land. Among restrictions found in covenants are the specification of minimum sizes for houses to be built, types of houses required (generally single family), acceptable materials, and permitted uses of houses (again, generally confined to single-family occupancy). Evidence suggests an increasing reliance on covenants that include such restrictions. A consequence of these restrictions is the exclusion of group homes, apartment in a house, and most forms of affordable housing from the areas they affect.

In the past, restrictive covenants were not a major concern from a public policy point of view. They merely narrowed the range of options permitted by a zoning system whose prime objective was to protect higher levels in a hierarchy of land uses from negative externalities originating from activities belonging to its lower levels. By shielding single-family residential developments from the encroachment of other activities, restrictive covenants shared the philosophy underpinning zoning by-laws. In fact restrictive covenants essentially expanded and refined the instruments used by zoning for this same protective purpose.

Recent land use policy changes shed a very different light on restrictive covenants. In Ontario, as in other jurisdictions, provincial and municipal governments have adopted, or are in the process of adopting, policies that promote affordable housing through the construction of new structures and the creation of an apartment in homes. Emerging policies also involve an inclusionary approach to zoning that calls for a more even distribution of affordable housing, rooming houses and group homes throughout a city's territory. These policies are clearly motivated by a will to ease the production of affordable housing, prevent the formation of low-income ghettoes, and assure that different residential sectors accommodate a fair share of affordable housing, apartment in a house, rooming houses, and group homes. In this context, restrictive covenants that exclude such land uses can clash with emerging planning policies by preventing them from meeting their objectives.

The report investigates the extent of the use made of restrictive covenants, their effectiveness and impact as instruments of land use control, and the attitude of planners and other professionals promoting affordable housing and inclusionary zoning towards them. It also comes up with recommendations aiming to lift restrictive covenants' detrimental impact on affordable housing and non-single-family residential uses.

The report is aimed at different categories of professionals involved in land use and housing issues, particularly at those who are concerned by obstacles impeding the production of affordable

housing and the actualization of more inclusionary forms of urban development that would reduce segregation between income groups and functions. Although some of the material presented is of a legal nature, the report is not targeted at the law profession. Accordingly the discussion of the legal dimensions of restrictive covenants is limited to major features and, therefore, glosses over aspects that are not absolutely essential to an understanding of the points raised in the report.

The report first engages in a discussion of restrictive covenants from a legal perspective. It focuses on differences between types of covenants and on conditions for their enforceability. The report then turns to debates about their role in the future. The stand that restrictive covenants could become an alternative to zoning is confronted to the view that zoning affords more concern for the city and society in their entirety and should thus supersede private land use controls. The next section deals with tensions that are likely to accompany attempts to implement inclusionary zoning by-laws in an urban context where restrictive covenants are widespread.

The remainder of the report centres on a Waterloo Region case study which examines trends in the reliance on restrictive covenants over the last forty years as well as in their geographic distribution. Results point to a sharp rise in the use of restrictive covenants over recent years. Explanations for this trend are provided by interviews with Waterloo Region developers who reveal their reasons for including restrictive covenants in

development plans. Meanwhile a survey of local and regional planners, as well as of out-of-region planners, officials and housing advocates, points to a general lack of knowledge of, and concern for, restrictive covenants, which is surprising given their capacity to obstruct planning policies. A final discussion interprets Waterloo Region findings and recommends means of curtailing obstacles restrictive covenants set in the path of affordable and non-single-family housing policy objectives.

1. Restrictive Covenants as Instruments of Land Use Control

This section offers a broad legal perspective on the legal aspects of restrictive covenants.[1] It centres exclusively on features that are essential to an understanding of their use and impact, which explains the omission of other legal dimensions. This is the case, for example, of differences between enforcement in equity and in common law. Readers interested in more detailed legal explorations are invited to consult titles cited in this section as well as property law textbooks (see in particular Da Costa and Balfour [1990], Megarry [1984] and Oosterhoff and Rayner [1985]).

Restrictive covenants originate in vendors' intent to limit possible uses of a sold parcel of land. The purpose of these restrictions is generally to maintain access, prevent competition, and protect resources such as water. Restrictive covenants are a form of contract in that they originate initially from the acceptance by a party of conditions of transactions set by another party. But a major difference between covenants and standard forms

of contracts is that covenants are allowed to "run with the land" and bind successive property owners who were obviously not involved in the original transaction (Korngold, 1984, p. 435).

In order for covenants to bind successive owners, they must conform to a number of conditions. First, they must be intended to run with the land and be registered on a title to the land to assure that notice be given to successive purchasers (Kratovil, 1978, p.467; Ontario Law Review Commission [OLRC] 1989, p.31). Second, the obligations included in a covenant must pertain to land and cannot be, therefore, of a purely personal nature (Da Costa and Balfour, 1990, p.20:20). Accordingly, covenants must clearly identify which land is servient, that is, burdened by the covenants, and which is the dominant land, in other words, the beneficiary land. Moreover the servient land must "touch and concern" the dominant land. While this requirement does not always involve contiguity, it does mean that the two properties must be close to each other (OLRC, 1989, p.8). Finally, unlike the situation that prevails in the United States where both positive and restrictive covenants can run with the land, in Canada only restrictive covenants can do so. In Canada covenants can thus prevent persons from making certain changes to their property, but cannot force owners to take specified actions (OLRC, 1989, p. 13).

Most of the urban land affected by restrictive covenants, however, is not under the control of the conventional form of covenants which was just described. It is rather the object of building schemes, which are a specific form of covenant meant to

protect the character of new urban developments. Building schemes do not tie a servient to a dominant property as standard covenants do. In building schemes, restrictive covenants are placed on all parcels of land in a development plan (typically, a subdivision plan or a portion of such a plan) by the vendor (generally, the developer) to control the form and nature of structures as well as their use. The vendor inserts a covenant in uniform language in each deed before the sale takes place. The vendor and all purchasers of land are bound by the restrictive covenants. As a rule, the purpose of a building scheme is to enhance property values and quality of life within the sector it covers. In these circumstances it is assumed that all owners have an interest in the enforcement of restrictive covenants within a building scheme. They are thus legally enforceable by any landowner in the plan against any other landowner. In other words, building schemes consist of reciprocal and mutually enforceable covenants (Da Costa and Balfour, 1990, p. 20:45; OLRC, 1989, pp. 41-2; Stoebuck, 1977, pp. 907-19).

The right to take legal action to assure compliance with restrictive covenants is confined to the owner of a dominant property or, in the case of a building scheme, any property owner. It follows that other individuals or organizations -- such as, for example, neighbourhood associations -- cannot initiate a legal case for such a purpose. Courts normally grant a prohibitory injunction to prevent the breach of a restrictive covenant, but in cases where the infringement has already taken place, courts can award a

mandatory injunction. The injunction would then require the demolition of structures that are at variance with the covenant. Courts also have the power to grant damages (OLRC, 1989, p. 48). In the United States compensation is often paid to the owner of the dominant land when the servient land is expropriated; restrictive covenants are then deemed to be expropriated as well. There is, however, an absence of test cases on this matter in Ontario (OLRC, 1989, p. 60; Perry, 1971, pp. 1044-6).

The Land Titles Act empowers a court to modify or discharge restrictive covenants when this represents a benefit to persons principally interested in their enforcement (Canadian Encyclopedic Digest, 1987, Section 130, Subsection 128; Revised Statutes of Ontario, 1990, Chapt. L.5, S.119[5], see also the Conveyancing and Law of Property Act, Revised Statutes of Ontario, 1990, Chapt. C.34, S.61[1]). Courts may also take such actions when neighbourhood conditions have changed to such a degree that restrictive covenants in place are no longer relevant, and when there have been many precedents to their non-enforcement. In any event, in Ontario restrictive covenants are considered to have expired forty years after their adoption, unless they were registered under the Lands Registry Act rather than the Lands Title Act and were renewed by the registration of a notice of claim (OLRC, 1989, pp.56-60).

Courts view restrictive covenants as private contractual agreements and, hence, generally refrain from interfering with the obligations they set forth. This is because courts uphold the right

to enter a contract concerning private property. As a result, the public interest beyond that of parties to a covenant is in most cases not considered to be a valid challenge to restrictive covenants. For example, courts would be unlikely to respond positively to an environmentally motivated challenge of covenants that forbid clothes lines. In the same perspective, a recognized need for affordable housing or group homes would generally not have a legal impact on covenants restricting such uses.[2] One exception to the precedence courts give to restrictive covenants over public interest concerns is the precedent created in 1945 by Re Drummond Wren ([1945] 4DLR674 [Ont.HC]) which struck down a restrictive covenant that excluded individuals on the basis of race (Da Costa and Balfour, 1990, p.20:34).

2. The Debate Over Restrictive Covenants

This section focuses first on two groups of writers who advocate an expansion in the role of restrictive covenants as instruments of land use control. The more moderate stand calls for an updating of the legislation pertaining to restrictive covenants in order to enhance their effectiveness and facilitate their use. Other proponents adopt a more radical stand: they see restrictive covenants as a potential free-market alternative to public sector regulations, in particular to zoning by-laws. But a balanced discussion cannot avoid identifying some benefits of public sector land use control over restrictive covenants. After a consideration of the arguments articulated by the supporters of an enhanced role

for restrictive covenants, the section turns to a discussion of restrictive covenants' shortcomings and to advantages of zoning regulations over private systems of land use control.

For partisans of the more moderate position that is favourable to restrictive covenants, this form of private obligation can work to the advantage of property owners by complementing zoning by-laws. Their argument is that planning law is suitable to the setting of broad development standards, while restrictive covenants can narrow these standards by focusing on detailed obligations which are beyond the purview of zoning by-laws. Covenants are thus perceived as effective instruments to protect and enhance neighbourhood amenities. This perspective is shared, for example, by the Law Commission of England (1984, pp.5-6), OLRC (1989, p.99) and Preston and Newson (1976).

The OLRC goes beyond a mere justification of restrictive covenants by calling for legislative changes that would broaden their scope of application and ease their adoption and enforcement. Its recommendations to that effect include the running of both positive and negative covenants with the property and the entitlement of hired managers or homeowners' associations to enforce restrictive covenants for the benefit of all property owners in a building scheme. The Commission also recommends that any person should be permitted to create a development scheme; the implication is that properties within a built up area could be brought under such a scheme (OLRC, 1989, pp.100-16). In essence, this first position recommends both a widening of restrictive

covenants' scope of application and the preservation of the public sector regulatory system.

The second, more radical, position that is favourable to restrictive covenants, adopts a free-market stand to launch an all-out attack on zoning which is perceived as an ill-guided form of government intervention into property rights. It proposes restrictive covenants as one alternative to zoning. This position was developed in the United States in the 1970s by Ellickson (1973) and Siegan (1970; 1972; 1975), and achieved political prominence in the 1980s when the President's Commission on Housing (1982) portrayed zoning as a foremost cause of high housing costs (see also Dowall [1984] and Garrett [1987, pp.66-77]). In Canada these views were espoused by Goldberg and Horwood (1980).

A major complaint levelled at the zoning process concerns its political nature and susceptibility to be seized by self-serving interests. According to this position's exponents, these interests would manipulate the zoning process to secure the social status of their residential areas and protect or improve their locality's fiscal balance. In these circumstances, zoning regulations would skew the free-market process against cheaper forms of housing and thus be detrimental to social groups with little influence on the zoning decision-making process (Goldberg and Horwood, 1980, pp.26-9; Siegan, 1975, pp.385-93). In this perspective, planners are another group that is advantaged by zoning: they derive power from administering the process (Siegan, 1975, p.458). Those who adhere to this anti-zoning view maintain that zoning's political nature,

which generally causes it to take the form of a compromise, is responsible for its inaptitude to offer the best planning solution to a neighbourhood.

Another major complaint aimed at zoning concerns its inability to provide a reliable protection of property values over the long term. This situation results from municipal governments' control over the zoning process and its sensitivity to political pressures. Local governments can grant variances which may be at odds with the character of a neighbourhood or the original intent of a zoning by-law (Ellickson, 1973, p.694). Ironically, some zoning opponents also criticize both zoning's rigidity, which causes it to perpetuate status quo, and its frequent lack of adaptation to future conditions because of the inaccuracy of the projections on which zoning by-laws are based (Goldberg and Horwood, 1980, pp.26-9).

Costs associated with the planning process are another grievance. Whereas public sector costs, which result from the need for a municipal bureaucracy to prepare and enforce zoning by-laws are perceived as relatively modest, private sector expenses are deemed to be far more important. These expenses include the cost of conforming to, and challenging, zoning by-laws. Finally, the argument is made that since zoning serves the purpose of protecting private property rights, it should logically be privatised (Tarlock, 1972).

For adherents to this approach the fundamental problem with zoning is that it represents an excessive public sector involvement

in the land development process (Siegan, 1975, pp.456-7). It follows that their proposed solution does not involve a reform of zoning, but rather its abolition (Siegan, 1972, p.247; Wolf, 1989, pp.267-8). Ellickson proposes a return to nuisance laws which hark back to the pre-zoning era. Such laws would result in corrective actions when interferences arise, and would thus represent a more targeted instrument than zoning by-laws to deal with negative externalities.

Siegan, on the other hand, turns to Houston, which is the only large United States city without zoning legislation, as a model. On the basis of the Houston experience, he observes that land use specialization takes place as efficiently whether zoning regulations are in place or not, which prompts him to conclude that such a purpose cannot justify the existence of zoning (Siegan, 1972). He also attributes Houston's plentiful supply of affordable apartments to the absence of zoning, and uses this observation to highlight the inequitable nature of zoning in cities where it severely confines the areas where multi-unit buildings can be erected (Siegan, 1970, p.128; see also Jones, 1980). Siegan contends that the broad land use control measures adopted by the city of Houston, which consist of sub-division controls and a building code, are sufficient; for him more encumbering public sector instruments such as zoning are both unnecessary and harmful.

Both Ellickson and Siegan perceive restrictive covenants as the foremost alternative to zoning. For example, Siegan describes the extensive role of restrictive covenants in protecting Houston's

residential neighbourhoods and argues that they are more effective than zoning in achieving this end (Siegan, 1970, pp.72-82). For these authors, restrictive covenants are more closely tailored to the interests of the residents of a sub-division than zoning by-laws, since developers use covenants exclusively to enhance their profits. Accordingly, when formulating restrictive covenants developers would anticipate preferences of targeted home buyers (Ellickson, 1973, p.713; Korngold, 1984). Anti-zoning exponents further argue that since restrictive covenants are employed for economic rather than political reasons, they are more efficient than zoning in protecting land values. In their perspective, restrictive covenants are less malleable than zoning because they remain unaffected by the political system, and thus provide a more reliable protection to homeowners.

And finally, according to these authors, social equity problems emanating from the use of restrictive covenants are infrequent despite their efficiency in excluding uses that can adversely affect property values. They ascribe this situation to the small proportion of a city's territory that is tied up by restrictive covenants at any given time (by contrast to zoning that affects all parcels of land). Indeed not all development plans are brought under covenants and, in any event, these obligations cease to be operative after their expiry date. It would follow that even if repelled by restrictive covenants, lower cost forms of housing can find plentiful alternative locations.

Some of the arguments raised by anti-zoning advocates do raise serious shortcomings with current planning practice, which are acknowledged by a wide variety of observers. For example, no one can repudiate the existence of social segregation caused by zoning by-laws, and the impediment they represent for the development of affordable forms of housing in certain jurisdictions. A closer attention to some of restrictive covenants' characteristics, however, raises grave questions about the appropriateness of covenants as a replacement for zoning regulations, and highlights the advantage of zoning over some aspects of private land use controls.

A major shortcoming of restrictive covenants -- although hailed as an advantage by anti-zoning proponents -- is their lack of flexibility. It is extremely difficult to alter or delete restrictive covenants once they are in place since such transformations must rely on the courts and may be subjected to unanimity rule (Korngold, 1989, pp.963-5; Urban, 1974). This rigidity may frustrate the expression of value changes. One thinks here of covenants that ban clothes lines and compost bins, restrictions that are clearly out of tune with the present concern for the environment and energy conservation. Planning legislation, on the other hand, allows for variances and updating. Moreover, participatory planning instills a measure of neighbourhood democracy within the zoning process by enabling residents to influence the formulation of zoning by-laws.

Another deficiency of restrictive covenants pertains to enforceability difficulties. Enforcement requires legal action by the owner of the dominant land, or any property owner within a development scheme. In these circumstances, one can surmise that many breaches go unchallenged because of the deterring effect legal costs have on individuals responsible for the enforcement of covenants. Also the freeloading potential dissuades individuals within building schemes from incurring legal costs on their own for the benefit of the entire scheme (Ellickson, 1973, p.717; Shelton et al., 1989, p.58).

Perhaps the major problem associated with restrictive covenants is that they treat sectors they affect as if they were cut off from the remainder of the city or even from society; those who adopt restrictive covenants are exclusively concerned with the territory they embrace and fail to heed broader city- and society-wide needs and objectives. Restrictive covenants' purpose is to protect a sector's property values irrespective of infrastructures and services required as a result of society's equity values and for the operation of an urban region as a whole. They thus result in the exclusion from the sectors they cover of land use types that are important to the operation of the city and of society, but may be damaging to property values within a given sector. It follows that in circumstances where a significant proportion of a city's territory is under restrictive covenants, the potential exists for the creation of "ghettoes" where these types of land use would be concentrated. Typically such ghettoes would accommodate low-income

residential areas and land uses that are major sources of negative spillovers (such as urban expressways and incinerators).

On the other hand, zoning by-laws have to conform to official plans, the role of which is to address current and future needs of a city. These by-laws must also reflect provincial social objectives. At least in theory, therefore, the zoning of a specific area should accord with planning guidelines that consider the requirements of a city as a whole and provincial social policies (Griswold, 1984, pp.190-1). We shall see in the next section that city-wide and social equity concerns are assuming a growing importance within planning systems and hence become increasingly influential in determining the form zoning by-laws take.

3. Tensions Between Restrictive Covenants and Emerging Approaches to Planning

In practice, few conflicts arise between restrictive covenants and conventional zoning regulations. This form of zoning is based on the principle of a graduated pyramidal structure whereby land uses at higher levels of the pyramid are protected from the negative externalities generated by activities occupying lower levels. This protection is assured through mechanisms excluding such activities from sectors occupied by higher level uses (Brooks, 1989, p.5; Fishman, 1978, p.40; Garrett, 1987; Mandelker, 1971, pp.23-6). Typically, single-family homes on large lots are positioned on the top of the pyramid, and as we descend its echelons we progressively come across other forms of single-family housing, multi-unit

housing, commercial uses and, finally, industrial activities. This is the form of land use control that anti-zoning advocates lambast for being socially segregative.

Restrictive covenants dovetail conventional zoning regulations by further limiting land use possibilities at the higher echelons of the zoning pyramid, and thus add a further layer of protection for property values. The relatively infrequent legal controversies pitting restrictive covenants against zoning by-laws arise when covenants are challenged by property owners seeking to introduce land uses that are permitted by zoning regulations but prohibited by restrictive covenants. In such situations, courts generally rule in favour of restrictive covenants. This is because, according to the Ontario Planning Act, the stricter obligations placed on an area by restrictive covenants do not contravene zoning regulations, since zoning prohibits and regulates but does not prescribe (Revised Statutes of Ontario, 1990, Chapt. P.13, S.34 [1]). The upshot is the enforcement of the more limiting measures whether they are the result of zoning by-laws or restrictive covenants (Korngold, 1989, pp.970-3; Lundberg, 1973, p.214, f.n.57; Perry, 1971, pp.1032-3).

An illustrative court case recently took place in Manitoba where respondents were set to open a group home after a successful zoning variance application. But the court ruled that such a use was unauthorized because of the existence of a restrictive covenant stating that "... nor shall building be used for any other purpose than that of a private dwelling home, to be occupied by one family

only..." (Keyron et al. v. Vogt et al., Manitoba Court of Queen's Bench, Dewar C.J.Q.R., Nov. 8 1983, in Dewar [1984]).[3]

This overall friendly accommodation between restrictive covenants and zoning by-laws is presently challenged by changing approaches to land use planning. In Ontario, the provincial government has reacted to housing affordability problems which were largely caused by the polarization of new housing production towards higher income groups over the last decade. This led to the adoption of the policy statement entitled "Land Use Planning for Housing" in 1989. The statement requires all municipalities and planning boards to set planning policies and standards that will enable a minimum of 25% of new residential units in a given urban area to be affordable to households living in this area with incomes up to the 60th percentile.

New affordable housing units are to result from "new residential developments and residential intensification through conversion of non-residential structures, infill and redevelopment..." (Minister of Housing and Minister of Municipal Affairs, Ontario, 1989, p.7). With respect to already built up areas, the policy statement requests municipalities and planning boards to include "zoning provisions to permit rooming, boarding and lodging houses and accessory apartments as-of-right where they are permitted uses in the official plan". The policy statement also requires municipalities and planning boards to secure future intensification possibilities in new residential developments by adopting policies and development standards "so that alterations to

create additional units in new building stock can take place in the future" (Minister of Housing and Minister of Municipal Affairs, Ontario, 1989, p.8).

More recently, the Ontario government has reinforced this policy by introducing legislation permitting the creation of one apartment on an as-of-right basis in houses located in any residential zone. The expression "apartment in a house" is synonymous with "accessory apartment", or "second unit", and the creation of such units is sometimes labelled "duplexing".[4] The aims of this legislation are to provide at little cost to the public sector a source of affordable housing, supply additional income to homeowners and thus ease their financial burden, reduce urban sprawl, and promote neighbourhood diversity and forms of intensification that respect the character of existing communities. The intent is also to strengthen the Ontario Planning Act requirement "that groups of unrelated people who form "a single housekeeping unit" be treated like any other household for zoning purposes" (Ministry of Municipal Affairs and Ministry of Housing, 1992, p.3). A final objective of this legislation is to ease municipal approval of garden units. Measures aiming at achieving such purposes are already in place in Australia and in a number of United States jurisdictions (Griswold, 1984; Toohey, 1991).

These changes were echoed by some municipal administrations which have initiated a departure from pyramidal zoning by adopting inclusionary zoning objectives. One purpose of inclusionary zoning as understood here is to mix house sizes and types. In this regard,

certain municipalities have adopted planning policies that authorize the location of group homes, affordable housing or rooming houses within all residential areas. According to the present definition, inclusionary zoning can also promote the blending of housing with compatible commercial and possibly industrial activities. As we shall see in the case of Waterloo Region cities, inclusionary zoning objectives may include only one or two of these land uses.

Together, such provincial and municipal initiatives point to the emergence of a new planning approach that is motivated by a commitment to cater to the needs of the less fortunate and to spread the responsibility for affordable housing and social facilities throughout a municipality's territory. Dispersion policies aim to avoid the concentration of such land uses in one area and the formation of low-income ghettoes. This planning approach also promotes flexibility in the use of existing buildings to ease the production of additional rental units and the adaptation of the existing housing stock to changing demographic and socioeconomic trends.

In the current legal context, however, restrictive covenants have the capacity to frustrate these new planning objectives by isolating entire subdivisions from a requirement to support their fair share of affordable housing and other social facilities. This can be achieved through restrictions that stipulate a single-family use of homes and set building standards that de facto rule out the construction of affordable housing. A further problem may result

from the aggregate effect of an ever greater number of development plans burdened by restrictive covenants, which would be employed precisely to resist the intent of planning objectives that promote affordable housing and inclusionary zoning. In these circumstances, a planning system that increasingly encourages affordable housing and inclusionary zoning would be set on a collision course with a growing reliance on restrictive covenants whose purpose is to shelter areas from the effects of this new planning approach. And the more extensive is the use of restrictive covenants, the harder it becomes to meet the objective of dispersing affordable housing and group homes (Guernsey, 1984, p.456).

The report now turns to the case study to throw light on the evolution in the reliance on restrictive covenants, on their geographical distribution within the cities located in the Regional Municipality of Waterloo, as well as on the attitude of planners, government officials and affordable housing advocates towards restrictive covenants.

4. Methodology

The case study focuses on the three cities that belong to the Regional Municipality of Waterloo -- Kitchener, Waterloo and Cambridge. (The Regional Municipality also includes four rural municipalities: Woolwich, Wilmot, Wellesley, and North Dumfries.) The choice of this urban area is justified by its diversity of residential sectors, the presence of developers of different sizes, and municipal planning objectives expressing a clear commitment

towards affordable housing and inclusionary zoning. While sufficiently important to encompass these characteristics, this urban agglomeration is not so large that it would preclude the inspection of deeds (conveyance of realty whereby title to property is transferred from one party to another) throughout its territory to examine the geographical distribution of restrictive covenants and hence identify their impact within the metropolitan region. Waterloo Region's rapid growth and therefore its profusion of new residential developments is another source of appeal as a case study (see Table 1.) This makes the region particularly conducive to a detailed analysis of recent trends in the use of restrictive covenants. Although the external validity of the case has not been the object of a systematic verification, there is no reason to doubt that Waterloo Region findings with respect to trends regarding the use of restrictive covenants are more or less typical of southern Ontario urban areas that have experienced rapid growth over the last decades.

The mainstay of the methodology is an examination of all the deeds that were registered in the three cities over the 1951-1991 period. This served to identify the deeds that were burdened with restrictive covenants. It then became possible to single out the development plans that contain deeds with such covenants. As it turned out, all deeds within a development plan tended to be affected by similar restrictive covenants, which in most cases resulted from the adoption of a building scheme by the developer of the plan. The search focused exclusively on restrictive covenants

affecting affordable housing developments, rooming houses, group homes, and apartments in houses. Such effects derive from the setting of building standards that exceed those required by zoning by-laws, and restrictions prohibiting non-single-family uses of homes and non-single-family home designs. These two non-single-family restrictions are considered jointly in this study because they can have the same effect in preventing

Table 1: Population Growth in the Kitchener CMA, 1971-1991

Years	Kitchener CMA	Kitchener	Waterloo	Cambridge
1991	356,421	168,282	71,181	92,772
1986-1991	14.5%	11.7%	21.2%	16.1%
1986	311,195	150,604	58,718	79,920
1981-1986	8.1%	7.8%	18.8%	3.5%
1981	287,801	139,734	49,428	77,189
1976-1981	5.8%	6.0%	6.0%	6.6%
1976	272,158	131,870	46,623	72,383
1971-1976	20.0%	17.9%	27.3%	16.8%
1971	226,800	111,810	36,615	61,990

Source: Statistics Canada (1983;1987;1992).

non-single-family uses of homes. While I am not aware of relevant test court cases in Canada, American courts are inconsistent in their judgements regarding the impact of single-family design covenants on the use of homes (Steimann, 1987, p.15). In some cases courts have ruled that the spirit of these design covenants is to prevent non-single-family occupancy and have thus disallowed such

uses. These two types of restrictions thus have the potential of precluding non-single-family uses of homes.

Note that throughout the case study the expression restrictive covenants refers exclusively to covenants that have a potential impact on affordable housing and/or inclusive zoning. The study does not give any consideration to other types of restrictive covenants.

The search of deeds registered over the 1951-1991 period makes it possible to identify virtually all the restrictive covenants that have had an impact on 1991 land use possibilities. We have seen that in Ontario restrictive covenants have a maximum life span of forty years, unless they are registered under the Land Registry Act and have been the object of a renewal notice (such cases are extremely unusual, however).[5] It is important to note that many restrictive covenants include expiry dates that limit their life span to less than forty years.

Another step of the methodology consists in the consultation of planning documents from the three cities to identify possible areas of disagreement between, on the one hand, municipal housing and zoning objectives, and obligations under restrictive covenants, on the other.

Interviews constitute the final facet of the methodology. They serve to define a context for the deeds data by explaining reasons for the use of restrictive covenants and exploring their impact on affordable housing and inclusionary zoning. Face to face interviews were carried out with three categories of informers: 1) three local

developers; 2) five regional and local planners involved in matters concerning affordable housing and inclusionary zoning; and 3) one Ministry of Housing and one Ministry of the Attorney General official. Four out-of-region planners and representatives of affordable housing advocacy groups were interviewed by telephone to verify the extent to which Waterloo Region planners' experience with restrictive covenants can be generalized to other communities.

5. Trends in the Use of Restrictive Covenants in the Waterloo Region

This section considers both historical and geographical trends in the use of restrictive covenants. Tables 2, 3 and 4 denote a rise in the reliance on restrictive covenants in the three surveyed municipalities. As seen in Table 2, this rise has been particularly sharp in Kitchener where the proportion of development plans that include restrictive covenants has more than doubled since 1985. Table 3 indicates that in Waterloo the level of use of such covenants has also increased dramatically since 1985. But it is noteworthy that in this city, before a 1980-1984 decline, restrictive covenants were attached to more than half the development plans registered and that this situation prevailed from 1965 to 1980. So in Waterloo, by contrast to Kitchener, an extensive use of this form of restriction is not a new trend. A result of this increased reliance on restrictive covenants is the exclusion of affordable housing and non-single-family home uses from a majority of Kitchener and Waterloo newly developed

Table 2: Trends in the Registration of Development Plans with Restrictive Covenants in Kitchener, 1951-1991

Years	All Development Plans	Plans with Restrictive Covenants Limiting Affordable Housing and Non-Single Family Uses	Plans with Restrictive Covenants Limiting Non-Single Family Uses Only	Total of Plans with Such Restrictive Covenants
1985-91	70	43 (61.4%)*	3 (4.2%)*	46 (65.7%)*
1980-84	30	9 (30.0%)	2 (6.6%)	11 (36.7%)
1975-79	47	11 (23.4%)	3 (6.4%)	14 (29.8%)
1970-74	36	8 (22.2%)	0	8 (22.2%)
1965-69	52	14 (26.9%)	1 (1.9%)	15 (28.8%)
1960-64	74	5 (6.8%)	0	5 (6.8%)
1955-59	104	3 (2.9%)	1 (1.0%)	4 (3.8%)
1951-54	58	3 (5.2%)	0	3 (5.2%)

* Percentage of all development plans.

Table 3: Trends in the Registration of Development Plans with Restrictive Covenants in Waterloo, 1951-1991

Years	All Development Plans	Plans with Restrictive Covenants Limiting Affordable Housing and Non-Single Family Uses	Plans with Restrictive Covenants Limiting Non-Single Family Uses Only	Total of Plans with Such Restrictive Covenants
1985-91	62	42 (67.7%)*	2 (3.2%)*	44 (71.0%)*
1980-84	30	8 (26.7%)	0	8 (26.7%)
1975-79	29	11 (37.9%)	4 (13.8%)	15 (51.7%)
1970-74	29	15 (51.7%)	2 (6.9%)	17 (58.6%)
1965-69	28	14 (50.0%)	0	14 (50.0%)
1960-64	34	4 (11.8%)	0	4 (11.8%)
1955-59	20	0	0	0
1951-54	23	0	0	0

* Percentage of all development plans.

Table 4: Trends in the Registration of Development Plans with Restrictive Covenants in Cambridge, 1951-1991

Years	All Development Plans	Plans with Restrictive Covenants Limiting Affordable Housing and Non-Single Family Uses	Plans with Restrictive Covenants Limiting Non-Single-Family Uses Only	Total of Plans with Such Restrictive Covenants
1985-91	78	21 (26.9)*	5 (6.4%)*	26 (33.1%)*
1980-84	11	3 (27.3%)	0	3 (27.3%)
1975-79	57	6 (10.5%)	1 (1.8%)	7 (12.3%0
1970-74	43	3 (7.0%)	0	3 (7.0%)
1965-69	30	3 (10.0%)	0	3 (10.0%)
1960-64	18	1 (5.6%)	0	1 (5.6%)
1955-59	36	2 (5.6%)	1 (2.8%)	3 (8.3%)
1951-54	32	4 (12.5%)	0	4 (12.5%)

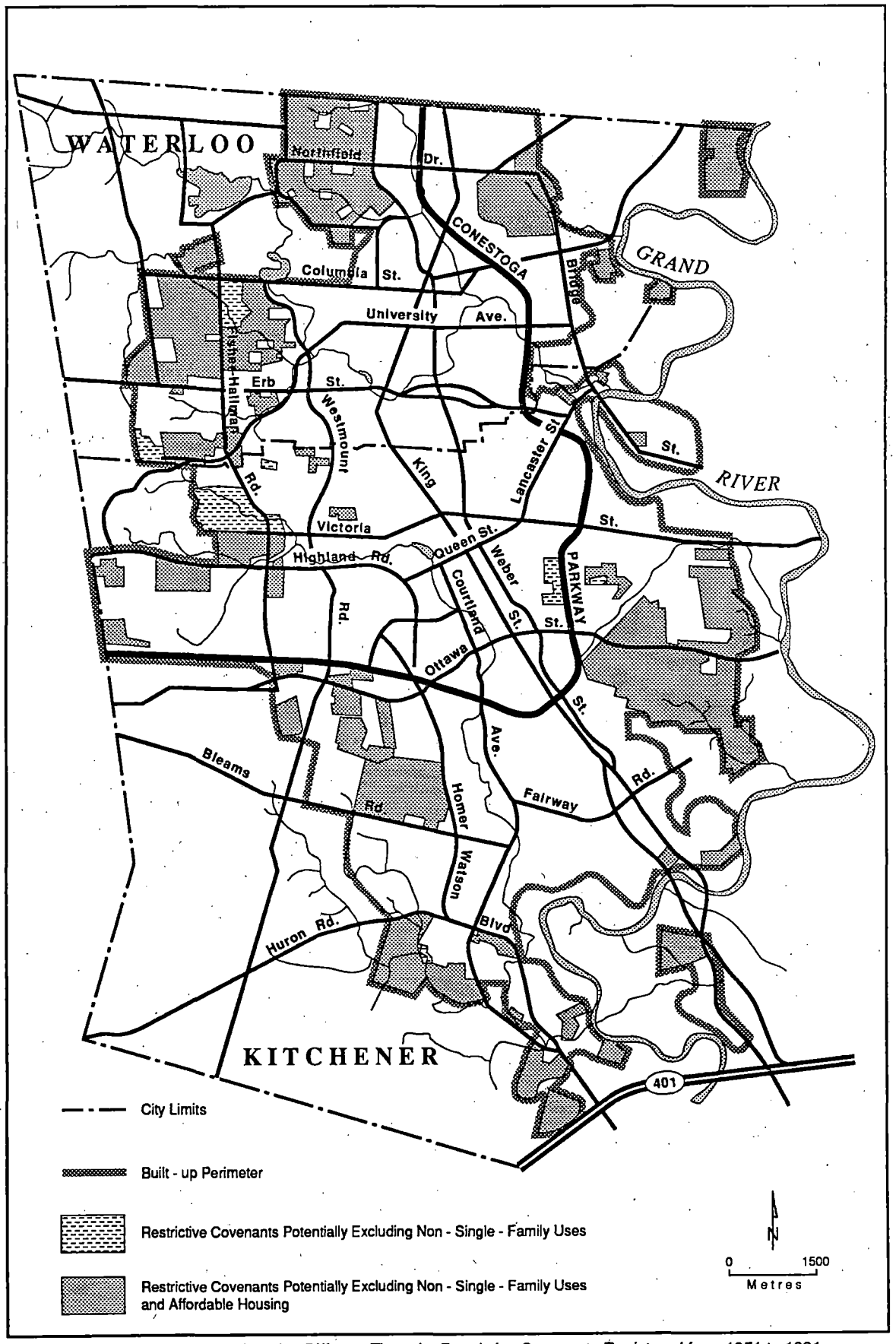
* Percentage of all development plans.

residential sectors. Although, as seen on Table 4, the proportion of new development plans burdened by restrictive covenants has nearly tripled since 1979, at 33.1% the overall Cambridge level of use for 1985-1991 remains modest by comparison to the two other cities.

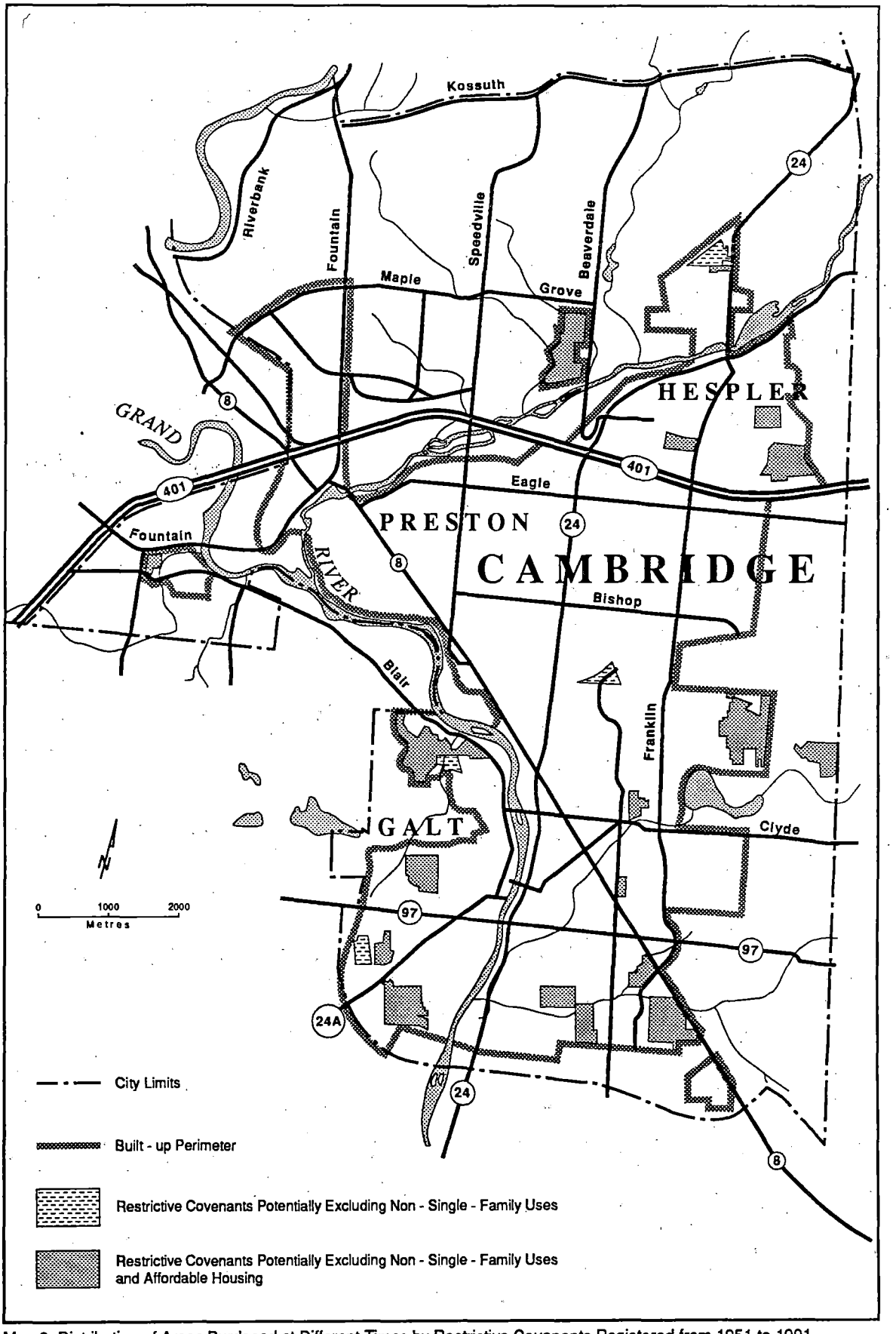
The three tables indicate that development plans that contain restrictive covenants precluding affordable housing also include restrictions on non-single-family uses of homes. Meanwhile we see that a small proportion of development plans with non-single-family housing restrictions do not contain design standards that potentially rule out affordable housing.

Four maps illustrate the distribution of the areas burdened by restrictive covenants. Maps 1 and 2 depict the areas in Kitchener, Waterloo and Cambridge that are or have been the object of restrictive covenants which had been registered over the 1951-1991 period and which have had over at least part of this period the potential of hampering the siting of affordable housing and non-single-family uses of homes. It is important to consider all these restrictive covenants even those whose termination predates 1991 because they had an impact on the design of buildings in the sectors they cover and thus influenced their character well after they ceased to be enforceable. It is also informative to identify the type of areas where restrictive covenants were in place at different times over the last forty years.

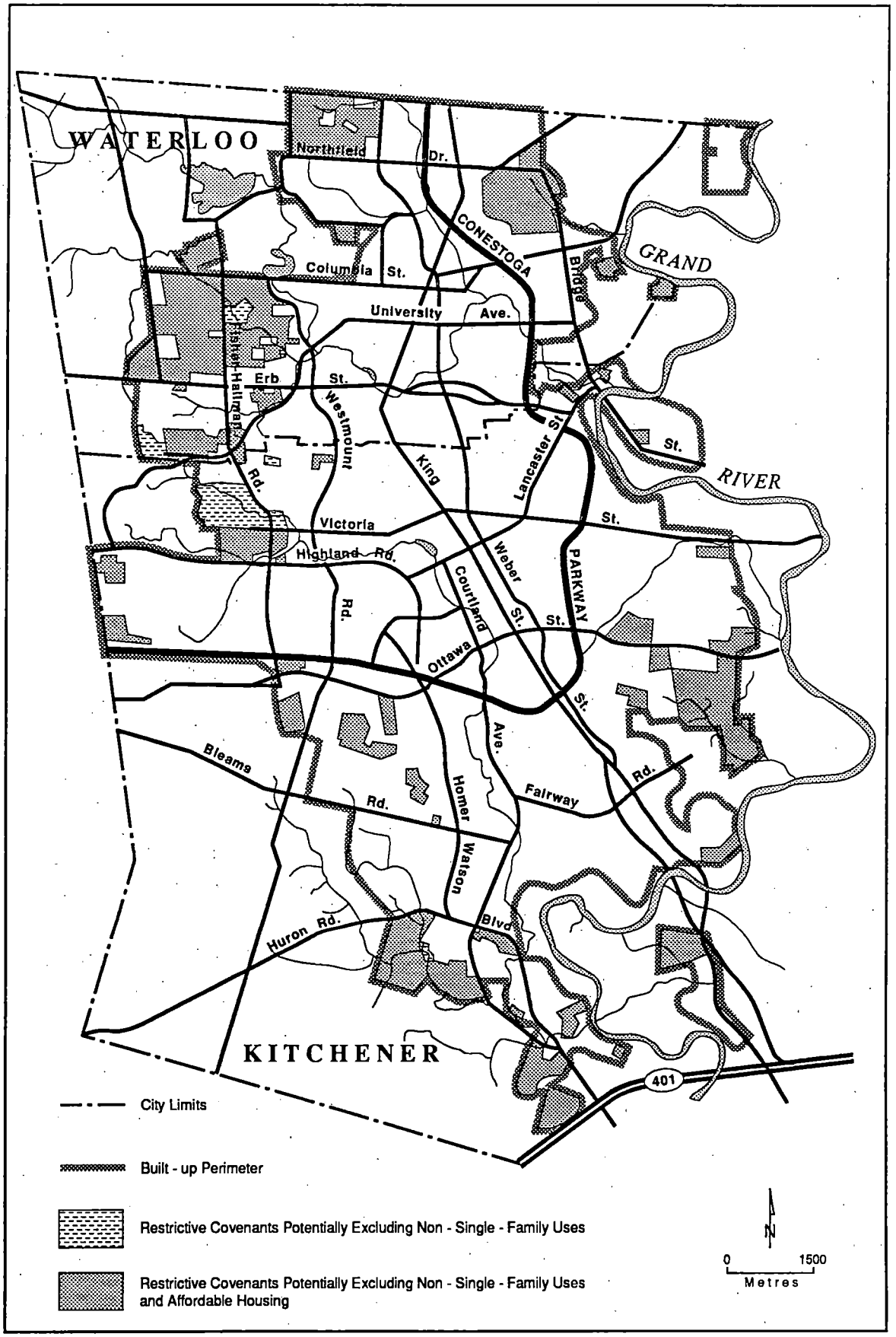
Maps 3 and 4 delineate sectors burdened by restrictive covenants that have been adopted since 1951, were still active in



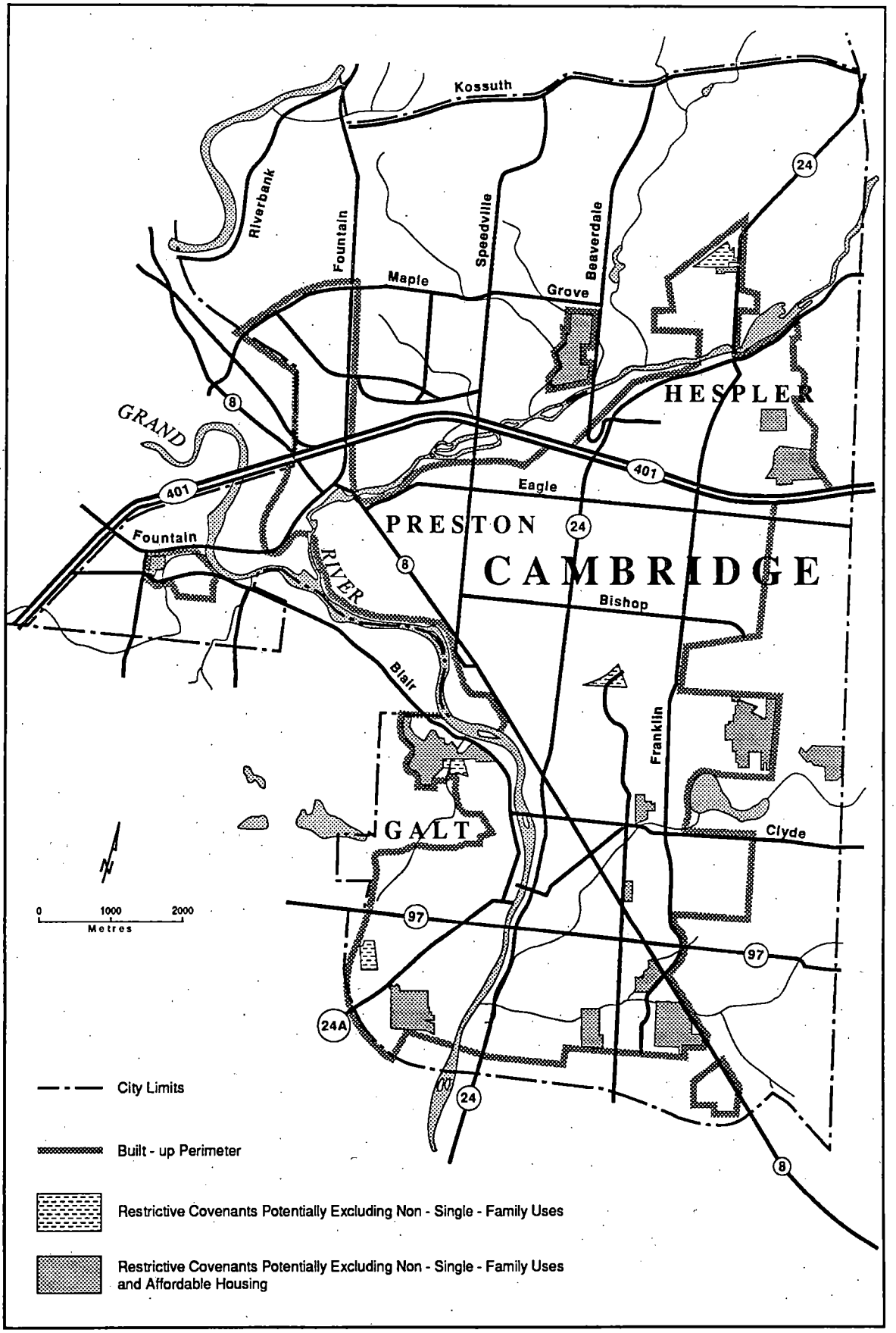
Map 1: Distribution of Areas Burdened at Different Times by Restrictive Covenants Registered from 1951 to 1991, Kitchener and Waterloo



Map 2: Distribution of Areas Burdened at Different Times by Restrictive Covenants Registered from 1951 to 1991, Cambridge



Map 3: Distribution of Areas Burdened in 1991 by Restrictive Covenants, Kitchener and Waterloo



Map 4: Distribution of Areas Burdened in 1991 by Restrictive Covenants, Cambridge

Table 5: Duration in Years of Restrictive Covenants in the Waterloo Region

Duration in Years	Restrictive Covenants Adopted Between 1951-1979	Restrictive Covenants Adopted Between 1980-1991
1-9	6 (4.8%)	13 (9.0%)
10-19	37 (29.4%)	31 (21.4%)
20-29	24 (19.0%)	17 (11.7%)
30-39	5 (4.0%)	4 (2.8%)
40	54 (42.9%)	80 (55.2)
Total	126 (100.0%)	145 (100.0%)

1991, and thus could have then hampered affordable housing and non-single-family uses of homes. As seen, under Ontario legislation, restrictive covenants are generally extinguished after forty years. But in the three cities, restrictive covenants' specified time span was often less than the statutory forty year period. As shown in Table 5, half the covenants had a prescribed life span of less than forty years. The Table indicates, however, that the tendency is towards a greater proportion of restrictive covenants having a forty year period of enforceability.

As expected given the recent increase in the use of restrictive covenants, the maps show that the sectors they burden tend to be located at the edge of the urbanized perimeter. Map 1 indicates that restrictive covenants adopted over the last forty years burdened most of the land in residential areas to the northwest, northeast and to the west of the city of Waterloo. In Kitchener, they affected residential areas to the west, southwest

and to the east. In fact, restrictive covenants either affect or have affected most recently developed residential sectors in Waterloo and a large proportion of such sectors in Kitchener. On the other hand, Map 2 shows an absence of such concentrations in Cambridge; this is consistent with the observed lesser use of restrictive covenants in that city.

Turning to Map 3, it emanates that Kitchener and Waterloo residential sectors that were still burdened by restrictive covenants in 1991 tend to be the ones that are the closest to the edge of the urbanized perimeter. This is not surprising since these covenants are generally the ones that have been most recently registered. It appears from a comparison of Maps 2 and 4 that there is little difference in Cambridge between all the areas that were covered at different times by restrictive covenants registered over the last forty years and the sectors still burdened in 1991. This is due to the high proportion of restrictive covenants that were adopted between 1985 and 1991, which was in Cambridge a period of both intense residential development and higher reliance on restrictive covenants than in the past.

Table 6 lists the 1986 census tracts that host a high concentration of development plans burdened by restrictive covenants. Although in some cases their average household income is well above the census metropolitan area (CMA) average -- census tract 101.4 posts the highest average within the CMA -- it is in many cases only slightly above the CMA average and in other cases somewhat under this average. There is thus no evidence of a strong

correspondence between census tract average household incomes and the location of development plans burdened by restrictive covenants.[6] Restrictive covenants are by no means confined to wealthy residential areas.

Table 6: Average 1986 Household Income, Kitchener Census Metropolitan Area and Census Tracts with Concentrations of Restrictive Covenants Adopted from 1951 to 1991.

CMA	$35,769
002.02	$35,852
002.04	$38,830
008.03	$48,984
009.03	$64,887
014.01	$36,527
014.02	$34,323
014.03	$38,039
101.1	$32,666
101.3	$36,918
101.4	$77,952*
107	$47,749
120.01	$35,159

* Census tract with the highest average household income in the Kitchener CMA.
Source: Statistics Canada (1988).

6. Purpose and Consequences of Restrictive Covenants

This section is divided in four parts. The first part relies on interviews with local developers to investigate motives for creating building schemes. The section then addresses potential

conflicts between restrictive covenants and regional and local planning objectives. It moves on to a consideration of Waterloo Region and Kitchener, Waterloo and Cambridge planners' knowledge of, and concern about, restrictive covenants. And the section ends by comparing this information with comments from planners and affordable housing advocates from outside the Waterloo Region.

Interviews with developers reveal two major reasons for the adoption of building schemes. One is to assure their control on the structures erected within a subdivision. Subdivision developers who sell land to builders adopt building and use standards that are designed to enhance property values throughout the sector. It is through restrictive covenants that these standards are enforced. Accordingly, an increased reliance on restrictive covenants can be tied to the emergence of large developers who are responsible for a high proportion of subdivision developments and who rely on builders to carry out this development. The other reason is a desire to give assurance to successions of home purchasers that the character of their neighbourhood will be preserved in the future.

For interviewed developers, restrictive covenants are a means to enhance the appeal for home purchasers of the subdivisions they develop and, therefore, ease the selling process, and increase property values and, ultimately, profits. Covenants are thus a useful marketing tool, which is often used by real estate agents as a selling feature.

Having considered the purpose of restrictive covenants from the point of view of developers, the attention now shifts to

contradictions between restrictive covenants and regional and local planning objectives. More precisely, we will see how the aggregate impact of restrictive covenants may stand in the way of a full achievement of these objectives.

As seen, the Province of Ontario has legislated land use policy changes supporting the production of affordable housing and is in the process of adopting legislation that will sanction the creation of an apartment in a house in all residential zoning categories. The implementation of these policy objectives takes place via municipal official plan and zoning by-law revisions that are requested by the provincial government. Provincial authority over the local planning process is exerted by the review of Municipal Housing Policy Statements to assure their conformity to provincial guidelines, and directives requiring the adjustment of official plan policies and zoning by-laws to provincial objectives within a specified time frame. Conformity is also achieved through the statutory Ministry of Municipal Affairs approval of official plans and subdivision plans. This explains the adaptation of the three surveyed cities' land use policies to provincial objectives. Municipal land use policy changes were also driven by self-generated planning goals as will become apparent in the case of inclusionary zoning.

The official plans of all three cities express a clear commitment to the production of affordable housing. Waterloo and Kitchener frame this objective within an inclusionary planning approach that attempts to prevent the formation of low-income

ghettoes. The Waterloo official plan specifies that "Council shall endeavour to ensure an adequate mix of rental and ownership units for a wide variety of household sizes when considering development proposals and District Plans" (Waterloo, 1990, p.56, para. 3.1.1.2). It also states that "Council shall continue to support the efforts of senior levels of government and private agencies to provide housing geared to the needs of economically, socially, mentally and physically disadvantaged residents. Housing for these need groups should be dispersed throughout the city and not be concentrated in any one area" (Waterloo, 1990, p.56, para. 3.1.1.5). In that same vein, the City of Kitchener official plan stipulates that "areas of lower priced homes should be located in most new subdivisions", and that the City shall "endeavour to ensure an adequate mix of family rental units in plans of subdivision and/or communities" (Kitchener, 1990, p.12, para. 4.6 and 4.8).

Cambridge's official plan, by contrast, does not express any commitment towards the dispersal of this form of housing throughout the city. In fact it calls for a concentration of multi-unit housing in central areas, which has a direct impact on affordable housing since this type of dwelling is mostly found in multi-unit structures (Cambridge, 1991, p.38, para. 2.1.3).

All three cities' official plans include policies permitting group homes in all residential zoning designations in order to prevent the clustering of such homes (Cambridge, 1991, p.46, para. 2.2.5; Kitchener, 1990, p.16, para. 4.16; Waterloo, 1990, p.61,

para. 3.1.6.1.1). In terms of inclusionary zoning, the City of Waterloo has taken a lead recently by creating a residential zoning category to be applied in newly developing areas which would have been designated hitherto as single residential zones. This new category permits an apartment in homes as-of-right and fails to specify minimum dwelling size requirements that are above that of the Ontario Building Code. When the proposed provincial legislation on the creation of an apartment in a house is adopted, all residential zoning categories in every Ontario municipality will be modified to allow such apartments. Moreover, a 1992 Waterloo Planning and Development Department report proposes the amendment of existing zoning categories to delete performance standards that set out minimum floor area or unit size requirements (Waterloo, 1992, p.13). Finally, Kitchener planners inspired by the neo-traditional planning model are considering creating neighbourhoods which would finely mix different forms of housing and some commercial uses (Kitchener, 1992).

Together these policies, either adopted or proposed, point to an uneven but nevertheless indisputable shift towards inclusionary planning objectives in the three Waterloo Region cities.

The results of the interviews with Waterloo Region regional and local planners involved in matters of affordable housing and inclusionary zoning are highly surprising given the evident potential for conflicts between emerging municipal land use policy objectives and the widespread existence of restrictive covenants.[7] None of the interviewed planners alluded to ever being frustrated

by the existence of restrictive covenants in the pursuit of planning objectives. Likewise, no one had any experience of affordable housing projects or non-single-family uses of homes that had been prevented as a result of the presence of restrictive covenants. No interviewed planner mentioned giving any attention to the existence of restrictive covenants in carrying out their planning duties. As one local planner remarked: "When preparing and changing zoning by-laws we don't pay attention to restrictive covenants; we don't know what are the sectors they cover". Planners perceive restrictive covenants as being outside their sphere of responsibility, as a private matter that has nothing to do with municipal planning. Planners see themselves as responsible for the enforcement of zoning regulations; if this enforcement sanctions violations to restrictive covenants, they consider that it is left to property owners to take legal action against contravening neighbours.

Interviewed planners have been alerted to the existence of restrictive covenants in the region by unsuccessful attempts on the part of city of Waterloo neighbourhood associations to enforce covenants requiring residents to pay dues for the upkeep and operation of neighbourhood-owned swimming pools and recreation centres. One planner was also aware of the possibility for municipalities to use restrictive covenants to control private sector developments. But he stated a preference on the part of municipalities for development agreements because their clauses are extinguished when conditions are fulfilled, and therefore, unlike

restrictive covenants which run with the land, do not encumber titles to the land.

Waterloo regional and local planners' perspectives on restrictive covenants are shared by one official from respectively the Ontario Ministries of Housing and of the Attorney General, and out-of-region planners and affordable housing activists. None of them reported being hindered by restrictive covenants in their efforts to promote affordable housing or inclusive zoning. Their energy was for the most part focused on challenging exclusionary zoning practices. It is noteworthy that the Ontario Ministry of Housing, which, as seen, promotes affordable housing and the creation of an apartment in a house, has not adopted an official position on restrictive covenants.

7. Conflicts Between Restrictive Covenants and Land Use Policies

The combined effect of an increased use of restrictive covenants, the large areas they burden, and the adoption of provincial and municipal planning objectives that promote affordable housing and inclusionary zoning, supported the expectation of clashes between these policy objectives and restrictive covenants. These clashes would have taken the form of an obstruction to planning objectives and could have led to repeated legal attempts to challenge restrictive covenants. We have seen, however, that interviews with planners, officials and affordable housing advocates indicate otherwise. This section explores reasons that may have prevented

the eruption of conflicts between land use policy and restrictive covenants.

First, the interviews suggest that planning and restrictive covenants operate as two distinct land use control systems. In these circumstances, planners do not see it as their role to monitor, or interfere with, restrictive covenants. Another possible factor stems from the embryonic nature of the recent change of direction in provincial and municipal land use planning approaches. The provincial legislation enabling the creation of an apartment in a house is yet to be adopted and the pyramidal zoning system still dominates municipal planning despite inclusionary zoning inroads. Accordingly, it may be the case that the recent nature of these policies accounts to some degree for the fact that conflicts with restrictive covenants have not yet materialized.

Another explanation for the absence of conflicts may be the nature of the regulations that accompany emerging planning policy objectives. These regulations do not force the location of affordable housing or non-single-family use in different sectors, they rather enable it. In the same vein, although restrictive covenants affect a significant area within the Waterloo Region, as seen on Maps 3 and 4, they do not impede the possibility of locating affordable housing and non-single-family uses within the metropolitan region since there remains a wide supply of unburdened residential sectors. In any event, affordable housing is unlikely to locate in sectors that are burdened by restrictive covenants, because such sectors are also zoned for single-family units. In the

Waterloo Region this form of housing is generally too expensive to comply with provincial affordability requirements.

Finally, legal costs associated with the enforcement of covenants can have opposite effects which may both explain the absence of visible conflicts between covenants and planning objectives. One is the "chilling effect" the expectation of legal costs would have on potential land uses that violate restrictive covenants. For example, a group home board of director would generally look for an alternative location after learning that a considered site is burdened by a covenant restricting non-single-family uses. Only rarely would such a board be willing to expend the money required to challenge legally a restrictive covenant, especially since it would in all probability lose the case. The other effect accounts ironically for the tolerance of non-conforming land uses. In this case anticipated legal costs would explain the non-enforcement of restrictive covenants.

It emerges from these observations that in Waterloo Region restrictive covenants do not necessarily threaten the meeting of city-wide affordable housing and non-single-family use objectives because of a plentiful availability of non-burdened sites. It is apparent, however, that covenants can produce major equity problems because of the uneven distribution of such land uses they cause. In their current utilization, restrictive covenants permit the sheltering of residential sectors from land use policy objectives purporting to assure a sharing of affordable housing and non-single-family uses by different residential areas.

Serious clashes between planning policy objectives and restrictive covenants seem inevitable in the future if current trends persist. On the one hand, the provincial commitment to affordable housing and inclusionary planning is about to be intensified by the policy to authorize an apartment in a house located in all residential zoning categories. Moreover current circumstances suggest that municipalities will adapt their zoning to provincial policy requirements and maintain their own inclusionary zoning objectives. On the other hand, we have witnessed a sharp increase in the reliance on restrictive covenants and can therefore expect that they will burden a very high proportion of newly developed residential areas in the future. Also, if current Waterloo Region trends hold, it is to be expected that restrictive covenants will cover the residential sectors of a wide range of income groups, possibly most single-family housing developments. The only sectors that would be left unburdened would be multi-unit housing sectors, which are often low-income residential areas. In fact, efforts to protect neighbourhoods from the impact of policies promoting affordable housing and inclusionary zoning may well lead to an even higher reliance on restrictive covenants.

Restrictive covenants' capacity to subvert this type of planning policies would be further enhanced were the Ontario Law Review Commission recommendations adopted. As seen such recommendations would ease the enforcement of covenants and allow the creation of building schemes in built up areas. Residents of

such areas could then use restrictive covenants as a device to deflect affordable housing and non-single-family uses of homes (OLRC, 1989).

8. Recommendations

We have seen that whereas in the past restrictive covenants converged with zoning to protect certain land uses from the negative externalities of other activities, such covenants may well foil emerging planning objectives. As the number of developments they burden increases, restrictive covenants make it very difficult to reach planning goals that promote affordable housing and inclusionary zoning. We now turn to measures that have the potential of easing the pursuit of such planning objectives in the face of restrictive covenants.

One such measure would consist in following the lead of affordable housing advocates in their challenge of exclusionary zoning by-laws. Attempts could be made to contest restrictive covenants on the basis of Section 15 of the Canadian Charter of Rights and Freedoms and Section 2 of the Ontario Human Rights Code.[8] The outcome of such actions is, however, uncertain and would at best concern only certain groups and thus be irrelevant to restrictive covenants affecting other groups.

Section 15(1) of the Canadian Charter of Rights and Freedoms affords equal protection under the law to every individual without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability. But a

successful challenge of covenants restricting affordable housing, which would be based on this section of the Charter, appears unlikely. This is because the Charter does not promote affordable housing since there is no mention of economic discrimination. Likewise, single-family-use restrictions do not represent a direct segregation against any of the categories mentioned in Section 15. The Section's reference to mental or physical disability could possibly be used to challenge covenants that include single-family-use restrictions and thus prevent the opening of group homes catering for individuals with such disabilities. But the outcome would be highly uncertain because these covenants restrict the use of a house rather than the presence of specified categories of individuals.[9]

More useful in challenging single-family-use restrictive covenants could be Section 2(1) of the Ontario Human Rights Code which reads as follows: "Every person has a right to equal treatment with respect to the occupancy of accommodation, without discrimination because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, age, marital status, family status, handicap or the receipt of public assistance" (added emphasis). The direct reference to marital and family status could question the enforcement of such restrictive covenants. It is noteworthy, however, that as the Canadian Charter of Rights and Freedoms, the Ontario Human Rights Code steers clear of any reference to economic segregation and thus does not threaten covenants restricting affordable housing.

Another possibility would be for municipal planners to demand the right to examine restrictive covenants attached to a development plan before giving planning approval. They could prescribe as a condition for approval that no restrictive covenant run counter to official plan policies. The problem in this case is that restrictive covenants burdening development plans that have already been adopted would be left unaffected by this approval process.

Finally, the surest way to assure the non-interference of restrictive covenants with emerging planning objectives is for the provincial government to adopt legislation that would extinguish without compensation restrictive covenants that exclude affordable housing and non-single-family uses. This legislation could consist in an amendment to, or be part of a revision of, the Ontario Planning Act. It could rule out building standards above that specified by zoning by-laws, restrictions concerning the nature of ties between the residents of a house, and covenants preventing the creation of an apartment in a house. But there would be no reason for this legislation to interfere with covenants that define and safeguard the character of a residential area without affecting affordability and non-single-family uses. For example, restrictions concerning antennas, satellite dishes and overground swimming pools would remain intact.

Endnotes

1) This section is based on both cited works and interviews with five property law professors. Please note that according to the conditions of approval for this research project set by the University of Waterloo Office of Human Research and Animal Care (OHR File 5339) the name of interviewees are not to be revealed.

2) This is the legal opinion of three property law professors interviewed for this research.

3) See for other Canadian cases with a similar impact, Bull (1979), McTaggart (1981, pp.168-74), and Morrow (1980, pp.224-5).

4) The proposed legislation uses the expression "an apartment in houses".

5) The statement regarding the infrequent renewal of restrictive covenants beyond the forty year period was made by one of the property law professors interviewed.

6) The correspondence between higher incomes and the presence of development plans containing restrictive covenants may have been higher had 1991 rather than 1986 census data been used. This would have made it possible to capture recently developed areas, which have tended to include a high proportion of large homes, and where,

as seen, restrictive covenants were used extensively. 1991 census data was, however, unavailable at time of writing.

7) Regional and local planners are interviewed because both the regional municipality and local municipalities are involved in matters of land use planning. The former sets planning policies for the region while the latter deal with usual aspects of municipal planning. The two levels must approve development plans.

8) The two interviewed affordable housing advocates mentioned using these sections of the Canadian Charter of Rights and Freedoms and of the Ontario Human Rights Code in their challenges of exclusionary zoning by-laws.

9) This is the opinion of interviewed law professors.

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