general legal principle that zoning and covenant restrictions operate independently.[1] Possible taking claims and other remedies when zoning and covenant restrictions directly conflict are also discussed herein.[2] Public policy, statutory and constitutional limitations on enforcement of covenants that control the use of land are examined[3] as is the issue of whether a municipality may adopt zoning ordinances less restrictive than covenants that it had originally placed on land that is now privately owned.[4] The pitfalls of "contract zoning" when negotiating for development approval are noted herein,[5] while the subject of private covenants and "contract" and "conditional" zoning are fully discussed elsewhere in this treatise.[6] The final section herein discusses conservation easements and tax incentives therefor.[7]

I. RELATIONSHIP BETWEEN ZONING AND COVENANTS

§ 82:2 Zoning ordinances and private covenants operate independently: Validity of one unaffected by the other

Zoning ordinances regulate the use of land through the exercise of the police power in accordance with a comprehensive plan for the entire community. As an exercise of the state police power to promote the general welfare, zoning is entirely divorced in concept, creation, enforcement, and administration from restrictions arising out of agreements between private parties who, in the exercise of their constitutional right of freedom of contract, can impose whatever lawful restrictions upon the use of their lands that they deem advantageous or desirable. Zoning restrictions and restrictions imposed by private covenants are independent controls upon the use of land, the one imposed by the municipality for the public welfare, the other privately imposed for private benefit.

[Section 82:1]

[1]See §§ 82:2, 82:3, 82:4, and 82:6, infra. See also Korngold, Single Family Use Covenants: For Achieving a Balance Between Traditional Family Life and Individual Autonomy, 22 U.C. Davis L. Rev. 951 (1989).

[2]See § 82:5, infra.

[3]See §§ 82:7 and 82:8, infra.

[4]See § 82:11, infra.

[5]See §§ 82:9 to 82:11, infra.

[6]See §§ 44:10 to 44:12, supra.

[7]See §§ 82:12 to 82:22, infra.

Both types of land use restrictions are held by courts to legally operate independently of one another.[1] Whether either type of restriction is valid and enforceable presents two separate and distinct legal issues. As a local governmental exercise of the police power, zoning restrictions are subject to the usual constitutional and statutory limitations imposed on the exercise of the zoning power.[2] Private covenant restrictions are subject to limitations imposed by the sometimes technical common law real property rules in each state which govern the creation, operation, termination, and enforcement of covenant restrictions that "run with the land."[3] While similar constitutional and statutory limitations

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[Section 82:2]

[1]E.g., Barrett v. Lipscomb, 194 Cal. App. 3d 1524, 240 Cal. Rptr. 336 (3d Dist. 1987); McDonald v. Emporia-Lyon County Joint Bd. of Zoning Appeals, 10 Kan. App. 2d 235, 697 P.2d 69 (1985); Annison v. Hoover, 517 So. 2d 420 (La. Ct. App. 1st Cir. 1987), writ denied, 519 So. 2d 148 (La. 1988); Our Way Enterprises, Inc. v. Town of Wells, 535 A.2d 442 (Me. 1988).

But see Friends of Shawangunks, Inc. v. Knowlton, 64 N.Y.2d 387, 487 N.Y.S.2d 543, 476 N.E.2d 988 (1985), wherein New York's highest court, the Court of Appeals, held that, under a zoning ordinance setting density restrictions and authorizing cluster developments, the portion of a parcel burdened by a previously granted conservation easement precluding development may be counted as part of the open space required as a density set-off for construction on the unburdened portion. The court ruled that the legislative purpose of cluster zoning—"flexibility of design and development" and preservation of "the natural and scenic qualities of open land"—would be frustrated if the trade-off of increased density on the developed portion in exchange for preservation of the remainder is foreclosed, simply because the owner had already privately agreed with others to keep the latter areas open. The court noted that the use of land under a zoning ordinance and its use under an easement or restrictive covenant are, as a general rule, distinct matters. The court also pointed out that the parcel owner still owned the underlying fee in the burdened portion and with it the right to use the property in any manner consistent with the easement. The parcel was 450 acres, 240 acres of which were under the conservation easement purchased by a park commission. Zoning regulations permitted one dwelling per acre and granted a developer the option to use the cluster technique. The effect of the court's ruling is to allow development of 300 condominium units clustered on part of the 210 acres not covered by the easement.

[2]See Ch 2, supra.

[3]See § 1:1, supra, for a discussion of state law rules affecting operation and enforcement of private covenants.

With respect to interpretation of the scope of private covenant restrictions see the ruling of the Nebraska Supreme Court in Breeling v. Churchill, 228 Neb. 596, 423 N.W.2d 469, 76 A.L.R.4th 493 (1988):

may be applied in some cases to both types of restrictions,[4] this section focuses on the general rule adopted by state courts that zoning restrictions and private covenants legally operate independently of one another.

An important implication of the "independent operation rule" is the uniformly held view of state courts that a zoning ordinance does not terminate, supersede, or in any way affect a valid private restriction on the use of real property.[5] The fact that a use may be permitted by a zoning ordinance

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A restrictive covenant is to be construed in connection with the surrounding circumstances, which the parties are supposed to have had in mind at the time they made it; the location and character of the entire tract of land; the purpose of the restriction; whether it was for the sole benefit of the grantor or for the benefit of the grantee and subsequent purchasers; and whether it was in pursuance of a general building plan for the development of the property.

[4]Despite the fact that, in some cases, similar constitutional and statutory limitations on enforcement may be applied to both types of restrictions (see § 82:7, infra), for clarity of analysis, the validity of zoning restrictions and covenant restrictions should be considered separate and distinct issues so that possible lines of argument that are not necessarily applicable to both types of restrictions are not overlooked.

[5]See the following cases:

Federal. C. F. Lytle Co. v. Clark, 491 F.2d 834 (10th Cir. 1974).

Alabama. Brown v. Morris, 279 Ala. 241, 184 So. 2d 148 (1966).

Alaska. Kalenka v. Taylor, 896 P.2d 222 (Alaska 1995) (zoning provision allowing both duplexes and single family dwellings is irrelevant to determination of whether covenant restricts use within subdivision to duplexes).

Arizona. Murphey v. Gray, 84 Ariz. 299, 327 P.2d 751 (1958).

Arkansas. Owens v. Camfield, 1 Ark. App. 295, 614 S.W.2d 698 (1981).

California. Barrett v. Lipscomb, 194 Cal. App. 3d 1524, 240 Cal. Rptr. 336 (3d Dist. 1987); Seaton v. Clifford, 24 Cal. App. 3d 46, 100 Cal. Rptr. 779 (2d Dist. 1972).

Connecticut. Johnson v. Guarino, 22 Conn. Supp. 235, 168 A.2d 171 (Super. Ct. 1960).

District of Columbia. Castleman v. Avignone, 12 F.2d 326 (App. D.C. 1926).

Florida. Rocek v. Markowitz, 492 So. 2d 460 (Fla. Dist. Ct. App. 5th Dist. 1986); Harwick v. Indian Creek Country Club, 142 So. 2d 128 (Fla. Dist. Ct. App. 3d Dist. 1962).

Illinois. Dolan v. Brown, 338 Ill. 412, 170 N.E. 425 (1930).

Indiana. Bob Layne Contractor, Inc. v. Buennagel, 158 Ind. App. 43, 301 N.E.2d 671 (2d Dist. 1973).

Iowa. Burgess v. Magarian, 214 Iowa 694, 243 N.W. 356 (1932).

Kansas. McDonald v. Emporia-Lyon County Joint Bd. of Zoning Appeals, 10 Kan. App. 2d 235, 697 P.2d 69 (1985).

does not relieve an owner of the obligation to comply with a

Kentucky. City of Richlawn v. McMakin, 313 Ky. 265, 230 S.W.2d 902 (1950), cert. dismissed, 340 U.S. 945, 71 S. Ct. 531, 95 L. Ed. 682 (1951).

Louisiana. Annison v. Hoover, 517 So. 2d 420 (La. Ct. App. 1st Cir. 1987), writ denied, 519 So. 2d 148 (La. 1988); Hammons v. East Baton Rouge Parish, Dept. of Public Works, Permit Div., 461 So. 2d 1225 (La. Ct. App. 1st Cir. 1984).

Maine. Whiting v. Seavey, 159 Me. 61, 188 A.2d 276 (1963).

Maryland. Martin v. Weinberg, 205 Md. 519, 109 A.2d 576 (1954).

Massachusetts. Jenney v. Hynes, 282 Mass. 182, 184 N.E. 444 (1933).

Michigan. Rofe v. Robinson, 93 Mich. App. 749, 286 N.W.2d 914 (1979), case remanded, 408 Mich. 899, 295 N.W.2d 228 (1980), on remand to, 99 Mich. App. 404, 298 N.W.2d 609 (1980), decision rev'd (Supreme Court rev'd the the Court of Appeals which found a change in the character of the subdivision which made enforcement of the restrictions inequitable), 415 Mich. 345, 329 N.W.2d 704 (1982), on remand to, 126 Mich. App. 151, 336 N.W.2d 778 (1983); Morgan v. Matheson, 362 Mich. 535, 107 N.W.2d 825 (1961).

Minnesota. Strauss v. Ginzberg, 218 Minn. 57, 15 N.W.2d 130, 155 A.L.R. 1000 (1944).

Montana. State ex rel. Region II Child and Family Services, Inc. v. District Court of Eighth Judicial Dist., 187 Mont. 126, 609 P.2d 245 (1980).

New Jersey. Scillia v. Szalai, 142 N.J. Eq. 92, 59 A.2d 435 (Ch. 1948).

New Mexico. Singleterry v. City of Albuquerque, 96 N.M. 468, 632 P.2d 345 (1981); Hines Corp. v. City of Albuquerque, 95 N.M. 311, 621 P.2d 1116 (1980).

New York. Regan v. Tobin, 89 A.D.2d 586, 452 N.Y.S.2d 249 (2d Dep't 1982); Gordon v. Incorporated Village of Lawrence, 84 A.D.2d 558, 443 N.Y.S.2d 415 (2d Dep't 1981), order aff'd, 56 N.Y.2d 1003, 453 N.Y. S.2d 683, 439 N.E.2d 398 (1982).

North Carolina. Crabtree v. Jones, 112 N.C. App. 530, 435 S.E.2d 823 (1993); Buie v. Johnston, 53 N.C. App. 97, 280 S.E.2d 1 (1981); Mills v. HTL Enterprises, Inc., 36 N.C. App. 410, 244 S.E.2d 469 (1978).

Oklahoma. Magnolia Petroleum Co. v. Drauver, 1938 OK 545, 183 Okla. 579, 83 P.2d 840, 119 A.L.R. 1112 (1938).

Oregon. Heitkemper v. Schmeer, 146 Or. 304, 29 P.2d 540, reh'g denied, 146 Or. 338, 30 P.2d 1119 (1934).

Pennsylvania. Haskell v. Gunson, 391 Pa. 120, 137 A.2d 223 (1958).

Rhode Island. Farrell v. Meadowbrook Corp., 111 R.I. 747, 306 A.2d 806 (1973).

South Carolina. Inabinet v. Booe, 262 S.C. 81, 202 S.E.2d 643 (1974).

Texas. Farmer v. Thompson, 289 S.W.2d 351 (Tex. Civ. App. 1956).

Virginia. Ault v. Shipley, 189 Va. 69, 52 S.E.2d 56 (1949).

Wisconsin. Webster v. Dane Corp., 9 Wis. 2d 437, 101 N.W.2d 616 (1960).

more restrictive private covenant.[6] When a zoning restriction and a private covenant are in conflict, the more restrictive of the two prevails.[7] As stated in a 1987 decision:

> Zoning ordinances neither terminate nor supersede existing building restrictions. However, where subdivision building restrictions are more restrictive than zoning ordinances, the building restrictions will govern. The inverse is also true that, if zoning ordinances are more restrictive than subdivision building restrictions, the more stringent ordinance will govern.[8]

As stated above, a zoning ordinance which permits less restrictive uses than those to which property is limited by a

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Wyoming. Fox v. Miner, 467 P.2d 595 (Wyo. 1970); Anderson v. Bommer, 926 P.2d 959 (Wyo. 1996) (zoning restrictions cannot override, annul, abrogate, or relieve land from building restrictions or covenants; thus, lacking any evidence that restrictive covenants are invalid, illegal, or contrary to public policy, city ordinances cannot relieve homeowner of obligation to uphold the restrictive covenants).

See also Note, Zoning Ordinances and Restriction in Deeds, 37 Yale L.J. 407 (1928); Note, Municipal Corporations—Zoning—Abrogation of Private Restrictive Covenants by Zoning Regulations, 48 Mich. L. Rev. 103 (1949); Annot., Restrictions on use of real property, or remedies in respect of them, as affected by zoning law, 54 A.L.R. 843.

[6]In some cases, zoning ordinances expressly provide that the provisions thereof do not abrogate private covenant restrictions. See, e.g., Kramer v. Nelson, 189 Wis. 560, 208 N.W. 252 (1926); Burgess v. Magarian, 214 Iowa 694, 243 N.W. 356 (1932). However, such provisions are irrelevant in view of the express holding by courts that zoning ordinances do not affect private restrictions and that a municipality has no authority through zoning to terminate private covenants. See also § 82:3, infra.

Consider also the analogous situation involved in cases which hold that a use can be enjoined as a private nuisance even though it happens to be a permitted use under the zoning ordinance. See, e.g., Dunham v. Zoning Board of Town of Westerly, 68 R.I. 88, 97, 26 A.2d 614, 618 (1942).

[7]E.g., Brown v. Morris, 279 Ala. 241, 184 So. 2d 148 (1966); LaSalle Nat'l Bank v. Village of Palatine, 92 Ill.App.2d 327, 236 N.E.2d 1 (1968); City of Gatesville v. Powell, 500 S.W.2d 581 (Tex. Civ. App. Waco 1973), writ refused n.r.e., (Jan. 23, 1974).

And see McDonald v. Emporia-Lyon County Joint Bd. of Zoning Appeals, 10 Kan. App. 2d 235, 697 P.2d 69 (1985), wherein the Kansas Court of Appeals, citing Am. Jur. 2d, Covenants, Conditions, etc. § 277, stated as the generally recognized rule that: "Restrictive covenants do not supersede or in any way affect the requirements of an already existing zoning ordinance, and, conversely, a zoning ordinance cannot destroy, impair, abrogate, or enlarge the force and effect of an existing restrictive covenant."

[8]Annison v. Hoover, 517 So. 2d 420, 422 (La. Ct. App. 1st Cir. 1987), writ denied, 519 So. 2d 148 (La. 1988).

private covenant does not impair the efficacy of the private restriction. The language used in this connection is that the zoning ordinance does not "override" the restrictive covenant. As was stated by the Court of Appeals of Maryland in *Perry v. County Board of Appeals:*[9]

> The ordinance does not override or defeat whatever private rights exist and are legally enforceable, but neither is it controlled in its workings or effects by such rights. The enforcement of restrictive covenants is a matter for the exercise of the discretion of an equity court in the light of attendant circumstances. Many times, the covenant relied on may have ceased to be effective at the time relief is sought.[10]

The extent to which an inconsistent zoning restriction may be a factor in holding a restrictive covenant unenforceable is discussed later herein.[11]

The above discussed "independent operation" principle is applied in a variety of contexts. For example, it has been held that annexation by a city of an area restricted by private covenants did not relieve the area of the restrictions.[12] It has also been held that statutory vacation of a filed subdivision map on which the developer had imposed restrictive covenants did not affect the covenants.[13] The principle also is applied with respect to administration of zoning ordinances.[14]

The independent operation of zoning and covenant restrictions renders them of limited value in construing each other. In *Haskell v. Gunson*,[15] the court construed a private covenant prohibiting the use of property "for any purpose other than that of a private dwelling house" to prohibit use of a portion of a dentist's house for his office, even though the zoning ordinance allowed that use of a private dwelling. The

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[9]Perry v. County Bd. of Appeals for Montgomery County, 211 Md. 294, 127 A.2d 507 (1956).

[10]127 A.2d at 509. See also St. Luke's House, Inc. v. DiGiulian, 274 Md. 317, 336 A.2d 781, 788 (1975) (this case includes a discussion of *Perry*; however, the court determined that *Perry* was not applicable to the case at hand).

[11]See § 82:4, infra.

[12]Sorrentino v. Cunningham, 111 Ind. App. 212, 39 N.E.2d 473 (1942).

[13]Bob Layne Contractor, Inc. v. Buennagel, 158 Ind. App. 43, 301 N.E.2d 671 (2d Dist. 1973).

[14]See § 82:3, infra.

[15]Haskell v. Gunson, 391 Pa. 120, 137 A.2d 223 (1958). See also Grasso v. Thimons, 384 Pa. Super. 593, 559 A.2d 925 (1989) (accounting practice constituted nonresidential use of property and therefore violated restrictive covenant).

court, after noting the fact that the zoning ordinance permitted such a home occupation, stated:

> It is to be observed . . . that a gulf of difference separates a zoning regulation from a covenant restriction. What a covenantor specifically demands of the person to whom he sells his property has nothing to do with what the community, through municipal regulation exacts of every property owner.[16]

The court noted that the zoning ordinance, unlike the covenant, made specific provision for accessory home occupation use of private dwellings. It noted further that the creator of the covenant could not have had the provisions of the zoning ordinance in mind in creating the restriction, since the covenant was imposed 13 years before the zoning ordinance was enacted.

A zoning ordinance which furthers a legitimate public purpose can validly continue to restrict land in the same manner as the land had formerly been restricted by private covenants. In *Baddour v. City of Long Beach*,[17] a zoning ordinance was upheld which continued the private restrictions imposed by the developers of a summer resort community who had developed the community in accordance with a uniform plan.

Sometimes, individuals seek to bolster the enforceability of zoning restrictions on private individuals by incorporating zoning restrictions into private covenants.[18] In one such case,

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[16]137 A.2d at 225. Similarly, in Kalenka v. Taylor, 896 P.2d 222 (Alaska 1995), the court noted that a zoning provision allowing both duplexes and single family dwellings to be constructed on the property at issue was irrelevant to the interpretation of a restrictive covenant, which the plaintiffs claimed only allowed the construction of duplexes. Without considering the zoning ordinance, the court determined that while the covenant clearly envisioned multiple-unit dwellings, it contained no express prohibition on the construction of single-family homes and, therefore, given the principle that covenants should be construed in favor of free use of land, the property owner could construct single family dwellings on the property.

[17]Baddour v. City of Long Beach, 279 N.Y. 167, 18 N.E.2d 18, 124 A.L.R. 1003 (1938), reargument denied, 279 N.Y. 794, 19 N.E.2d 90, 124 A.L.R. 1003 (1939) and reargument denied, 18 N.E.2d 698 (N.Y. 1939). See also Tobler v. Beckett, 297 So. 2d 59 (Fla. Dist. Ct. App. 2d Dist. 1974).

[18]In Cogliano v. Lyman, 370 Mass. 508, 348 N.E.2d 765 (1976), for example, the grantees of property covenanted that for 30 years the premises would be used only in accordance with the town's zoning bylaws "presently in force and applicable to said premises, regardless of any changes in said By-Laws which may hereafter be made."

covenants restricted property to residential purposes and also to all zoning ordinances affecting the property. It was held that the additional restriction to zoning ordinances did not enlarge the meaning of the restriction to residential purposes; therefore, a residence to be additionally used for a hairdressing establishment was allowed, for it would also be permitted under the zoning ordinance.[19]

The independent operation of zoning and covenants also may affect the "standing" of persons entitled to enforce land use restrictions in court. Standing to enforce covenant restrictions may be more limited than standing to enforce zoning restrictions.[20] However, courts hold that the existence of a restrictive covenant has no effect on a person's standing to challenge a zoning ordinance or decision.[21]

Finally, the relationship between zoning ordinances and covenants may arise in connection with the sale of property. For example, in *Seymour v. Evans*,[22] the seller's warranty deed included a covenant against encumbrances. The purchasers sued for breach of that covenant after it was discovered that the applicable zoning ordinances prohibited the use to which they intended to put the property. The court noted that "[a]s a general rule, zoning and other public restrictions on the use of land do not in and of themselves constitute breaches of a covenant against encumbrances."[23] In other words, the existence of a zoning ordinance that

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[19]Johnson v. Guarino, 22 Conn. Supp. 235, 168 A.2d 171 (Super. Ct. 1960).

[20]In the following cases, courts followed the usual rule that private covenants are enforceable only by those persons intended to be benefited by the covenants and in whose favor such covenants run. Staninger v. Jacksonville Expressway Authority, 182 So. 2d 483, 22 A.L.R.3d 950 (Fla. Dist. Ct. App. 1st Dist. 1966); Suess v. Vogelgesang, 151 Ind. App. 631, 281 N.E.2d 536 (2d Dist. 1972); Whiting v. Seavey, 159 Me. 61, 188 A.2d 276 (1963).

[21]E.g., Our Way Enterprises, Inc. v. Town of Wells, 535 A.2d 442 (Me. 1988).

[22]Seymour v. Evans, 608 So. 2d 1141 (Miss. 1992).

[23]Id. at 1146. See also Powell on Real Property, at 900[2]; Thompson on Real Property § 5354; Annotation; Zoning or Other Public Restrictions on the Use of Property As Affecting Rights and Remedies of Parties to Contract for the Sale Thereof, 39 A.L.R. 3d 362. Additionally, the following cases hold that zoning laws are not encumbrances:

Massachusetts. Dover Pool & Racquet Club, Inc. v. Brooking, 366 Mass. 629, 322 N.E.2d 168, 169 (1975) ("In general building and zoning laws in existence at the time a land contract is signed are not treated as encumbrances.").

limits the use of the land does not violate the covenant against encumbrances, even if its effect is substantially similar to that of a restrictive covenant, which is considered an encumbrance. This rule is not as clear, however, in situations where the property is not merely subject to a zoning ordinance, but actually violates an existing zoning ordinance. In such a case, the majority of jurisdictions have held that an existing violation of a zoning ordinance is a breach of the covenant against encumbrances.[24]

§ 82:3 Rezonings, variances, special exceptions, subdivision approvals, and building permits do not affect and are unaffected by private covenants

Pursuant to the principle that zoning and covenants operate independently, courts hold that the existence of a restrictive covenant has no relevance to the question of whether a zoning restriction is valid.[1] Similarly, courts hold that private covenants have nothing to do with the administration of zon-

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Nevada. Laand Corp. v. Firsching, 91 Nev. 271, 534 P.2d 916, 918 (1975) (existing subdivision ordinance does not constitute encumbrance).

New York. Pamerqua Realty Corp. v. Dollar Service Corp., 93 A.D.2d 249, 461 N.Y.S.2d 393, 395 (2d Dep't 1983) (purchaser is deemed to have entered contract subject to laws and ordinances).

[24]This holding is illustrated by the following cases:

Colorado. Feit v. Donahue, 826 P.2d 407, 409 (Colo. Ct. App. 1992).

Kansas. Lohmeyer v. Bower, 170 Kan. 442, 227 P.2d 102 (1951).

Louisiana. Oatis v. Delcuze, 226 La. 751, 77 So. 2d 28 (1954).

North Carolina. Wilcox v. Pioneer Homes, Inc., 41 N.C. App. 140, 254 S.E.2d 214 (1979).

Pennsylvania. Moyer v. De Vincentis Const. Co., 107 Pa. Super. 588, 164 A. 111 (1933).

But see Barnett v. Decatur, 261 Ga. 205, 403 S.E.2d 46 (1991), on remand to, 199 Ga. App. 893, 407 S.E.2d 139 (1991).

[Section 82:3]

[1]E.g., Isenbarth v. Bartnett, 206 A.D. 546, 201 N.Y.S. 383 (2d Dep't 1923), aff'd, 237 N.Y. 617, 143 N.E. 765 (1924). And see cases cited § 82:2, supra.