Private Preservation: Using Garden City-Inspired Legal Tools to Preserve Communities and Heritage

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Private Preservation: Using Garden City-Inspired Legal Tools to Preserve Communities and Heritage

Abstract
This thesis looks at the legacy of Ebenezer Howard's Garden City vision, and analyzes how a reappropriation of privatism and communal land ownership and management can work to preserve communities and heritage as an alternative set of tools to public preservation. Using the law of property to explore private legal and economic preservation tools, this thesis explores the precedents of private governments and the use of restrictive covenants as tools for private preservation. Using the legacy of communal land ownership and management, the thesis explores the use of land trusts and Real Estate Investment Trusts (REITs), and their potential to be used in preserving heritage sites while giving community members a powerful voice and a financial dividend. Three railroad and garden suburbs in Queens – Forest Hills Gardens, Richmond Hill, Kew Gardens – are used as inspiration for this thesis and the latter two of them as case studies where we can learn about the problems that communities face with public preservation, along with the realities of social, economic, and political transaction costs that present difficulties to private preservation. Despite challenges with advocacy and education of the use of these private preservation tools, there is great potential for their use in protecting heritage and communities. As communities struggle to adapt to the realities of development, displacement, and lost heritage and community, we can look at Howard’s vision for a radical approach to land tenure and management that helps us envision novel ways of preserving heritage and community through the private realms.

Keywords
Garden City, privatism, land trust, private government, garden suburb

Disciplines
Historic Preservation and Conservation

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PRIVATE PRESERVATION: USING GARDEN CITY-INSPIRED LEGAL TOOLS TO PRESERVE COMMUNITIES AND HERITAGE

Santiago Preciado Ovalle

A THESIS

in

Historic Preservation

Presented to the Faculties of the University of Pennsylvania in Partial Fulfillment of the Requirements of the Degree of

MASTER OF SCIENCE IN HISTORIC PRESERVATION

2019

______________________
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Dedication

Life has given me a very interesting twist of fate. I was born in Bogotá and grew up in a neighborhood called Ciudad Jardín, which translates in English to “Garden City.” I don’t know much about the history of Ciudad Jardín, but it is surely tied in to the larger narrative of Howard’s vision of his Garden Cities. When my sister and I were little, our parents brought us to the New York City borough of Queens, where we settled in the garden city-inspired garden suburb of Kew Gardens. Growing up and living there has been the main source of inspiration for this entire thesis and for my studies in historic preservation here at Penn. My desire to protect Kew Gardens and to raise awareness of its history and beauty come from a great source of gratitude to my parents for having chosen it as our home, and gratitude to Kew Gardens for being a wonderful village within a city. As a result, I dedicate this thesis to my parents, Julio César Preciado Duarte and Jeannette Esperanza Ovalle Rodriguez, and to my sister, Natalia E. Preciado Ovalle for collectively building a wonderful home together and for their boundless love and support throughout the years. I also dedicate this thesis to Ciudad Jardín in Bogotá and lastly to Kew Gardens in New York City. I hope my work proves fruitful in advancing preservation efforts in Kew Gardens and in furthering conversations in the field of preservation.
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Finally, I thank God Almighty always and everywhere for all the graces and blessings he has bestowed upon me and my loved ones. None of this would have been possible without His boundless love.
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9. The Kew Gardens “Ponte Vecchio” Lefferts Boulevard Bridge and its stores, all spanning over the railroad tracks, taken in 1940.
The Cities Inside Us

We live in secret cities
And we travel unmapped roads.

We speak words between us that we recognize
But which cannot be looked up.

They are our words.
They come from very far inside our mouths.

You and I, we are the secret citizens of the city
Inside us, and inside us

There go all the cars we have driven
And seen, there are all the people

We know and have known, there
Are all the places that are

But which used to be as well. This is where
They went. They did not disappear.

-Alberto Rios, 1952
Section 1 – Reappropriating Privatism

Introduction

In his seminal publication *Garden Cities of To-Morrow*, published in 1902, Ebenezer Howard laid out his utopian vision for a place where city might marry country, and achieve a harmony that would cure society’s ills [Image 1]. The ideas expounded in that work have been misunderstood over the decades, but have had wide-reaching implications in urban planning and policy, in particular in the rise of private communities and community design. While true garden cities – those that adhere strictly to Howard’s expansive vision – are relatively few and far between, it is beneficial to revisit his work and use elements of his vision to search for contemporary solutions to several ills that plague our cities and societies today. Indeed, today we live in a world similar to the Gilded Age that Howard knew: extreme income inequality that corresponds to the rise of homelessness, lack of affordable housing, the loss of civic and community participation, displacement and gentrification, tenement-like squalid conditions in major cities, the loss of historic built fabric, rampant speculative development, and a veritable global environmental crisis whose lasting effects we still fail to fathom. The proposals laid out

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1 Originally titled *To-morrow: a Peaceful Path to Real Reform* and published in 1898.
in this work attempt to address several of these afflictions, and have been inspired by my education and advocacy work in New York City, along with my socioeconomic and political views and my desires for a more equitable and democratic society. They are grounded in preservation because of the importance of place in shaping and conserving stable communities, and of giving back to stakeholders. Private preservation is the main theme of this thesis, and its ramifications are wide-reaching. In proposing the wider use of privatism in preservation, we must revisit past ideas and the trajectory of their application through the last century.

F. J. Osborn, the disciple of Howard in the New Towns Movement, wrote in a 1965 introduction to Garden Cities that Howard was a pragmatist who “was as much concerned for free enterprise as for social control; and his experimental attitude and tentative suggestions as to the boundary between the two, as to devolution of democratic control, and as to the sphere of voluntary co-operation, are relevant to our present situation.”3 Truly this quote applies today as well – the excesses of capitalism and the collapse of active civic participation and democracy have taken a toll on our society that only moderation and new solutions can mend. By searching for how communities can actively engage in saving their built environment and heritage, they have the potential of saving themselves from displacement, and stemming the tide of income inequality and the loss of place. By owning the community assets themselves, communities can exert control over their use and benefit


financially from them. These are not new ideas – they have been widely used over the past century in the form of private communities (or common-interest developments, also known as CID's), and land trusts in the form of real estate investment trusts (REITs). Looking at Howard’s vision for harmonious, livable, democratic, and equitable cities will allow us to understand how we can reappropriate these tools in order to achieve historic preservation goals that simultaneously address socioeconomic problems that we face today. To that end, it is important to recognize that the main inspiration for this thesis has been my own work in community history and preservation advocacy in my New York City communities. These are the Victorian, garden suburb of Richmond Hill, the planned garden suburb of Kew Gardens, where I grew up, and the world-famous private planned garden city-inspired garden suburb of Forest Hills Gardens. The three neighborhoods are all located in central Queens, and are immediately adjacent to each other [Image 2]. The developers and community builders who envisioned and built these places were inspired by Howard’s vision, which gives them a shared history. This is a shared heritage of being sites where community builders implemented Progressive Era ideas that addressed broader social purposes, more than just housing itself.

During the late nineteenth and early twentieth centuries, several developers in the Borough of Queens in New York City built garden-suburb developments to attract Manhattanites tired of crowded and sordid living conditions. These three neighborhoods reflect a significant history of real estate development, and tell a story of preservation attempts and solutions, with varying degrees of success. Richmond Hill was a Victorian railroad-suburb subdivided and developed by the Man family, and was recently listed on the National Register of Historic Places as a historic district, after decades of community
activism. Kew Gardens was a planned garden community developed by the same family in the early twentieth century, and Forest Hills Gardens was developed by the Russell Sage Foundation with an architectural masterplan by Grosvenor Atterbury and landscape plan by Frederick Law Olmsted, Jr.

The preservation stories and solutions for these three communities fall along a broad spectrum: Richmond Hill has applied for local historic district designation at least four times, and has been denied as many even though the community desires protection. Kew Gardens homeowners have been very ambivalent about preservation because of property rights issues, but the neighborhood is home to a strong activist and preservationist community. Finally, Forest Hills Gardens has been very well preserved because it is a private community which uses restrictive covenants to enforce and maintain the community, all handled by the Forest Hills Gardens Corporation. These three communities and examples are historically significant because of their planning and architecture, and moreover because they serve as inspiration and potential testing grounds for innovative preservation solutions that may have wider application in the fields of historic preservation, city planning, and urban design; simultaneously they help inspire policy that addresses heritage concerns and socioeconomic issues.

Joining and using the precedents and visions outlined by Howard and these three communities as sources of inspiration, this thesis aims to suggest extra-governmental preservation solutions. The search for a set of private preservation solutions comes from a frustration with the citywide (public) preservation commission in New York City, its

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shortcomings, and the preservation landscape overall, which is discussed in greater detail in section 5. Therefore, my research will focus on proposing a set of private preservation solutions, one legal and one economic that form the basis for the privatization of regulations and land ownership and management. These two solutions go hand in hand, and reflect the reappropriation and adaptation of Howard’s vision of internal, self-regulation within a community and communal ownership and control of land and resources. The tools and scenarios ultimately suggest favorable economic situations geared toward preserving built heritage while promoting socioeconomic equity.

Private Property and Communal Land Ownership Solutions

The legal and economic proposals are meant to be used either individually or together in any community that desires to achieve private preservation goals and advance community equity through such communal land or property ownership. The basis for the legal solutions have been used as a recourse by community builders and developers of private communities and governments in the form of CIDs for decades now; these refer to easements, real covenants, and equitable servitudes, or more generally, the Covenants, Conditions, and Restrictions (CC&Rs) that a community uses. Section 3 will further expound upon these terms, their historic use, and their limitations. Ultimately the first

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proposal is a system wherein preservation-minded neighbors would impose private contracts and deed restrictions upon their own properties, allowing their neighbors to regulate and enforce preservation easements or covenants even after the sale of the property. This might be expanded gradually among neighbors and eventually lead to the establishment of a type of homeowners’ association on an existing neighborhood that self-regulates for a preservation outcome when the public sphere will not or cannot enforce the preservation of the properties. Alternatively, it could lead to the establishment of a neighborhood-based preservation easement-holding trust or association – both of these ideas will be discussed in greater detail later on.

In addition to these legal recourses, the economic proposal is likewise inspired from Howard’s vision and subsequent applications regarding community ownership of land. This vision affected the growth of land trusts in this country and around the world, both as conservation land trusts and Community Land Trusts (CLTs that preserve affordable housing), concepts explained in section 4. Using this legacy, this thesis’s economic proposal represents an attempt to provide equitable and preservation-minded real estate development. Community members would purchase shares in properties as a solid real estate investment akin to a Real Estate Investment Trust (REIT). This proposal’s ultimate goals would be the establishment of an investment that pays dividends back to the community and the creation of an innovative preservation solution.

Using my own activism and Howard’s vision as inspiration, these two proposed solutions represent essentially private preservation solutions. The aim is to give individuals

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and communities the power to have a significant voice in the future of their communities outside of the public regulatory framework of zoning ordinances, which include historic districts and landmarks. The economic proposal addresses significant issues of equity and community ownership, allowing residents to remain in the community, make a profit, and preserve their heritage. There are of course significant downsides to private solutions, ranging from homeowner concerns about property values, to the high transaction costs regarding social, economic, and political challenges that surface when trying to get community support. These challenges and drawbacks will be discussed in section 5, which looks at the nascent solutions in practice.

Problems with Public Preservation

These real-life complications which I will elucidate in section 5 derive partly from an additional problem within the realm of historic preservation, which is a dependence on the public realm to provide protection and regulation of historic sites.7 Throughout the United States, local municipalities designate landmarks or historic districts, and protect and regulate their alteration through their historical commissions. At the national level, the National Parks Service administers the National Register of Historic Places, and national landmarks, sites or districts listed on the register receive an important honor, but not protections from alterations or demolitions.8 With respect to the three aforementioned

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7 Although the public realm has saved thousands of places in this country and is still extremely valuable and necessary, there are significant barriers that preservationists face – for instance, we are often pitted against developers as being anti-growth or taking away property rights. A private alternative might lessen the potency of such attacks and give preservation more power of persuasion.

Queens communities, the principle issue in New York City is currently the politically and bureaucratically complex and fraught issue of nominating properties or districts to the local register. Moreover, in recent years, preservationists in New York have argued that the Landmarks Preservation Commission (LPC) has been derelict in its duty to save landmark-worthy buildings and neighborhoods. Furthermore, preservationists have argued that the last couple of administrations, those of Mayor Bill de Blasio and Mayor Michael Bloomberg, have been increasingly pro-development, to the detriment of historic sites. Despite this, a city as large and attractive to newcomers and developers as New York must balance development and preservation. In addition, significant preservation hurdles lie not with government but with communities themselves; for instance, Kew Gardens itself is divided between staunch preservationist and anti-landmarking groups of residents and homeowners, creating a situation where there is no consensus or latitude to proceed with nominations or gain political support. This stands in contrast to Richmond Hill, a tight-knit community where homeowners have desired protection for almost thirty years but have

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9 Craig Hubert, “Shaken by Recent Decisions, Preservationists Say Landmarks Commission is Not Doing Its Job,” *Brownstoner*, January 25, 2018, https://www.brownstoner.com/architecture/landmarks-preservation-commission-historic-landmarking-meenakshi-srinivasan/. For instance, this article explains a new trend where the LPC takes “no action” on proposed alterations, and that there may be ulterior motives at play: “Some believe that, under the guise of “no action” decisions, the LPC is merely presenting a false formality. According to one preservationist who wished not to be named, developers are aware that a “no action” means they are on the right track. In the past, many of these “no action” decisions would be denied, or the LPC would require substantial changes before approval was granted.” At the same time, another critique was that “ ‘The LPC won’t designate buildings because they are too altered, but will allow alterations to buildings that are designated.’”

been denied by the LPC for purportedly “lacking character” or “a sense of place,” among other reasons further explained in section 5.\textsuperscript{11}

Having recognized these broad societal and specific preservation problems, this thesis will identify and analyze Howard’s lasting and influential role in the creation of private communities and land trusts. Among the main sources will be Howard’s own work, and other scholars’ analyses of Garden Cities and garden suburbs; scholarship on the rise of private communities; histories and testimonials derived from interviews and conversations with community members regarding preservation in the three Queens communities; scholars’ work regarding the use of investment trusts and land trusts; and explanations of concepts in property law to better understand the private nature of these solutions. Ultimately this thesis proposes a reappropriation of past ideas and a new application of contemporary legal structures (namely CIDs and REITs) to understand how a contemporary application might be achievable – one that not only preserves the built environment for communities through the private sphere, but gives back to people through a vision of communal ownership in land and investment in people and places.

\textsuperscript{11} Such reasons include former lack of elected representative support and lack of funding for a thorough preservation nomination. These will be further explained in section 5.
Section 2 – Historical Background and the Rise of Private Governments

Introduction

In *Garden Cities of To-morrow*, Ebenezer Howard described his pioneering vision as one which would “be carried out by those who have not a merely pious opinion, but an effective belief in the economic, sanitary, and social advantages of common ownership of land…” His was a radical vision wherein people might live in peace and harmony with nature (the garden) and society (the city), and included industrial and agricultural surroundings to provide stable jobs, food, and the pleasures of the countryside. His utopian vision was influenced by his lower middle-class childhood, his work as a farmhand in Nebraska, and his time in Chicago, during which he first encountered the problems caused by high values of urban real estate. After the ‘Great Depression’ of 1876, Howard understood that laissez-faire capitalism caused by international trade interests had begun destroying the traditional agricultural system in Britain. His observations of life in Chicago, New York, and London created within him a desire to cure society of its ills. Howard was influenced by many writers and concepts, grabbing ideas on green belts, regional city complexes, industry in cities, the Back to the Land movement from past influential men such as Henry George, Peter Kropotkin, Thomas Spence, Alfred Marshall,

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15 Ibid., 9. Among these problematic interests were “the ascendancy of the manufacturing interest…, the principle of free trade to the status of natural law,” and the mass migration of people to the cities.
and Edward Bellamy, among others.\textsuperscript{16} Henry George’s ‘single tax’ on landlord’s rent formed the financial foundation for the Garden City’s socioeconomic reforms, to serve the public at large, not private individuals.\textsuperscript{17} Howard did not wish to destroy the system, but reform it to serve the public good, a goal worthy of imitation in these similar times.\textsuperscript{18}

Howard’s innovative conception of the socialism that should serve as the foundation of this new society was not one where the government was the largest and ultimately the only employer and monopoly.\textsuperscript{19} He saw inspiration in Edward Bellamy’s \textit{Looking Backward}, which led him to believe in the potential of a society “freed by socialism…a Christian society, imbued with a spirit of co-operation and harmony, by contrast with that of capitalism…”\textsuperscript{20} Indeed, Howard’s vision was that a peaceful

\begin{quote}
\footnotesize
16 \textsuperscript{16} Ibid., 17. Howard was for instance influenced by Henry George’s single tax on landlord’s rent. Peter Hall writes that it was reading Bellamy’s \textit{Looking Backward} which joined all of Howard’s ideas, but that Howard rejected Bellamy’s centralized socialist management because it seemed authoritarian. Peter Hall, \textit{Cities of Tomorrow: An Intellectual History of Urban Planning and Design Since 1880}, 4\textsuperscript{th} ed. (Malden, MA: Blackwell Publishing, 2014), 92.

17 Central to Howard’s “economic and social reforms [was Henry George’s] unearned increment, [which] secured for public rather than private uses, would support it all.” The unearned increment was an increase in property values without the owner having invested in it. Taxing this unearned increment would therefore equitably benefit all community members. Beevers, \textit{The Garden City Utopia}, 18. Howard wrote himself that “the rate-rent of a well-planned town, built on an agricultural estate, will form out of rates compulsorily levied.” Howard, \textit{Garden Cities}, 81. All these municipal undertakings and improvements would be by and for the community; Howard repeatedly states that there would only be “one landlord, and this the community,” which would grow and serve its own members. Ibid., 88.

18 Howard Gillette, Jr. agreed, writing that although planners and developers failed to incorporate Howard’s social vision into new communities, the social impact is worthy of study and emulation: “shorn of adequate public financial support and directed to other often profit-oriented ends, those efforts typically failed to achieve the broad social goals they were intended to attain, but the record of their goals and philosophy remains for a new generation of critics and designers to adapt.” Howard Gillette, Jr., \textit{Civitas by Design: Building Better Communities, from the Garden City to the New Urbanism} (Philadelphia: University of Pennsylvania Press, 2010.) 44.

19 Indeed, Peter Hall argues that Howard’s was a “third socio-economic system, superior both to Victorian capitalism and to bureaucratic centralized socialism. Its keynote would be local management and self-government. Services would be provided by the municipality, or by private contractors, as proved more efficient. Others would come from the people themselves, in… pro-municipal experiments…” Hall, \textit{Cities of Tomorrow}, 95.

\end{quote}
revolution might bring about a new civilization that would supplant exploitative capitalism and which was based on mutual cooperation. It is this privatism that aims for the public good which is the focus of this thesis. While present researchers have written about Howard’s ideal versus the reality of private communities today, this thesis joins other researchers in proposing that it is possible for privatism to work towards the goal of public ownership, control, and benefit of property.

Rate-Rent

To finance his Garden City, Howard came up with the rate-rent system, which came from capital borrowed at a rate to be paid back by the residents themselves, who became the owners of the entire land through trustees: “‘we will secure for ourselves an honest landlord, namely ourselves,’” wrote Howard in Commonsense Socialism (1892). This rate-rent allowed residents to be freed from “landlordism” and to create a sinking fund to lower the rate itself and fund future public works and services. Instead of any income tax, only a ground rent would be paid to the trustees, who would reinvest it in the principal endowment of sorts, and with the interest, reinvest it in the same community. Some of

21 Gillette, Civitas by Design, 23. Howard for instance encouraged the establishment of a limited-dividend company, thereby reducing the worst of that exploitative and speculative capitalism. Hall, Cities of Tomorrow, 93.
24 Beevers, The Garden City, 32.
Howard’s contemporaries called these plans socialistic because of the element of common land ownership, through which a cooperative land company would purchase the land, improve, and manage it.

However, Howard feared moving too far left and creating similar centralization and monopoly, which would have destroyed economic diversity and vibrancy. The middle course he took was his Garden City, and the economic system the ‘local option;’ with this basis he spelled out in greater detail the logistics of his invention. Instead of wanting to join individuals into a larger organization, his proposal appealed “not only to individuals but to co-operators, manufacturers, philanthropic societies, and others… and with organizations under their control, to come and place themselves under conditions involving no new restraints but rather securing wider freedom.” Such cooperation sought to reduce wealth concentration in a minority’s hands, and would be accomplished through the common land ownership, profit sharing, and cooperative shops. This voluntary joining of individuals and groups agreeing to be placed under a common control with conditions would be adopted by community builders and developers in the United States throughout the nineteenth and twentieth centuries in the creation of private communities. While not exactly as Howard envisioned, this legacy of privatism has left significant and sometimes problematic precedents on housing policy in this country.

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26 Ibid., 38-39. Evan McKenzie calls Howard’s proposal a “democratically controlled corporate technocracy,” with a constitutional that looked more like a corporation’s business charter instead of a municipality’s composition; furthermore, experts would manage the city not through political ideology but through reason and logic. McKenzie, Privatopia, 5.
27 Howard, Garden Cities, 116.
28 Gillette, Civitas by Design, 24. Howard argued that “if the example were set of profit-sharing, this might grow into a custom, and the distinction between master and servant would be gradually lost in the simple process of all becoming co-operators.” Howard, Garden Cities, 98-101.
From the beginning of his fundraising efforts, Howard faced the problem of low enthusiasm due to the risk of communal land ownership, and he gradually had to make difficult concessions from his ambitious ideas of social equity in order to fund the first Garden City at Letchworth. Architecturally, this new city was designed by Raymond Unwin and Barry Parker, who used a medieval- and John Ruskin-inspired, Arts and Crafts aesthetic in the new buildings. This aesthetic became the standard for many garden cities throughout Britain and the United States – an oasis of neo-Tudor and revivalist architectural works set in a verdant landscape. In several of these cases, the craftsmanship and building costs became so high that they ultimately prohibited the working classes for whom they were intended.

Shell of a Vision

Moreover, the main problem became that the physical designs overtook the original and intended social agenda of cooperation. Howard’s main concern was never the architecture of the planned garden city, but the social life and systems of the community. As the revivalist, Arts and Crafts architecture took a stronger hold of the new garden cities and the later garden suburbs, Howard’s social visions were being ignored and not put into

29 Gillette, Civitas by Design, 27. George Bernard Shaw, one of the Garden City’s early supporters, predicted that funders and directors (who wanted instant profits) would not be amenable to the 5% dividend limit and distribution of their profits, and that the only solution might be to nationalize the garden city. Hall, Cities of Tomorrow, 99.
31 Hall, Cities of Tomorrow, 95.
play, largely as a result of the fundraising and construction expenses. The openness of the plan, the beauty of the architecture with its cottages, town halls, and village greens, and the immersion in nature all made these garden cities easy to replicate in form at least, which other developers and community builders did with alacrity. Consistently, later garden cities and suburbs had such high design standards that mainly only the upper-classes could afford to live there.

Although the garden city architects, Uwin and Parker, also wanted to achieve social ends, they instead achieved great beauty in architectural and civic design in the garden cities and then in the first garden city-inspired garden suburb at Hampstead. This suburb was not a true garden city because it lacked industry and was anchored to London by virtue of proximity. While they had their early origins in late-eighteenth-century England, the garden suburbs only really flourished in the late nineteenth century and exploded in the twentieth, taking on Howard’s garden cities’ look and applying it to urban contexts in many cases. A great deal of misuse in the semantics of the two types – garden cities and garden suburbs – can be attributed to the success of Howard’s creation; nonetheless they remain at heart different creations with a shared history and look. Howard’s invention and vision became so widespread and popular that the general public began to misuse it to refer to

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32 “As Robert Fishman has commented, instead of a peaceful alternative to capitalism, the Garden City became a device for preserving it,” and later on: “What survived from all this was, however, a watered-down essence of the Howard vision.” Hall, Cities of Tomorrow, 100.
33 Hall, Cities of Tomorrow, 102-103.
34 Hampsted prices inevitably rose, and “the objective, ‘day-to-day coexistence which would sooner heal the estrangement of the classes,’ was frustrated by the suburb’s own success; today, even the tiny artisans’ cottages are well and truly gentrified.” Hall Cities of Tomorrow, 107.
actual garden suburbs, which lacked industry or were purely residential areas, and were dependent upon a nearby major city.\textsuperscript{36}

Howard’s own supporters realized the financial difficulties of encouraging public land ownership by and for the people, and thus the garden suburb became a more attractive alternative with more realistic goals than the socially ambitious garden city.\textsuperscript{37} The attractive Arts and Crafts aesthetic amid copious greenery was copied throughout the world in subsequent garden ‘cities,’ but the actual intent was thoroughly diluted.\textsuperscript{38} The ideas of walkability and traditional, revivalist architectural styles were emulated by American influencers such as Lewis Mumford, Henry Wright, and Clarence Stein, who established the Regional Planning Association of America in 1923 to promote the garden cities in the United States. While the first official attempt at creating a garden city was in Radburn, NJ, there was already a legacy in the United States of garden suburbs. Nonetheless, while innovative in design and its attempt at decentralization from New York, Radburn did not make use of the crucial and core socioeconomic transformations that Howard had advocated in his work, and therefore was also not a true garden city but a suburb.\textsuperscript{39}

\textsuperscript{36} “Garden suburbs, in short, were conceived as parts or dependencies of large cities; garden cities were intended to be largely self-sufficient.” Stern, \textit{Paradise Planned}, 203.
\textsuperscript{37} Hall, \textit{Cities of Tomorrow}, 109.
\textsuperscript{38} Henderson, Lock, and Ellis, \textit{Art of Building a Garden City}, 20-23.
\textsuperscript{39} While Radburn was innovative for separating the pedestrian and the car, its promoters hoped for the creation of a vibrant community aided by the nonprofit Radburn Association, and it was \textit{hoped} that an egalitarian community might naturally grow out of it. The Depression destroyed any other ambitions for Radburn, including the aim of self-sufficiency. Gillette, \textit{Civitas by Design}, 35-36.
Forest Hills Gardens

One of the most important of these garden city-influenced garden suburbs was Forest Hills Gardens, begun in 1910 under the auspices of the Russell Sage Foundation. It was here that many of the idealistic architectural designs and motifs [Image 3] were perfected by Grosvenor Atterbury and Frederick Law Olmsted Jr., and yet again, its planners could not achieve its original, altruistic aims.\(^{40}\) Instead, Forest Hills Gardens almost immediately became a community for the upper middle class, as it remains to this day. What has helped preserve its architectural beauty, plan, and greenery, is its private legal, contractual nature and its private architectural review process. As a result, the community was one of the first to successfully demonstrate the power of private legal protections for the preservation of property, ideas that guide this very thesis. Similar to Radburn, the *hope* in Forest Hills Gardens was that good design and civic spaces would naturally “enhance and sustain a vital civic life,” without the radical social transformation that Howard advocated but his successors could not feasibly implement.\(^{41}\)

As a garden-city inspired garden suburb, Forest Hills Gardens shares that important legacy with Kew Gardens, which was also founded in 1910, but which did not have the advantage of a bespoke masterplan. In addition, Richmond Hill, the oldest of the three (founded 1869) was an early railroad suburb, again sharing in that legacy of community builders who aspired to create a wholesome and united community. All three of these communities made use of deed restrictions to regulate the use and look of all buildings in the community. These truly were just three examples of what community builders were

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\(^{40}\) Stern, *Paradise Planned*, 140.

\(^{41}\) Gillette, *Civitas by Design*, 24.
doing throughout the United States in the late nineteenth and early twentieth centuries; their evolution helps us understand the legacy of Howard’s vision, how it could not completely take hold in a capitalist society, and how a derivative vision of it took hold in the development of private communities.\footnote{Although Richmond Hill predates Howard’s ideas, it forms part of the larger legacy of social-impact oriented developers who believed in community institutions and the social aspects of housing. Community builders set themselves apart from speculative developers because they designed, engineered, financed, developed, and marketed purely residential areas and urban environments through private innovation and vision. In particular before the advent of zoning regulations, community builders tightly controlled their new developments through private legal means as a way to ensure stability in who lived there and in property values. See Marc A. Weiss, \textit{The Rise of the Community Builders: The American Real Estate Industry and Urban Land Planning} (Washington, D.C.: Beard Books, 2002), 1-4.}

Literature Review

In this way, this thesis follows in the work of historians such as Marc A. Weiss, who looked at that rise in the power of community builders, and of Evan McKenzie, who was among the first to write about the connection between Howard’s utopian vision for the garden cities and development realities. Weiss looked into how early twentieth century ‘community builders’ saw themselves as having an important job in building cities and wielded great power through private planning, during a time when city planning as a field was still in its infancy.\footnote{Ibid., 68-70.} Developers in the twentieth century resorted to private legal property law solutions such as easements, real covenants, and equitable servitudes (to be explained in the following section) to establish Common Interest Developments (CIDs) and private governments to protect homeowners and developments from undesirable and
uncontrolled change. These legacies will be explored in the next section, along with the historic problems with private government, and their potential for use in existing communities.

McKenzie shed light on the legacy of Howard’s vision and the reality that community builders imposed on their new developments in order to protect their interests. In *Privatopia*, McKenzie laid out the view that private communities are illiberal, present a false choice to homeowners, are problematic because they represent the privatization of formerly municipal systems, and have too much power, through which they take away homeowners’ rights. In general, his scholarship presents a critical view, in light of many of the legitimate negative effects that Common Interest Communities can have on their homeowners and democracy at large. These deleterious symptoms include overregulation of allowable activities to and on the properties, including new aesthetic choices, the display of political signs and flags, among others – actions that result in the imposition of fines, liens on the property, or litigation. These are legitimate concerns with private overregulation, and libertarian scholars such as Robert H. Nelson would counter by saying that individuals voluntarily choose such strict regulation for the benefit of stability.

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47 Ibid., 19.
Indeed, a parallel with historic preservation would be that the protection through a landmark designation of a property ‘burdens’ the property owner with regulations on aesthetic concerns – a regulatory system that some choose to enter willingly while others do not. Either way, historic preservation is now accepted as a legitimate and compelling public interest, and such a compelling interest can be transferred over to the private realm.

While McKenzie aptly narrates the history and trajectory of private governments and housing, he consistently acknowledges the utopian roots in Howard’s ideas and references Nelson, who stands at the opposing spectrum regarding increasing privatism in property. Nelson advocates for the increasing offloading of municipal services to private communities, and envisions the ultimate demise of zoning in favor of private community associations, which he argues can be more democratic and equitable. McKenzie acknowledges that Howard and Nelson correctly identified “an alternative form of political and social organization [that] could bring about broad social and political change.”

Therefore, while the literature on the rise of homeowners associations and private communities is still quite young, this thesis engages in a conversation around these topics for the preservation of people and the built environment, joining a small group of political scientists and economists who have begun exploring the effects of these community groups within the last forty years.


50 McKenzie, Privatopia, 177.

51 Evan McKenzie, Beyond Privatopia: Rethinking Residential Private Government (Washington, D.C.: The Urban Institute Press, 2011), x-xi. Some scholars argue that increased privatism serves to protect the upper classes and their interests, and in essence creates ghettos or elite playgrounds for the wealthy. Others, perhaps coming from a politically conservative framework,
Among the most influential scholars seeking to analyze what the privatism of property tells us about our society is Fred E. Foldvary. Writing as an economist on the political right, Foldvary has written a useful historiography on the rise of private communities and what other scholars have to say about them, and ultimately concludes that the issue at heart is not a “market versus government” situation, but whether the governance is imposed (public) or voluntary (private).

Indeed, he categorizes proprietary governance as being characterized by unified ownership, versus democratic governance, which is characterized by an “association of co-owners.” He further more argues that residents of private communities are unfairly doubly taxed, that it is excessive governmental regulation that diminishes consumer free choice, and that private communities have the potential of helping reform all government.

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see the advent of increased privatism in communities and the rise of voluntary associations in reaction to government as a public good to be further encouraged. It is part of a much larger sociopolitical and economic debate about the future of our economic systems, voluntary associations, the power of the state to regulate private enterprise, the role of increasingly powerful private organizations/corporations in people’s lives, etc. Others have studied Western private and gated communities and their influence through globalization upon non-Western peoples, and have found non-Western historical precedents and influences in places such as Africa, China, and Latin America. These include colonial remnants of segregation and native tribalism, among others, and in addition, gated communities for low-income residents exist outside the U.S as well. Samer Bagaeen and Ola Uduku, “Gated Histories: An Introduction to Themes and Concepts,” in Gated Communities: Social Sustainability in Contemporary and Historical Gated Developments, ed. Samer Bagaeen and Ola Uduku, (London: Earthscan, 2010), 1-7. For another great source on international case studies, see several chapters in Private Cities: Global and Local Perspectives, ed. Georg Glasze, Chris Webster, and Klaus Frantz, (London: Routledge, 2006). McKenzie, Privatopia, 22. See David T. Beito, Peter Gordon, and Alexander Tabarrok, “Toward a Rebirth of Civil Society,” in The Voluntary City, 1-9.

52 Fred E. Foldvary, “Proprietary Communities and Community Associations,” in The Voluntary City, 285-286.


54 Foldvary further blames civic fragmentation in cities on governments, and says gated communities are the effect, not the cause, of governmental failure to satisfy residents. Foldvary, “The Economic Case for Private Residential Government,” in Private Cities, 31-33, 43.
From another perspective, economist Spencer Heath MacCallum sees problems with both extremes – total governmental control or total privatism – and proposes an alternative system of land-leasing, a “nonpolitical approach to neighborhood organization long employed in commercial real estate,” which harks back to Howard’s original rent-rate system.\(^{55}\) He gives as his main examples commercial developments with multiple tenants, such as malls, hotels, or even a few land trusts, all of which have one landlord/owner and multiple leases; these are Multiple-Tenant Income Properties (MTIPs), as he calls them, which are basically estates that are not subdivided, as the more common CIDs are.\(^{56}\)

MacCallum’s proposal for a faithful return to Howard’s land-lease system would signify a true system of common ownership of land, akin to a for-profit land trust, discussed later on in section 4. The current and extremely popular system of private governments does not actually represent common ownership of all the land; instead the way it functions is that individual property owners buy a property or unit and are contractually bound through an association to pay dues that go towards maintaining the common areas and systems.\(^{57}\) Despite the legitimate criticisms of undemocratic methods of regulation and concerns that these governments have too much power and that there is a false choice when

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56 MacCallum, “The Case for Land Lease,” 379-381. MacCallum also refers to corporation-owned and operated governance systems as “entrepreneurial communities,” or “entrecoms,” which means proprietary, or property under one owner; this harks back to Howard’s garden city cooperatives and networks of community associations. Foldvary, “The Economic Case for Private Residential Government,” in Private Cities, 42.
57 McKenzie argues that from the very beginning, the ideology of privatism has worked against Howard’s vision for common land ownership, which has never found favor for residences; instead, our culture and federal government have promoted and funded private home ownership for decades. McKenzie, Privatopia, 7.
owners buy into these communities, many people continue to look to private communities, because in essence they protect private property through internal regulatory frameworks.58

Private Communities and Community Builders

These frameworks were first used in the nineteenth century in elite neighborhoods for the very wealthy to protect and preserve their property interests. The first such private community organizations to be formed were in Gramercy Park in New York City (1831), where the developer placed the park space’s title in the hands of trustees [Image 4]; and Louisburg Square, in Boston (1844), where wealthy homeowners placed restrictions and covenants upon their own deeds to self-regulate and protect the open land in perpetuity [Image 5]. However, in the nineteenth century, restrictive covenants did not involve an external organization to regulate them, and instead ran for a limited number of years; furthermore, homeowners wishing to enforce a covenant had to bring litigation against another homeowner independently, which was financially and socially costly.59

It wasn’t until the twentieth century when community builders began experimenting with the creation of mandatory homeowners associations for homeowners,

58 McKenzie has argued that there is a legal fiction of voluntary living in a private community, and that there is an inherent contradiction between the ownership and responsibility that residents feel toward the community after buying into it. McKenzie, Privatopia, 25. Also see MacCallum, “The Case for Land Lease versus Subdivision: Homeowners’ Associations Reconsidered,” in The Voluntary City, 375. Moreover, these private communities disenfranchise renters completely. Nelson, “Privatizing the Neighborhood,” in The Voluntary City, 341. For the scholarly debate between consensual versus coercive joining of private governments, see Robert G. Natelson, “Consent, Coercion, and Reasonableness in Private Law: The Special Case of the Property Owners Association,” 51 Ohio State Law Journal 41 (1990), 42-44.

59 Residents formed the Committee of the Proprietors of Louisburg Square, and bound themselves and all successors to the deeds. Nelson, “Privatizing the Neighborhood,” in The Voluntary City, 331. Also, McKenzie, Privatopia, 34-35.
and following in the steps of Progressive Era thinking brought about a desire from community builders to protect their developments and future property values in the era before zoning.\footnote{In fact, deed restrictions became the model that city planners used for zoning, to separate and regulate uses. Weiss, \textit{The Rise of the Community Builders}, 3-5.} At Forest Hills Gardens, the Russell Sage Corporation surrendered control after the last properties were sold off in the 1920s, and residents agreed to regulate themselves internally through the Forest Hills Gardens Corporation.\footnote{Susan L. Klaus, \textit{A Modern Arcadia: Frederick Law Olmsted Jr. & the Plan for Forest Hills Gardens} (Amherst, MA: University of Massachusetts Press, 2002), 145.} In the same decade, the planned community of Radburn was begun (1929), where city planner and lawyer Charles Ascher found the legal solution for the creation of a private government through contract – a privatized version of the Progressive Era-inspired council-manager system.\footnote{McKenzie, \textit{Priva
topia}, 30-31. MacCallum, “The Case for Land Lease versus Subdivision: Homeowners’ Associations Reconsidered,” in \textit{The Voluntary City}, 374.} The National Association of Real Estate Boards (founded in 1908) supported the expanded application of these private legal solutions and governments in new developments, and with Ascher, community builders were able to create permanent and self-perpetuating legal entities now known as Homeowners’ Associations (HOAs). While the intent for some community builders in Forest Hills Gardens and Radburn may have been the garden city ideal based on common land ownership, this was never truly achieved in residential communities in this country, primarily due to the wide cultural and political opposition to common land ownership the strong encouragement of private home ownership instead of tenancy.\footnote{Ibid., 48. Also see Nelson, \textit{Private Neighborhoods}, 105. Policymakers continue advocating for the use of public funds and classic economics to further the ideal of private homeownership. The decline in homeownership is seen as a crisis in this country. See David C. Schwartz, Richard C. Ferlauto, and Daniel N. Hoffman, \textit{A New Housing Policy for America: Recapturing the American Dream} (Philadelphia: Temple University Press, 1988), 270-273. Dennis R. Judd, \textit{The Politics of}}
To understand the legal basis for the creation of these private governments and communities, and the justification for their continued existence and success in the courts, we must now look at the property law explanations regarding easements, real covenants, and equitable servitudes. These tools have been used in the past century to protect private interests and communities, to restrict access to certain social and racial groups, and have been strengthened by the American judicial system. Ultimately, we shall explore their potential to be used as a private preservation solution.

Section 3 – Private Communities in Action

Introduction

The three main types of private associations that exist through contractual agreements among private residents in a community are Homeowners Associations, condominiums, and co-operatives. As types of corporations, these private governments have total legal rights, limited liability, a long lifespan, and the specific purpose of protecting private property values. They share the following characteristics: common ownership of certain areas and private ownership of specific units; a ‘constitution’ for the association to legally exist, with rules and bylaws; and mandatory membership upon purchase of property in said community association that manages the communal property and regulates individual units.

Condominiums and Homeowners Associations

There are significant differences among these types. For one, condominiums refer to ownership, not type of property (they can be apartments or detached houses, although they most often do refer to apartments); in this system, people own their individual unit in full title, plus a portion or undivided interest of ownership in the communal spaces. A

64 Several names exist for Homeowners Associations, including Community Associations, Common Interest Developments, Common Interest Communities, or Planned Unit Developments, among others. In this work, I refer to them most often as private communities, private governments, or CIDs.
65 McKenzie helpfully discusses the nature of public versus private entities, the theoretical groundwork and justification that lies behind allowing private individuals to associate privately through contract, and the various differing schools of thought regarding the levels of democracy, sociopolitical and economic influence, and jurisdiction of powerful private corporations and interests. McKenzie, Privatopia, 122-125.
Homeowners Association (or a CID) in this way is a type of condominium, but is very often characterized by detached houses and a series of amenities for residents (such as pools, tennis courts, police, etc.). Furthermore, in a CID, the association owns all the common elements, whereas in a condominium, the association owns nothing but manages the commons. In a condominium setting, each member instead owns their unit and a share of the commons, which are owned by all collectively. The governing documents for the association includes covenants, conditions, and restrictions (CC&Rs) which run with the land (not individual homeowners), bylaws, and rules and regulations which give the association contractual power to enforce restrictions in court. These are recorded as a declaration or master deed in the municipal register of deeds before units sell, and all subsequent purchasers agree to the CC&Rs by contractual consent.

In these HOAs or condominium associations, residents elect a board of trustees to oversee the management, operation and regulation of the community, and only property owners get votes, disenfranchising the rest of the family unit and renters. The payment of monthly dues by residents funds the association, which uses those funds for the community’s upkeep and for potential litigation costs if and when residents break the covenants and restrictions.

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69 After the landmark Neponsit case, courts upheld the right of private governments to charge fees and assessments on homeowners, and since then courts most often defer to the associations over individual homeowners. McKenzie, *Privatopia*, 55. Nelson, *Private Neighborhoods*, 56.
Cooperatives

In addition to condominiums, there are cooperatives, which mainly exist in apartment buildings in New York City and Chicago, and are rarely created now. The first cooperative was The Rembrandt in New York, built in 1881 and which housed artists who could tolerate the radical co-op concept of controlling expenses together and internally monitoring themselves.\(^\text{70}\) Cooperative apartment buildings became more widespread and were known as ‘home clubs’ for a while. After the 1920s, wealthy New Yorkers were drawn to the cooperative living arrangements because of the exclusivity, with co-op boards screening potential residents, a policy that survives to this day. The New York Housing Act of 1927 spurred the development of low- and middle-class cooperatives, but the Great Depression destroyed many of them.\(^\text{71}\) 1940s legislation helped bring co-ops back, and because of rising expenses, some landlords converted entire buildings to co-ops. The 1949 National Housing Act gave co-ops government insurance of mortgages, which helped the development of new co-ops. The 1980s saw a boom in conversions because of rising housing prices once more, and landlords were eager to make a profit by selling to residents via conversions.\(^\text{72}\) After the 1987 market crash, cooperatives lost popularity, and condominiums remain more popular than cooperatives throughout the country for various

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reasons, chief among them that they allow for unit-owners to rent them out and make a profit.\textsuperscript{73}

In co-ops, residents do not individually own their units, but instead own shares of a corporation which holds the title to the entire development, including apartments and commons. A resident, or tenant-stockholder, owns stock in the corporation and in addition leases a unit from the corporation for the long-term.\textsuperscript{74} Part of the reason that cooperatives are so unusual and limited to two major cities is because they are not actively promoted by developer or government initiatives, or by financial institutions who would only lend one mortgage to a cooperative under one united title instead of scores of mortgages for a condominium.\textsuperscript{75} In addition, there is a discomfort that millions of people feel with not owning a total interest in their property and instead leasing it. Culturally and aided by federal administrations, it has been hard for Americans to accept this system of common ownership through shareholding, but the popularity in apartment buildings in New York reflects that it has more potential on a smaller scale.\textsuperscript{76}

\textsuperscript{73} For the United States, nine out of ten common-interest communities are condominiums, whereas for New York City, nine of ten are cooperatives. See Martha W. Jordan, “Are Tenant-Stockholders Entitled to a Charitable Contribution Deduction When a Cooperative Housing Corporation Donates a Preservation Easement?” 39 U. Mem. L. Rev. 515 (2009), 518-519. In 1995, there were 416,000 cooperative apartments in New York City. See Nelson, Private Neighborhoods, 29.

\textsuperscript{74} Ibid., 519. Cooperatives are difficult to sell or finance because of this complex legal structure. Sprankling, Understanding Property Law, 616.

\textsuperscript{75} Furthermore, there is the element of strong voluntary collectivism in cooperatives which is not as present in the other two common-interest communities. McKenzie, Beyond Privatopia, 9.

\textsuperscript{76} Matthew Lasner also suggests that cooperative housing types would be more popular if it were not for the federally-backed, widespread bias in favor of single-family housing as the American ideal. See Matthew Lasner, High Life: Condo Living in the Suburban Century (New Haven: Yale University Press, 2012). McKenzie, Privatopia, 127.
Private Governments Functions and Concerns

All of these private governments have declarations which impose compulsory restrictions on all residents that are legally enforced as real covenants and/or equitable servitudes (the aforementioned CC&Rs); the declaration lists all units and common areas, lists the government’s powers, creates procedures, compels the payment of dues and fees (assessments), and lists in detail all restrictions on “use, appearance, construction, and… transferability of units.”⁷⁷ Many times there are so many restrictions that property owners may afterwards regret having purchased the property, and there are opposing schools of thought regarding the enforcing of such restrictions: as mentioned in the previous section, some scholars posit that upon purchase, a buyer voluntarily surrenders certain freedoms for the stability of the private community. Others believe that covenants are much more coercive than voluntary, and that there is a false alternative, because the supposed alternative not to adhere to the restrictions is not to purchase the property at all.⁷⁸

Many people who buy into private communities do so because of a disenchantment with and even distrust of public government and its ability to maintain and protect stable communities.⁷⁹ Moreover, private communities are able to protect the built environment through their associations in a very strict and internal manner that makes the regulation and enforcement much more localized than a municipality could ever achieve. Associations achieved such incredible private regulatory power through a centuries-long development

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⁷⁷ Restrictions may limit architectural styles, pets, banners or signs, materials, use by individuals, among others. Almost all restrictions are upheld by courts because of the voluntary nature of the contractual agreement. Ibid., 617.
⁷⁸ Ibid., 21. Also see MacCallum, “The Case for Land Lease,” 375.
⁷⁹ McKenzie, Beyond Privatopia, 7.
of English common law precedents, which reveals a pivotal historical trajectory and applications of property law in novel land use situations.

Easements

The first legal framework important to understand is the easement, which fundamentally is the right that one party possesses to use another’s land or property for a specific purpose. Easements, as well as real covenants and equitable servitudes, are all forms of servitudes, which are in the most basic definition, rights or obligations that run with the land. Easements are divided into affirmative easements and negative easements; affirmative easements give rights to use another’s land for a specific reason.\footnote{The most common of these affirmative easements is the right of way that one person might own across another’s property, usually for access. Singer, Property Law, 513.} Negative easements are “restrictions with respect to what owners can do with their own land,” such as prevent from using it for commercial reasons, or to keep undeveloped land in that state. The law of servitudes is complex, because negative servitudes or easements are known by varying terms, including real covenants, and equitable servitudes, “but the modern trend is to call all negative servitudes covenants.”\footnote{Ibid., 514.} While these terms may appear interchangeable and are in fact used almost interchangeably today, they do denote different situations and different powers.

Easements are among the oldest of the nonpossessory rights to property, dating back to medieval England. In an easement, the land subjected to the burden is called the burdened or servient estate, while the land that benefits from the easement is the benefited or dominant estate. In the case of an estate whose benefit runs with the land, the easement
is known as an appurtenant servitude. If, however, the servitude does not run with the land but with an individual, it is a servitude in gross. For an easement to run with the land, it must exist in writing, there must be notice to the servient estate holder, and there must be an intent for it to run with that servient estate.

When it comes to negative easements, which are restrictions held by one party on what a property owner can do with their land, the traditional limits to easements by contract included only the right to lateral support of a building, the right to prevent the blockage of light and air, and the right to prevent interference with the flow of water. However, the law of covenants expanded these traditional limitations, and relevant to our preservation purposes, there now exists language that prevents land from being developed for environmental reasons – a conservation easement; or that prevents the alteration or demolition of a historic building – a preservation easement. For a preservation easement to be valid, it must run with the land, and the easement must be held by a certified easement-holding organization capable of continuously regulating the easement. Preservation easements are generally understood to be the single most powerful preservation tool that exists, because they run with the land forever and are almost impossible to destroy.

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82 Ibid., 515.
83 Ibid., 519.
84 Ibid., 518.
85 Thomas Coughlin, *Easements and Other Legal Techniques to Protect Historic Houses in Private Ownership* (Washington, D.C.: Historic House Association of America, 1981), 6. Under certain conditions, an easement can be destroyed, for example if it is agreed upon by the holder, if it had an expiration date, if the servient estate becomes the owner of the dominant estate, by abandonment, or by adverse possession. For preservation purposes however, easements are held by non-profit entities such as the National Trust, and so are generally accepted to last forever, and are upheld in the courts. Singer, *Property Law*, 559.
Real Covenants and Equitable Servitudes

The next category of private restrictions that evolved to address the limitations of easements were real covenants, which addressed the issue of being able to benefit or burden future possessors of property. A contract between proprietors would bind all successors if it was written down, intended to bind future owners, if it touched and concerned the land, and if there was privity of estate (mutual ownership of the land). Where there was a lack of privity of estate, the third concept of equitable servitudes evolved – these were “covenants that could be enforced by injunction despite the lack of privity.” While real covenants required privity, equitable servitudes required notice of restrictions for the new owner.

In the United States, property law merged these concepts of real covenants and equitable servitudes through the new idea of instantaneous privity, which meant that privity existed if a covenant could be formed during the transfer of land. Because of the rise of private communities during the twentieth century, “courts relaxed restrictions on the covenant form, merging the law of real covenants and equitable servitudes, and modifying or even abolishing touch and concern and privity requirements,” a key development that community builders and developers used greatly in the formation of private communities.

Almost all developers of private communities today do not know or care about the subtle distinctions between easements, real covenants, and equitable servitudes, or their historical development, where each successive one was created to address limitations with the previous one. Simply put, the Covenants, Conditions, and Restrictions (CC&Rs) are

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86 Ibid., 560.
87 Ibid., 561.
drafted quickly and use a set standard prior to start of a new private community. The units are then built, and sold off to individuals as buyers agree to the covenants and are bound by the newly created association. This method reverses the Lockian belief that property is the root of all rights and exists before the social contract does, because the order is reversed: first there is a plan, then the rules to preserve the property, then the property is built, and lastly there are the inhabitants. In trying to use private preservation solutions, however, we are reversing this again so that the already-established community comes first and then we use privatism to preserve built heritage and the presence of the community members themselves. It is a narrower and much more specific purpose than that of modern-day private governments.

Racial Restrictions

Part of the largest and best-recognized historic problem with private communities was the racial restrictions that almost all of them imposed to keep racial minorities out. Racial zoning restrictions had existed in various municipalities since the end of the nineteenth century, to prevent the mixing of people of different racial backgrounds, supposedly to keep the peace and general welfare, along with ‘racial integrity.’ However, in a landmark 1917 case, Buchanan v. Warley, the Supreme Court ruled that racial zoning laws were unconstitutional in violation of the Fourteenth Amendment. This ruling did not

88 There are other important drawbacks to how private governments function in that they do not grant residents rights as a public government does, but places restrictions on use; the issue of consent through purchase; a growing number of private governments limits people’s ability to choose where to live; finally a detached citizenry weakens civic and communal responsibility and participation. McKenzie, Privatopia, 145-149.
prevent developers from finding a private solution to the desire for racial and minority exclusions; they turned to the restrictive covenants to impose the same restrictions but in a legally allowed private contractual setting. These prohibited the sale of property to African Americans, Indians, Jews, Latinos, and Native Americans.

This scheme for limiting private communities to wealthy white people continued legally for decades until 1948, when the United States Supreme Court ruled in the landmark Shelley v. Kraemer case that racially restrictive covenants were unconstitutional and in violation of the Fourteenth Amendment. The case was difficult because the Constitution could only apply if state action had been found; in this case, Kraemer, a white resident, sought to enforce the community’s racially restrictive covenants against the petitioners, Shelley, a black family. The Supreme Court found that bringing the case to trial was in itself the relevant state action that allowed the Court to rule that the racial covenants’ were unconstitutional. The US Supreme Court also cited the Civil Rights Act of 1866 in its decision, which states that all citizens have the same rights to “inherit, purchase, lease, sell, hold, and convey real and personal property.”

Despite this momentous ruling, private communities found other ways to restrict access, mainly through more contemporary systems such as background checks and credit scores, thereby excluding whole swathes of the population on economic grounds. The Federal Housing Administration had supported racially restrictive covenants on the

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90 Singer, Property Law, 626-632.
91 Ibid., 629.
92 Robert M. Fogelson writes about economic and social markers that associations used to mark out who to restrict, by raising prices and instituting “minimum cost requirements.” Fogelson, Bourgeois Nightmares, 132-134. Also see Richard R. W. Brooks and Carol M. Rose, Saving the Neighborhood: Racially Restrictive Covenants, Law, and Social Norms (Cambridge, MA: Harvard University Press, 2013), 142-143.
grounds of neighborhood stability, and it was not until 1968 that the Fair Housing Act was passed, legally prohibiting these racial covenants. This problematic history of socioeconomic and racial inequity reflects very serious policy considerations that merit debate and reflection. Notwithstanding, the utility of covenants toward the private preservation of communities, be they historic or not, is still too powerful to completely disregard. For the purposes of this thesis, the aim of historic preservation is emphasized despite these consequential policy issues.

Private Governments Upheld

Indeed, restrictive covenants in their broadest sense have been consistently upheld by the courts, but not if they are arbitrary, unreasonable, if they contradict public policy, or if they are unconstitutional. This general rule was clarified after a series of cases, most notable among them the 1994 California Supreme Court ruling on Nahrstedt v. Lakeside Village Condominium Association. In that case, plaintiff Natore Nahrstedt bought a unit at Lakeside Village and lived with her three cats, despite the prohibition against keeping pets. The association sued and ultimately won because the restriction was neither unreasonable nor unconstitutional, and it did not contradict public policy; it also followed California’s laws. The court ruled that it would be wrong to release one individual from the obligations which she agreed to at the detriment of the rest of the unit owners.\(^93\) The Nahrstedt ruling

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\(^93\) The California legislature passed a law in 2000 in reaction to this case, stating that no private community could prevent owners from keeping at least one pet. Ibid., 607-613. This 2000 California law did not, however, apply to covenants that were agreed to before the enactment of the law.
codified the limits of private government regulations – a basis which allows for most of the current regulations within private communities to continue standing.

All of these sorts of restrictions reveal what historian Robert M. Fogelson has identified as the most intrinsic reasons why people choose to buy into a private community – desires for stability, fears of unwanted change and distrust of others.94 This has in essence been part of the guiding reasons for the ever-increasing popularity and widespread use of private communities. However, we cannot forget about the desire to protect property, values, heritage, and communities themselves. While the history of private communities and their use of internal restrictions is complex and at times problematic, this does not take away from the value of private contractual agreements through restrictive covenants to protect and preserve heritage sites in an extra-governmental way.

Forest Hills Gardens’ Privatization

As we have seen, restrictive covenants have been used by developers and community builders for various reasons; to protect new developments, to keep certain people out, to maintain a stable community, to maintain a certain lifestyle, and to preserve property values. Intertwined in all of these is an important architectural element – many of these private communities were designed with bespoke architectural and planning standards and designs, by prominent and leading designers. For example, the Queens, NY site that helped to inspire this thesis, Forest Hills Gardens, was master-planned by Grosvenor Atterbury and Frederick Law Olmsted, Jr. The general manager, John M.

94 This ‘other’ is not only the neighbor who property owners agree to regulate internally, but in a grander sense, the government itself. Fogelson, Bourgeois Nightmares, 204.
Demarest, knew at the start of the garden suburb’s development that “all the buildings had been designed to harmonize with one another in both material and design, and the landscape and planting scheme for the entire property was designed by an expert. Restrictions were in place to guarantee that the ‘homes of today will be protected and in time become more attractive and more valuable.’”\(^{95}\) Atterbury and Olmsted themselves were quite concerned with preserving their unique creation for posterity; Olmsted wrote an advisory report recommending the use of restrictive covenants to control the look of the houses and landscapes.\(^{96}\) Inspired by the restrictions at the planned community of Roland Park in Baltimore, the Russell Sage Foundation filed a plat map and a Declaration of Restrictions for the community in 1911, to remain in effect until 1950. A new type of restriction was also used – that of requiring approval from a design board for all alterations and new construction, and relating to aesthetics, structure, materials, and color schemes. Maintenance fees would be levied on all homeowners in proportion to their property size, and the Sage Foundation desired that the homeowners manage themselves internally, so as to be as democratic as possible and preserve stability and harmony.\(^{97}\)

By 1921, Atterbury and Olmsted saw declining design standards and breaches of the restrictive covenants, and hoped that the Sage Foundation would maintain control. However, by May of 1922, the Foundation had decided to sell all of its remaining stock in the Sage Foundation Homes Company to a syndicate which later became the Forest Hills Gardens Corporation in December of that year. In the intervening time, therefore, the

\(^{95}\) Klaus, *A Modern Arcadia*, 118-119.

\(^{96}\) Ibid., 112-116. These restrictions controlled setbacks, greeneries, prohibited various nuisances such as commercial or industrial uses, and the design and location of structures.

\(^{97}\) Ibid., 115.
homeowners had to come together to bind themselves voluntarily to the restrictive covenants under a new organization, one whose job was “to act as their common agency ‘to promote and to sustain in Forest Hills Gardens in all suitable ways the living and aesthetic conditions for which the Gardens was founded.’” 98 The ownership was finalized in January 1, 1923, and since then the Forest Hills Gardens Corporation has regulated and maintained the community in the name of its residents. The community’s survival at heart “depends on the willingness of each one of its residents to protect, preserve, and maintain it,” by actively engaging in the internal regulatory and management systems. 99

That gap in time, from May 1922 to January 1923, represents a vital transition period in the community, when residents agreed to self-regulate and impose restrictions upon the use of their property. In essence that is the idea behind this thesis’ proposal – that private residents may seek an extra-governmental preservation solution through internal regulatory mechanisms. Scholars have acknowledged that this is possible, and has indeed been done, but that the transaction costs – meaning social, economic, political, fundraising, logistical planning efforts, etc. – are very high. Law professor Dan Tarlock believed that for non-private communities, the “high transaction costs of private actions to protect neighborhood quality often posed an insurmountable obstacle to collective private

98 Ibid., 145.
However, while difficult, it is not impossible, and has indeed been seen in a few cases.

Precedents of Privatization

One of these first instances was at Louisburg Square, Boston, in 1826. There was a private park around which stately houses stood, and in order to privately preserve the park, twenty-eight property owners signed a mutual contract in 1844 establishing the Committee of the Proprietors of Louisburg Square, binding each other and all future owners to conserve the park. This mutual contract was in essence an equitable servitude, so that the obligation would not only bind the signatories, but all future owners, in essence running with the land. To this day, Louisburg Square is a private park held by the surrounding property’s owners, in one of the most expensive neighborhoods in Boston. This is a notable example because it was both the first private government and it was formed after the houses had been built, a truly rare occurrence.

A similar precedent that exists for the privatization of property after its construction exists in St. Louis, where city streets were deeded over by the city to private neighborhood communities in an effort to stabilize communities and prevent crime through decreased access. Of course, St. Louis has hundreds of private communities, so the social transaction costs there might be less than in other places. In Houston, famously the largest

100 Nelson, “Privatizing the Neighborhood,” in *The Voluntary City*, 323.
101 This Committee is now considered to have been the first homeowners association in the United States. McKenzie, *Privatopia*, 34.
103 Nelson, “Privatizing the Neighborhood,” in *The Voluntary City*, 331.
104 Ibid., 344.
city without a zoning code, there are instead also dozens of private communities.\footnote{The lack of zoning is seen as a benefit in that it keeps property prices low by keeping the politics out of development, and creates an inclusive policy for people and uses. Bernard H. Siegan, “The Benefits of Non-Zoning,” in Regulating Place: Standards and the Shaping of Urban America, ed. Eran Ben-Joseph and Terry S. Szold (New York: Routledge, 2005), 214-229. For more on the limitations of zoning, see John M. Levy, Contemporary Urban Planning, 7th edition, (Upper Saddle River, NJ: Pearson Prentice Hall, 2006), 124-139.} A 1985 Texas law let property owners without private communities or deed restrictions or whose deed restrictions expired, to write new restrictions upon themselves and their property titles, again collectively binding each other under one private association. It is surely difficult to overcome the sociopolitical and economic transaction costs necessary to get widespread community approval for new regulations, but this is routinely done in Houston. Under this law, a property owner in a community without restrictions can create a petition to create a private community, which must be approved by 75% of the lot owners.\footnote{Randal O’Toole, “Houston’s Land-use Regime: a Model for the Nation,” in Cities and Private Planning: Property Rights, Entrepreneurship and Transaction Costs, ed. David Emanuel Andersson and Stefano Moroni, (Northampton, MA: Edward Elgar Publishing, Inc., 2014), 180. Also see Reid C. Wilson, “Deed Restrictions: Protecting Historic Neighborhoods in a City Without Zoning,” (paper presented at Historic Houston Preservation Day Symposium, University of St. Thomas, May 20, 2000, accessed from https://www.wcglaw.com/assets/docs/publications/1092085282_Restrictions-in-Historic-Neighborhoods-2000.PDF, 2-3, 20.}

Proposal to Privatize Through Legislation

There exist a few scholars who encourage neighbors to come together and form a private community, among these Robert M. Nelson and Stefano Moroni. In response to critiques, Moroni emphasized that when private individuals come together to form such an association, it is not a privatization of public space, but only a reorganization of already-private property into a collective union for their own benefit.\footnote{Stefano Moroni, “Towards a General Theory of Contractual Communities: Neither Necessarily Gated, nor a Form of Privatization,” in Cities and Private Planning: Property Rights,} Nelson has been the most
vocal supporter of allowing individual homeowners to come together and privatize a community through a private government created long after the houses have been built, calling these creations a “Neighborhood Association in an Established Neighborhood,” or NASSENs for short. He argues that the appeal of a private community, with all its amenities, is too powerful, and it is unfair for homeowners who do not live in such a community but want to. His proposal is a five-step process, beginning with assembling 60% of homeowners who agree to ask the state to allow them to form a private community association, describing the boundaries, the services, and the governance; then the state would certify the reasonableness of the new community government; the state would allow a service-transfer agreement to ensue with the municipality; a neighborhood election would be scheduled; and finally the election would occur to determine if the community were established. This proposal relies on the initial introduction of new legislation by states allowing this privatization to occur.

Nelson acknowledges the advantage of having a more local say in issues of property maintenance and historic preservation, allowing neighbors to control the look and feel of their community when one-size-fits-all zoning cannot cover the specifics of unique or historic communities. He also expands this thinking, arguing that inner-city

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109 Nelson, “Privatizing the Neighborhood,” in *The Voluntary City*, 313-314. As it currently stands, a voluntary association formed in an existing neighborhood can be formed by likeminded neighbors, but the association has no right to enforce rules or take possession of property to collect fees, significant barriers to thorough enforcement of covenants. See Craig Woodman, “When Can a Subdivision Form a Homeowners Association?” *Zacks Investment Research*, accessed April 30, 2019, https://finance.zacks.com/can-subdivision-form-homeowners-association-10744.html.

110 Ibid., 314.
neighborhoods may want to privatize to help stem the tide of crime, litter, and to conserve the peace and introduce amenities. His suggestion is therefore “to bring suburban powers of exclusion – the rights of private property, if now in a collective form – into the inner city.” It is, however, a harsh reality that the transaction costs and logistics to achieve this would be very high, and almost prohibitive in an existing neighborhood.

Proposal to Privatize Through Covenants

Therefore, my proposal, while similar in desire for a privatized union among homeowners, is smaller in scale. Knowing about real covenants and equitable servitudes, imagine a scenario where two preservation-minded neighbors who want to restrict alterations and prohibit demolition of their property might create a mutual contract imposing these restrictions upon themselves and their heirs and assigns. These deed restrictions would be equitable servitudes, because the restrictions could be enforced in court through an injunction. This agreement between two neighbors would grow as more preservation-minded property owners wished to enter this private, internal-regulatory community. It would be very useful if the homeowners had adjacent properties, or if they could establish that they had once been part of a united development.

111 Ibid., 343.
113 There is the issue of “touch and concern,” but American courts stand divided on whether properties much have such a relation in order to have servitudes bind successors. There must also be a promise in writing or a “common plan,” and notice to successors. In the Sanborn v. McLean case, the Michigan Supreme Court held that there had been a common plan limiting property development to residences, and that the builder of a gas station should have known that he could not build there, following with the requirement of “inquiry notice.” See Sprankling, Understanding Property Law, 597-599.
The Historic House Association of America suggested a similar private preservation solution in 1981, acknowledging that at times preservation through government was not available or feasible. They included the techniques of Right of First Refusal and Option to Purchase as limitations on potential successors that could preserve a historic property in a private manner. As to the use of mutual covenants, they explained that it was possible for neighbors to mutually impose limitations upon future use, and for owners to be able to bring forth litigation to correct a violation. Finally, the Association also suggested using a Sale Subject to Protective Covenants as a tool for a seller of a historic house to be able to continue regulating the future use the historic property; the disadvantage is that they would only be enforceable during the seller’s lifetime, and in many jurisdictions cannot be inherited or assigned. Furthermore, it is difficult for neighbors to self-regulate each other and maintain an aura of friendliness; this explains why in private communities there is an association that takes on the responsibility of regulating the covenants and restrictions, in the name of all residents. Even in well-preserved Forest Hills Gardens, where the Corporation actively regulates the community, “lack of compliance with and ‘even total contempt’ for the architectural guidelines for new construction and renovation is a significant problem…”

114 Coughlin, *Easements and Other Legal Techniques*, 4-5.
115 Ibid., 5.
116 The Corporation apparently has to continually underscore “the integral role of architectural and other deed restrictions in maintaining the suburb’s beauty and value… the [Architectural Committee attempts] ‘to save houses that have stood for generations in quiet dialog with their neighbors from being remade into temples to their owner’s economic success.’” Klaus, *A Modern Arcadia*, 153-154.
homeowners in a private community to actively preserve the standards and regulations can be a continuously difficult task.\textsuperscript{117}

Therefore, despite several useful suggestions, we again meet the difficulty of overcoming high transaction costs in convincing people to ignore their property values for the sake of preservation. Nonetheless, the mutually restrictive real covenants are the best way that a group of preservation-minded homeowners can restrict themselves and all future owners, because they allow mutual enforceability not limited to the first seller, but to all future owners.

Proposal to Privatize Through Local Easements

The second private preservation solution presented in this thesis is the use of a historic preservation easement with a local, community-centered, easement-holding non-profit. This has a strong precedent throughout the country, where state or local communities have stepped up to privately preserve individual historic properties by accepting preservation easements.\textsuperscript{118} Typically, a historic preservation easement can be donated to an

\textsuperscript{117} It should be said, however, that despite the difficulty of bringing people together for a common cause, this has been seen scores of times in successful ways where residents unite and fight to save their communities throughout the country. See for example “Breakthrough Communities: Stories and Strategies in the Quest for Regional Unity,” in \textit{Breakthrough Communities}, ed. Pavel, 109-152. Similarly, communities have fought displacement for decades while retaining reinvestment using more traditional techniques, including municipal and federal funding initiatives, community coalitions, and philanthropies. See Solomon, \textit{Neighborhood Transition Without Displacement}, 4-7. For the example of the Roanoke Neighborhood Partnership, which brought residents together in a democratic participation of city planning, see Lynda H. Schneekloth and Robert G. Shibley, \textit{Placemaking: The Art and Practice of Building Communities} (New York: John Wiley & Sons, 1995), 109-147. There are dozens of examples of residents working with municipalities to revitalize communities through political will and action – see \textit{Community Renewal Through Municipal Investment: A Handbook for Citizens and Public Officials}, ed. Roger L. Kemp (Jefferson, NC: McFarland & Company, Inc., 2003).

easement-holding organization (such as the National Trust for Historic Preservation, or the New York Landmarks Conservancy), and the property owner can get a significant tax deduction for their loss of market value, which they experience because of this powerful restriction. However, in that case, to receive a tax deduction, the property must individually be listed on the National Register of Historic Places, which is a significant threshold to cross. Easements are incredibly powerful private preservation tools because they run with the land and are held in perpetuity by the dominant estate, in these cases the easement-holding organization.

Under this thesis’ second proposal for a private preservation solution, a preservation-minded property owner would donate a preservation easement to a strictly local non-profit preservation organization, which would regulate the exterior of the property although the property itself might change hands of ownership through the years. Depending on how onerous the easement donation was created, there might be some alterations allowed, but the local community organization would nonetheless regulate such alterations and prevent outright demolitions. This community organization could be replicated in any community, and would be managed by trustees, composed of community members themselves, thus ensuring a local and democratic preservation and conservation solution. The donation of easements and their protection in perpetuity occurs all throughout the nation but on a much larger scale; the National Trust holds scores of easements all across the country, and the New York Landmarks Conservancy holds easements all across

New York City. For this solution, an entirely localized, qualified, easement-holding non-profit would privately protect homeowners’ properties in perpetuity. It would be necessary for each property to be listed on the National Register of Historic Places in order to receive a tax deduction. Furthermore, it would be imperative to work closely with the Secretary of the Interior and the IRS to give residents their tax deductions, although that in and of itself is a significant challenge as well, in particular with recent governmental threats to the system.

An example of a localized private preservation solution through easements similar to this suggestion did occur in the town of Ipswich, Massachusetts. In the 1970s residents launched an effort to collect and accumulate easement donations from historic seventeenth-century houses; sixteen property owners donated easements to the local historical commission and Heritage Trust, which they themselves had founded. Some of the original donors did not even accept a monetary compensation for their easement donation, a veritable rarity in a culture that prizes property values. None could receive a tax deduction because the properties were not listed on the National Register. Even with such a successful example, it is clear that not only is strong community support imperative for the success of the private preservation solution, but moreover the easement holder must be effective in


121 The IRS has recently scrutinized façade easement donations to such an extent that easement donations nationwide have diminished, and some owners have chosen not to receive the tax benefits because of the audit risk. Phelps, “Preserving Perpetuity?,” 957-958.


permanently monitoring and upholding the strict terms of the contractual agreement. In the case of a local non-profit whose mission it would be to hold neighborhood easements in perpetuity, it would not be necessary that the properties were listed on the National Register unless the owners wanted the tax deduction. However, the donation of an easement without a financial incentive is a high transaction cost to consider indeed.

Conclusion

Despite these difficulties, these two private preservation solutions have the potential of achieving preservation goals for residents and communities that desire them. Using concepts of property law, from easements to equitable servitudes, it is possible for private property owners to mutually and voluntarily restrict current and future use as an extra-governmental preservation solution. While the history of private communities is long and complex with its problematic histories of elitism and racial exclusion, these proposals can help bring preservation to all communities, despite their not having been preemptively preserved through a private government at the time of their construction. In the following section, we will see how the land trust and the land-lease system, another innovative, Howard-inspired private solution, can be used to create true common ownership of land in the private sphere, helping people preserve their heritage and their communities as well.

123 Phelps, “Preserving Perpetuity?,” 948.
Section 4 – Land Trusts and Private Solutions

Introduction

After looking at the role of private governments and the way that individuals preserve communities through individual ownership of property, this section will look at the communal ownership and control of property that is more faithful to Howard and George’s land-tax system. Land trusts are the legal and private means by which people can hold title to land in common, for various reasons, including for affordable housing (which Community Land Trusts do quite well) to limited-equity cooperative housing and land conservancy trusts to conserve undeveloped land.\textsuperscript{124} There are also for-profit land trust models where single-ownership pays out dividends to shareholders, seen in Real Estate Investment Trusts (REITs) and Multiple-Tenant Income Properties (MTIPs) – systems with the potential of preserving heritage and communities by paying back dividends to community shareholders. Starting with a recapitulation of the central points of Howard and George’s visions for communal land ownership and land-rent, we will then look at the various iterations of land trust systems and how they can function as private preservation tools.

Howard and George’s Visions

As we have seen, community builders in the twentieth and twenty-first centuries have not been successful in truly bringing to life Howard’s vision for communal land ownership, despite efforts in several places. They have instead moved away from that

\textsuperscript{124} Phelps, “Preserving Perpetuity?,” 955.
vision and towards a privatized one where land is privately owned by a group of people who share certain communal spaces and amenities. In contrast, as Howard explained in his visionary work, the Garden City would only have one landlord, the people themselves. The land would be held in trust, and all residents would collectively own the land but individually rent out their living, working, and agricultural spaces. Originally because of the need to pay back the interest on the construction and land-purchase loans, residents of the Garden City would pay a landlord’s rent as “interest on debentures.” Howard called this rent that residents would pay the rate-rent; it would diminish as more people moved into the Garden City, and in addition establish an endowment for the future running of the city, until the landlord’s rent were entirely abolished, “the community depending solely on the very large powers it possesses as a landlord.”

In order to manage the Garden City after the interest on the debenture (loan) were paid off and the rate-rent were used for supporting all municipal services, residents would democratically elect a board of managers, who in effect acted as trustees. This Board of Management would possess ample powers because it would act on behalf of all the people and exercise “those wider rights, powers and privileges which are enjoyed by landlords under the common law.” As a private, quasi-public entity, the trust would control the plan of the city, all monetary concerns, and oversight and control of the various departments that Howard envisioned.

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125 Howard, Garden Cities, 88.
126 Ibid., 92.
127 These departments were divided into three – A) Public Control, B) Engineering, and C) Social Purposes. Each department had its sub-groups, such as Finance, Law, Assessment, and Inspection under the Public Control department. Under Engineering would be all physical plant concerns such as sewers, irrigation, roads, parks, railways, etc. Finally, under group C would be Education, Music, Libraries, Baths, and Recreation. Ibid., 93-94.
Howard called his governance system the “local option” and “Social Individualism,” combining capitalist with socialist elements into a cohesive assembly that served the people who lived in the Garden City. McKenzie has named this system of governance a “democratically controlled corporate technocracy,” led by the Board of Managers in tandem with associations of individuals united for causes that helped the greater good, while still making a profit for individuals and the community’s fund. This profit was a limited four percent dividend that was redistributed to the Garden City; this limitation ensured that it did not become a speculative and intensely for-profit endeavor, but that it remained affordable for the residents paying their rate-rents. This limited return is a crucial element in the successful functioning of land trusts in their fight against speculation and displacement. By purchasing the land in a land trust, Howard truly envisioned communal ownership of the land, going up against centuries of private property systems wherein landlords alone received profits from rising land values.

Such a conception of a land trust was influenced by Henry George’s ideas, mainly that of the single-tax on property. George was bothered by the fact that landlords could speculatively raise rents as they saw fit for their own profit, and suggested taxing property as a solution, so that it would be put to its best use. Instead of taxing people for the improvements they made upon the land, the government would tax landowners who did

129 McKenzie, Privatopia, 5.
130 Hardy, “Cities in the Sun,” in The Community Land Trust Reader, 87. Part of this significant legacy is the limited-dividend model tenements such as was seen at the Cobble Hill Towers in Brooklyn, built in 1879 by developer Alfred Tredway White, who imposed a limited dividend of 5% in order to make apartments affordable for tenants. Christopher Gray, “Architectural Wealth, Built for the Poor,” The New York Times, October 10, 2008, https://www.nytimes.com/2008/10/12/realestate/12scap.html?_r=3&ref=realestate&oref=slogin.
not have improvements, and those with improvements would be exempt from as high taxes. George wanted to treat land as “the common property of the whole people,” but could not so radically alter the system; therefore, his single-tax, ground-rent scheme was a practical way to achieve that, by rewarding the improvers of land and simultaneously establishing a growing common fund from which all would benefit. As he saw it under his system, “no one could afford to hold land he was not using, and land not in use would be thrown open to those who wished to use it…”

Howard used some of George’s ideas in his own Garden City vision, but instead of solely relying on a tax, he proposed communal land ownership in addition to the single rate-rent tax on property. There are several tax enclaves that used site value taxation to shift the tax burden to the land, not on buildings. A few Garden City-inspired communities that used the land-lease system were developed in the early twentieth century, including Arden, Delaware, which continues using this system to this day. Founded by sculptor and businessman Frank Stephens in 1900 as an artists’ community, all land in Arden is still held in trust by three trustees who grant 99-year leases to residents and set the annual land rent or single tax owed per house. Residents only pay the land rent, and the community

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pays the County of New Castle annual property taxes on behalf of the entire community, which is one large parcel of land, managed by the Arden Land Trust.¹³⁵

Land Trusts and CLTs

The moniker “land trust” itself was first used by one of George’s followers, Ralph Borsodi, who believed that land should always be communally held, never by private individuals. In addition, another follower, Arthur E. Morgan, helped spread the ideal of community land trusts throughout rural America during the New Deal era.¹³⁶ These early land trusts were located in planned developments, and the land was owned by a nonprofit corporation, whose governance was composed of only the development’s homeowners.

As such, they served various purposes for the community, such as building family farms and supporting economic development. However, as John Emmeus Davis explains, these early land trusts were not community land trusts (CLTs), whose operational characteristics, management and particular mission set it apart. In essence, CLTs operate on the belief that land and housing should not be commodities and that land speculation that displaces residents should be prevented. In a CLT, the landowner is a private and democratically-structured nonprofit corporation “with a corporate membership that is open to anyone living within the CLT’s geographically defined ‘community;’” it has a majority board elected by the membership; and there is a “balance of interests” on the board, where tenants, donors, and public officials sit.¹³⁷ Being a land trust, a CLT is a type

¹³⁶ Ibid., 7-8.
¹³⁷ Ibid., 9-10.
of land and property reform that treats the symptoms of land and property speculation, which prevents people from being priced out.\textsuperscript{138}

The CLT gives residents long-term leases to live on property but never own the land; in turn residents pay a lease fee that is based on the use value, not the full market value.\textsuperscript{139} Under a land trust, local control can potentially be gained and maintained, but not in all cases, because residents might feel and actually be excluded from the management of the CLT.\textsuperscript{140} CLTs do occasionally encourage the residents to perform development functions as individuals or through associations, including through community development corporations. However, residents do not directly influence the board because they are essentially the benefactors, not the trustees, and only some residents sit on the board. Coupled with the politicization of CLTs and the representation of public officials on the boards, this embodies some of the problems that CLTs encounter in being unable to give benefactors direct control and profit.\textsuperscript{141} This will be explored further on in the section. There have been additional historical problems with convincing people to trust in the leasehold principle and abandon the dream of private property ownership for the greater good; this is one of the most difficult burdens to overcome.\textsuperscript{142} However, CLTs generally benefit communities by preventing speculation, giving communities access to land and

\begin{itemize}
  \item \textsuperscript{138} John Emmeus Davis, “Reallocating Equity: A Land Trust Model of Land Reform,” in \textit{The Community Land Trust Reader}, 373.
  \item \textsuperscript{140} International Independence Institute, “From \textit{The Community Land Trust} (1972),” 223.
  \item \textsuperscript{141} Another important consequence of CLTs is the potential for balkanization of a city or region, to the detriment of the municipality or society at large. There are also some notable potential legal limitations against the unreasonable restraint on alienation of property, which CLTs do in a way. Davis, “Reallocating Equity,” 375-376.
  \item \textsuperscript{142} Robert S. Swann, \textit{The Community Land Trust; a Guide to a New Model for Land Tenure in America} (Cambridge, MA: Center for Community Economic Development, 1972), 18-19.
\end{itemize}
property that common systems might exclude them from. They provide security, earned equity, stable housing for communities, and preserve community equity and legacy.\textsuperscript{143}

### International Examples of Common Land-Ownership

Other international examples of common land tenure or investments for the common good exist throughout the world. In Tanzania, after the land nationalization of 1968 that returned the nation to the traditional \textit{Ujamaa Vijijini} (“familyhood in villages”) system, land now belongs to all the people and is only held when in use. The Mexican \textit{ejido} (“village lands”) system replaced landlords and allowed communities to control and preserve their villages and lands. In India, there is the \textit{Gramdan} (“village gift”) movement, villages act as trustees of land on behalf of the community for the benefit of individuals to use. The Jewish National Fund similarly functions through trustees who lease land to \textit{kibbutz} or \textit{moshav shitufi}, popular collective ownership agricultural communities. It owns approximately 60\% of land in Israel and has prevented speculation and displacement.\textsuperscript{144}

There are other international examples, including in Germany, Holland, and some East Asian nations, where collective land management and George-like taxation systems have been used under the broad term “land readjustment” or “land pooling” in Australia. Despite their great promise, land readjustment applications need broad landowner support; the system has been met with suspicion throughout the world for being too radical, and can

\textsuperscript{144} Swann, \textit{The Community Land Trust}, 7-10.
break down “when confronted with the thorny realities of the conservatism of entrenched political and economic interests,” which prove to be difficult realities time and again.\(^{145}\)

Conservancy Trusts and CLTs for Affordability

As non-profit organizations that hold ownership to land in trust for the benefit of another party, land trusts have been widely used in the form of (CLTs) to preserve affordability and communities themselves. A community land trust buys and holds the title to usually cheap property, and constructs buildings often with subsidies to sell the residences to low-income residents. These residents buy the unit but hold a ground lease for the land.\(^{146}\) In some cases, however, a land trust can be created for the sole purpose of conserving open land, protecting water, space for parks and preserves, scenic views, and preventing development through an easement or restrictive covenant, as in the cases of conservancy or land conservation trusts.\(^{147}\) Conservation easements donated by landowners are placed on this undeveloped land, and held in trust and regulated by a land trust. In general, conservation trusts are more present in wealthier communities, whereas CLTs are more prevalent in urban, low-income areas.\(^{148}\) Along the same lines, according to land trust pioneer Robert Swann, conservancy trusts are more self-centered and interested with


\(^{146}\) Singer, Property Law, 591-592.


keeping people off the land, whereas CLTs aim to make land and property affordable.\textsuperscript{149}

With the threat of environmental loss through climate change, overdevelopment, and loss of cultural landscapes, land trusts have become very popular in recent years, and now number approximately 1,200 throughout the United States, according to the Land Trust Alliance.\textsuperscript{150}

Community land trusts are popular for helping low-income workers find affordable housing, and have been widely used since the Civil Rights Era and the recent and continued trend of rising housing costs.\textsuperscript{151} They are very favored by among grassroots organizers and advocates of preserving affordable housing, especially in distressed or rent-burdened communities, and as potential catalysts for revitalizing neighborhoods and preserving communities.\textsuperscript{152} Some have also been inspired by George’s unearned land value, seeking to apply it to gentrifying areas and labeling it a “gentrification increment” whose increased tax revenue has the potential to fund the development of affordable housing and preservation of communities.\textsuperscript{153} Despite these important advantages, CLTs do have some problems, especially when it comes to not being able to let people profit from the private and communal ownership of land.

\textsuperscript{149} Kirby White, “Bob Swann: An Interview,” in \textit{The Community Land Trust Reader}, 273.


\textsuperscript{151} There are an estimated 225 CLTs throughout the nation, with approximately 15,000 individual units owned. The largest CLT is the Champlain Housing Trust in Vermont, with assets of $223 million. “Overview: Community Land Trusts,” \textit{Community Wealth}, accessed May 1, 2019, https://community-wealth.org/strategies/panel/clts/index.html.


Deed Restriction vs Ground-Lease

The ground-lease restriction enforced by CLTs can be more powerful than regular, private deed restrictions, which have also been used to preserve affordability. Both deed restrictions for affordable homeownership and CLT ground-lease restrictions use price restrictions, buyer eligibility restrictions to ensure that tenants are income-qualified, occupancy and use restrictions, and mortgage financing restrictions to prevent foreclosure.\textsuperscript{154} While deed restrictions placed on individual properties can be strong and allow the buyer total land ownership, they can only be enforced for up to 30 years since there is no privity of estate with another entity and because governments generally prohibit perpetuities without privity or restraints on alienation.\textsuperscript{155} Because the effective enforceability of individual deed restrictions is weak, some programs have been established to monitor and enforce such restrictions that are aimed at preserving affordable housing. Nonetheless, the CLT remains a more powerful alternative to ostensibly perpetually preserving affordability, because there is legal privity through the single ownership of land, meaning that restrictions are much more easily enforced. The constant monitoring and enforcement by the CLT of its lessees means that affordability is conserved, as is the entire system.\textsuperscript{156} In an interesting case, the Chicago CLT, founded by the city government in 2006, is not technically a CLT at all since it does not own the land outright, but is managed as a CLT. The idea that a CLT can manage land that it does not outright own helps support the

\textsuperscript{155} Ibid., 331.
\textsuperscript{156} Ibid., 332-333.
concept of a nonprofit land/property management trust, of which we will see a real-world example in section 5. The Chicago CLT ensures affordable housing not through ground leases but through deed restrictions which are managed by the its board in trust for the benefit of its residents.\footnote{Matthew Towey, “The Land Trust Without Land: The Unusual Structure of the Chicago Community Land Trust,” \textit{Journal of Affordable Housing \\& Community Development Law}, Vol. 18, No. 3 (Spring 2009), 337.}

CLTs do important work in preserving housing affordability, but its sources of funding mean that there is a separation between the trustees and the benefactors of the trust’s services. For the most part, CLTs need a great amount of fundraising to acquire land, develop housing, and operate the organization, among other expenses. For the earliest CLTs, a “miracle financing” donor usually gave a crucial amount, and the CLT might acquire small loans from philanthropists or institutions. For example, in 1989 Boston’s Dudley Neighbors, Inc., a CLT with municipal-granted eminent-domain powers, was able to buy privately owned vacant land through a $2 million Ford Foundation loan.\footnote{James J. Kelly, Jr., “Land Trusts that Conserve Communities,” \textit{59 DePaul Law Review}, no. 69 (2009): 80.} After 1992, CLTs were able to receive federal funding and technical assistance through official Community Housing Development Organization (CHDO) designation, as well as loans from the U.S. Department of Housing and Urban Development (HUD) and mortgage financing from Fannie Mae and later private lenders.\footnote{Davis, “Origins and Evolution of the Community Land Trust in the United States,” 33-35.} Municipalities have also partly funded (or in the case of Chicago, entirely founded) CLTs usually for the express purpose of preserving affordable housing, which is commendable, but narrows the scope of action for land trusts in the popular understanding.\footnote{Towey, “The Land Trust Without Land,” 337.} While CLTs do an important job of

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preserving affordability and therefore communities, they are nonprofits managed by a board of trustees who are not beholden to the trust’s benefactors. For this reason, there are alternate, profitable, and potentially better ways of using the land trust, land-lease methods to preserve communities and heritage, discussed below.

History and Workings of REITs

CLTs in the United States and around the world are significant because of their role in preserving communities and housing affordability through the mechanisms discussed. However, a CLT is a nonprofit corporation, while a real estate investment trust (REIT) is for-profit private entity. In addition, an investment trust is a closed system – “a private entity with private purposes… while the CLT is open…” As a nonprofit, members or beneficiaries of a CLT cannot own or hold the corporation’s assets, whereas in a legal real estate trust, members own an equity share of the assets. In both cases the organizations are said to be democratically structured because there is representation by board members, but ownership of shares does not exist for a CLT.

The history of REITs is older than that of CLTs, and they were born directly from land trusts. The earliest land trust model began in Boston in the middle of the nineteenth century, when real estate trusts were created so that investors could commonly own property. The Massachusetts Trust was formed because corporations were not allowed to own property, so corporations and individuals in association were unable to invest and deal in real estate only. This new legal entity had corporation-like benefits, namely

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“transferability of ownership shares, limited liability, and centralized management expertise.” In addition, the Massachusetts Trust benefited from not having to pay federal taxes, so investors could each receive dividends collected from the properties’ rents. The Trust was open to wealthy and general investors, and became a popular model followed in other cities, until a 1935 Supreme Court decision took away its favorable tax status. Land trusts could not compete with tax-favored mutual funds and real estate syndicates such as buildings and loans associations. Only in 1960, after lobbying from the real estate industry and with the subsequent amendment to the tax law did real estate trusts acquire similar benefits to mutual funds.

Under this 1960 law, Real Estate Investment Trusts (REITs) were able to be formed formally as “an unincorporated association with multiple trustees as managers and having transferable shares of beneficial interest,” following in the pattern of closed-end investment companies that issued shares whose value would fluctuate. The tax law placed important restrictions on REITs, such as having to pay annually to its shareholders a minimum 90% of its taxable income, and having at least 100 shareholders with no more than 5 shareholders owning 50% of the shares, among others. Because of these restrictions, REITs can be held as long-term passive investments, with a property manager at the helm.

REITs have suffered several ups and downs since the 1970s, due to changing federal tax laws and larger economic conditions, along with the expansion and growth of

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163 Ibid., 15.
164 This was the REIT Act title contained in the Cigar Excise Tax Extension of 1960, signed into law by President Eisenhower.
166 Ibid., 16.
the REIT market in general.\textsuperscript{167} After a boom in the 1990s, REITs have truly exploded, and since then are a regular favorite of Wall Street institutional investors and individuals, comprising $3 trillion worth of assets in the United States.\textsuperscript{168} REITs have increasingly been concerned with having social impacts, and there are some that invest in affordable housing and others in historic buildings as part of their broader growth and impact strategies.\textsuperscript{169} Despite immense growth and commendable social impact projects, for-profit real-estate ownership is still not accessible to the vast majority of people as there are large minimum amounts for accredited investors (those who have a net worth of at least $1 million) to be able to invest in private REITs. Furthermore, for those who can access such for-profit ownership, it often is through a retirement or brokerage account, meaning the investment is passive and the investor is relatively unconcerned with the direct impact the REIT is having on actual property.

\textsuperscript{167} Chan, et al, Real Estate Investment Trusts, 18-33.
Proposal of Local REITs for Preservation

Therefore, one of the proposals outlined here is to allow small-scale individual investors to be able to buy shares in property within a community, much as REITs do now, but on a smaller, community-wide scale. Using REITs as inspiration, it is possible to envision local individuals owning shares from a historic community property and reaping a profitable dividend from its use via its rental income. If REITs are seen as stable and lucrative investments because of the basic element of a continuous rental income, then the foundational idea should easily be transferred over to community use.170 There are some important drawbacks to this system of small-scale investment in real estate, which parallel all investments in real estate. The market is less liquid than other markets like stocks and bonds, meaning assets are less easily bought and sold. There is risk in real estate, and after the 2008 crash, some investors may be warier of investing in the market. Moreover, real estate requires continual site management and maintenance, which can be off-putting to some investors, and dividend yields are not as high as with other markets.171 However, these drawbacks can be abated for small-scale individual investors if they diversify their investments, if there is an excellent management scheme and team, and if investors are united in their goals.

Another model to follow is that of limited equity, low-yield cooperatives, where all members are simultaneously shareholders of the co-op’s value and land, although as such

they do not own real property but personal property instead. In a regular co-op, the increase in unit value can be positive for owners who sell their properties at a profit, it can also threaten the affordability of the units to lower-income families. Therefore, some co-ops have opted to limit the value or inflation potential of each share, thereby limiting the equity and keeping a low yield or profit. Of course, in a co-op, the shareholder owns and most usually lives in the unit. Under this thesis’ proposal, the trustees or owners of the unit would be the same benefactors under the condition that they not live in the same unit but instead that they collect a dividend from the rental income. If not, the shareholders would live in a regular cooperative or private government, which defeats the purpose of increased equity, ownership and control of property with a profit yield.

MTIPs and Land Lease for Profit

A more radical land tenure and property ownership concept is the use Multiple-Tenant Income Properties (MTIPs), as proposed by scholar Spencer Heath MacCallum. In suggesting an alternative to the system of individual and private land ownership in private communities, McCallum looks to commercial real estate for the inspiration to his nonpolitical solution of land-leasing. Similarly to a land trust, under the land-lease

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172 Julie D. Lawton has looked at the great potential of limited-equity housing cooperatives to make housing affordable and accessible to low-income people. It is an attractive alternative to the government-backed preference for traditional fee simple house ownership, in particular because residents share the cost burden of living in the cooperative. See Julie D. Lawton, “Limited Equity Cooperatives: The Non-Economic Value of Homeownership,” Washington University Journal of Law and Policy, 43 (Summer 2013), 200-201.


system, properties are individually held, but the land where they stand are owned and administered by an organization “as a long-term investment property for income,” in a way joining the land trust and REIT systems with the ambitious and radical concept of communal land ownership. Similarly inspired by Howard’s utopian vision of communal ownership and stewardship of land, MacCallum compares Howard’s land-lease concept to that of a modern-day hotel or a shopping mall, where a single landlord leases out properties to multiple tenants.\textsuperscript{175}

MacCallum’s alternative to CIDs and private communities subscribes to the notion that property can be held in common for the profit of all shareholders, without subdividing the land at all, in the form of an MTIP, or an estate. Among hotels, there also exist other examples of MTIPs that surround our everyday lives, such as marinas, mobile-home parks, apartment complexes, medical centers, research parks, office parks, and ostensibly even trains, ships, and planes.\textsuperscript{176} The advantages of single-ownership land-lease over the subdivided private governments that dot the landscape are numerous: leaseholders- as shareholders are informed decision-makers; their interests are aligned because their ownership takes the form of undivided shares; there is flexibility in land usage; the community is financially self-sustaining through the ground rents, not taxation; there can be effective planning of and by the community; there is predictability in future management; there is a long-term view taken because of continual tenancy and stake in the property; a service-oriented personnel that helps manage the community; there is effective dispute management and teamwork, and less costly litigation because of the profit-

\textsuperscript{175} Ibid., 378-379.
\textsuperscript{176} Ibid., 280.
motivated workings of the entire community. Lastly and importantly, MacCallum argues that the MTIP eliminates the speculative aspect of many private and non-private communities, because of the fact that there is a community entrepreneur whose role is to manage the running of the land and build its value without speculation.177

Like other scholars, MacCallum admits that it is difficult to convince American consumers not to want to own their own plot of land, because of the long history of cultural bias in favor of private home and land ownership. Allowing land to be held in common is for many a very radical departure from accepted norms, although in reality we see these systems working very well in commercial and residential areas. In critiquing the market monopolization of private communities and their “compulsory collectivism,” MacCallum proposes that the MTIP system be more widely accepted, because the land-lease communities are the “authentic privatization of government.”178 These land-lease for-profit communities therefore represent one of the ideal solutions for voluntary and communal property ownership through shareholding that actually pays dividends back to its tenants.

Bacatá Example

Although most often used in commercial real estate and a few RV campgrounds in the United States, there is potential and hope for shared property ownership to be applied to residential developments. There are international examples of jointly-owned commercial real estate ventures. In one famous example in Bogotá, Colombia, thousands of small- and medium-sized investors came together to buy shares in the construction of Colombia’s

177 Ibid., 381-392.
178 Ibid., 395.
tallest skyscraper, the 66-story, 1.2 million square-foot Bacatá Tower [Image 6]. It is ostensibly the world’s first crowdfunded skyscraper; at a cost of $240 million, more than 5,000 people have raised the necessary capital, and each owns a proportional share of the development and of its profits.179 Colombian investors gave their investments to a government-backed trust, which controlled the funds and handed them over to the developer, BD Promotores, as building permits were granted by the municipality. Crowdfunding in general is quite popular in Colombia as a way for working- and middle-class people to invest a bit and get shares and dividends in return. For the Bacatá Tower, investors are already getting back dividends which come from the rental income that the building’s hotel, commercial areas, and apartments generate. The Tower represents the world’s largest crowdfunding campaign, but there is ostensibly no difference between this crowdfunding and the joint-venture, common-ownership financial schemes that wealthy investors use for any equity purchases, especially when compared to the aforementioned REITs.180

What is necessary for such large-scale investments by thousands of investors to work is the enabling legislation; in Colombia’s case, the government legalized financial syndicates and had “created fiduciary authorities to minimize fraud and associated risk,” thereby giving access to thousands of small-scale investors to collectively pool their resources. In the United States, minimum investment limits exist which effectively bar

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most of the population from many financial schemes, as does the need for accreditation of investors.\textsuperscript{181} While savings and loans associations once performed similarly democratic investment opportunities for small-scale investors, the savings and loan crisis (1986 to 1995) has almost completely destroyed the industry.\textsuperscript{182} On the other hand, many credit unions do still operate as member-owned financial cooperatives that invest in an individual’s real estate projects through mortgage lending and pay dividends to the shareholders. The problem here is that the building or land is not held in common and there are no dividends from such common ownership, so it does not follow in Howard’s vision.

Philadelphia Example

Closer to home, a few communities have partnered with developers to provide low-income residents an opportunity to control and benefit from development. In Philadelphia, Mosaic Development Partners used the government’s New Markets Tax Credit, a crowdfunding service called Small Change, and capital from an Opportunity Zone tax incentive to raise the $7.2 million for the development.\textsuperscript{183} Mosaic Partners is developing Golaski Labs in Northeast Philadelphia, with 39 affordable apartments, mixed-use space, a co-working space, and a business incubator. The company wanted to attract small-scale investors (who can invest a minimum $500) in addition to the usual accredited investors.

\textsuperscript{181} Ibid.
\textsuperscript{182} For more on the decline of the Savings and Loan industry, see Lawrence J. White, “Fannie Mae, Freddie Mae, and Housing: Good Intentions Gone Awry,” in \textit{Housing America: Building Out of a Crisis}, ed. Randall G. Holcombe and Benjamin Powell (Oakland, CA: The Independent Institute, 2009), 264.
(who have a net worth of at least $1 million), and achieved this through Small Change, a crowdfunding firm. Although attracting low-income investors has been difficult because of their unease and lack of knowledge about the workings of investment finance, Mosaic is committed to attracting community members who will own shares in the development.\textsuperscript{184} The element of trust in the system is important to highlight, as working-class community members will not feel safe investing in a development within their own community if they do not understand or trust the system. Some developers are also wary of relying on crowdfunding to finance construction projects, instead seeing it as an alternative to equity; furthermore, crowdfunding takes time, and developers typically want their sources of finance secure before construction begins.\textsuperscript{185} Preservationists are already looking at crowdfunding and real estate investment as ideas to save and preserve historic buildings that then turn a profit for social impact investors, thanks to recent changes in securities law that allow for such local, small-scale investments.\textsuperscript{186} For communities where development is taking place, the potential rewards are too powerful to overlook, with community members gaining a seat at the table and a reliable dividend from their investment while being able to preserve built heritage.

\textsuperscript{184} According to Small Change, the anticipated seven-year return on a $1,000 investment is $2,737 and $3,096 after ten years. Other crowdfunding firms are also looking to raise capital through the Opportunity Zones tax incentives. Ibid. Also see “Golaski Labs,” Small Change, accessed April 23, 2019, https://www.smallchange.com/projects/Golaski-Labs.


Conclusion

Land trusts, CLTs, REITs, MTIPs, cooperatives, and their real-life historical and present-day applications are important tools that can help protect communities from speculation and displacement and in some cases provide a return on investment through the communal ownership, self-governance, and stewardship of property.\textsuperscript{187} In a sense, the aim of land trusts and cooperatives is the preservation of community through private legal limitations, a characteristics shared with private governments, although there are significant differences as well.\textsuperscript{188} Their increased use over the last century can be attributed to the increasing economic anxieties felt by many communities, the inability for many to have a secure land tenure, along with the loss of land, and the perception that public policy and regulatory planning has failed people, especially in finding and keeping affordable housing.\textsuperscript{189} These efforts to control land, speculation, and displacement through single-landlord, common ownership and land-lease or ground-rent systems represents yet another significant privatization of systems that were traditionally controlled by government.\textsuperscript{190} In part because of decreasing public funds the private and nonprofit sectors have stepped up

\textsuperscript{187} Kelly, “Land Trusts that Conserve Communities,” 73.
\textsuperscript{188} Ibid., 87.
\textsuperscript{189} Institute for Community Economics, “From The Community Land Trust Handbook (1982),” 256;
\textsuperscript{190} Since the 1960s, private non-profits have been very actively involved in using federal and private funds to implement affordable housing initiatives. See, for example, City of Philadelphia, New Housing for Families with Small Incomes (Philadelphia: City of Philadelphia Redevelopment Authority, 1970), 2. Housing problems have been a major concern for decades now. See for example William G. Grigsby and Thomas C. Corl, “Declining Neighborhoods: Problem or Opportunity?” The Annals of the American Academy of Political and Social Science: Housing America, ed. Richard D. Lambert, Vol. 465 (January 1983), 87-89.
to fight for communities, for affordable housing, and for land conservation. Scholars have proposed reducing homeowners’ financial commitments to enter into a stable land tenure through the use of market-oriented, shared-equity models and/or CLTs.\textsuperscript{191} It is time, as social justice advocate Chuck Matthei wrote, “to move from a policy of subsidy to one of equity,” by giving people the tools to become partners, stakeholders and shareholders in their communities’ assets and futures.\textsuperscript{192} Through a reappropriation of Howard and George’s visions and ideas, and by looking at these various tools and their shared heritage of communal land ownership and stewardship, we can envision new ways that people might have a stake in land and property that similarly protects the built heritage and gives back to the community at the same time. In the following section, we will look at the viability of applying these proposals for preservation outcomes through the two real-life case studies in Queens, NY. Although such preservation-oriented applications have been very few and far between, private preservation through restrictive covenants and communal land trusts has the potential to work to serve communities and their preservation goals.

\textsuperscript{191} Kelly, “Land Trusts that Conserve Communities,” 80.
\textsuperscript{192} Chuck Matthei, “U.S. Land Reform Movements: The Theory Behind the Practice,” in The Community Land Trust Reader, 389.
Section 5 – Three Communities and Private Preservation in Practice

Introduction

The sources of inspiration for this thesis have been one historic, pristinely preserved community, Forest Hills Gardens, and two case study sites, Richmond Hill and Kew Gardens [Image 7 shows Richmond Hill and the golf course which became Kew Gardens to the north]. Richmond Hill was a Victorian railroad suburb envisioned by Albon Platt Man and begun in 1869; Kew Gardens was a garden suburb developed by Albon Man’s sons, Alrick H. Man, Arthur Man, and Albon P. Man in 1910 with the opening of the Long Island Railroad’s East River tunnels; and finally the renowned garden city-inspired garden suburb of Forest Hills Gardens, envisioned and developed by the Russell Sage Foundation and designed by Grosvenor Atterbury and Frederick Law Olmsted, Jr., was also begun in 1910. All three are located in central Queens, in New York City, and thus are subject to local municipal zoning and land-use regulations.

The communities’ histories of growth and change are significant, as are the stories of community activists and preservation desires and goals achieved. Richmond Hill illustrates the story of a tight-knit community that desires landmark designation but has been denied it because of the failures of the public, highly political citywide designation process. The potential for use of private deed restrictions and easements is great in Richmond Hill, which has recently been designated a National Register historic district. Kew Gardens illustrates the story of a factionalized community and the failures of community planning; however, the potential for application of communal land ownership (or in this case management of property) is greater in Kew Gardens, as we shall see. Recent troubles with public preservation and public agencies like the Landmarks Preservation
Commission (LPC) and the Metropolitan Transportation Authority (MTA) has inspired a search for private preservation solutions among community residents. Despite the social, economic, and political difficulties of various kinds associated with radical land tenure ideas and community organizing, small forays have shown that in some cases residents are willing to overcome the high transaction costs for the good of preserving communities and their heritage. As such, the case studies are valuable for demonstrating the potential application of private preservation tools in theory and practice.

Richmond Hill – History

Albon Man was a wealthy lawyer in nineteenth-century New York City, who purchased 250 acres of undeveloped farmland in Queens in 1869; it was a time of outward expansion, with people wanting to leave the crowded Manhattan streets for more spacious areas with plenty of light and air. Together with architect Edward Richmond, both were influenced by the nineteenth-century planned garden communities being developed outside major cities, such as Llewellyn Park in New Jersey (1852), Garden City on Long Island (1869), and Riverside, Illinois (1869). The center of this new village was located at the intersection of Myrtle and Jamaica Avenue with Lefferts Boulevard, where shops, the Republican Club, the Carnegie Library, a theater, and the railroad station were located, all within close walking distance of both large Queen Anne style Victorian houses and smaller homes for the working-classes. Richmond Hill was located adjacent to Forest Park, a 536-

acre nature preserve that was kept as wooded parkland in part through a land donation from the Man family.\textsuperscript{195} This area above Jamaica Avenue and below Forest Park and Division Street (now 84\textsuperscript{th} Avenue) was the Victorian village of Richmond Hill which is still fairly racially and socioeconomically homogenous – the modern-day neighborhood is much larger, and encompasses a large area south of Jamaica which does not necessarily share this Victorian planned community heritage but is very racially diverse.\textsuperscript{196}

From the beginning, Man knew that he had to plan out Richmond Hill so as to conserve as much open land as possible; to that end and as part of the legacy of nineteenth- and twentieth-century community builders, Man made use of restrictive covenants to enforce the function and look of all lots. In particular, the covenants enforced a uniform setback of twenty feet to allow for continuous green lawns, a prohibition against fences, minimum lot sizes, and restrictions against nuisances of various kinds.\textsuperscript{197} These covenants stayed in place for decades, but without a regulatory organization to maintain oversight, they have been essentially forgotten among the community members. A significant part of the open land was the village commons near the railroad station at the center, at the intersection of Lefferts Boulevard and Hillside Avenue, where a Carnegie Library was built in 1904 [Image 7 shows the railroad line and the common area named ‘park’]. Nearby stands the Church of the Resurrection, a Tudor-Revival Episcopalian church where Jacob Riis attended services and where Theodore Roosevelt attended Riis’ daughter’s wedding.


This local history is celebrated to this day in the neighborhood. In the early years and up to the period after the Second World War, Richmond Hill remained a quiet, mostly middle-class, white community with professionals who commuted to Manhattan via the subway or the railroad. The Victorian triangle section, which has the oldest and best-preserved houses, is also mostly white and middle class today. However, after the 1980s, the broader neighborhood paralleled Queens’ demographic composition, which greatly began to change as newcomers from Latin America, Eastern Europe, South Asia, and the Caribbean arrived. Currently, Richmond Hill at large is very diverse, which is a social gain, but makes a united sense of community difficult to maintain. There is also poverty, especially in South Richmond Hill, concentrated among the recent immigrants, which makes engagement in community history and preservation goals difficult, because of different priorities that residents have. However, the smaller triangular section of the earliest and largest Victorian houses in northern Richmond Hill has maintained the older, white families that belong to the middle- and upper-middle classes and remain united through their church groups, through the Richmond Hill Historical Society and other community groups, and united through their preservation goals.

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**Richmond Hill Historical Society Activism**

The Richmond Hill Historical Society, of which I am a current board member, was founded in the 1997 in part by neighborhood activists Nancy Cataldi and Carl Ballenas, with the goal of preserving the neighborhood’s history and built heritage.\(^{201}\) The Historical Society has applied for a historic district designation under the city’s Landmarks Preservation Commission four times in the last 22 years. To be fair, the first applications were less formal and not expertly-researched or created, since it was the work of neighborhood volunteers. However, each successive application has improved upon the last; despite these improvements, the LPC has been unwilling to grant the community historic designation, even though most homeowners desire it. In an ironic twist of fate, Cataldi’s own Victorian home, which she had carefully restored, was severely altered by new owners after her death in 2008, further highlighting the lack of protections for historic properties through the public sector.\(^{202}\) This is particularly hurtful for community advocates of preservation whose volunteer efforts to gain historic district status and protect the built heritage have as of yet not worked out in the public arena through the LPC.

Because the four local nominations to the LPC have not been successful in the past, the fifth and most recent push for designation came at the National Register level. This effort to be listed as a National Register (not local) district began in 2016 with the support and funding from City Councilmember Eric Ulrich’s office and the support of the Historic

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\(^{201}\) Ballenas and Cataldi, *Richmond Hill*, 126.

District’s Council under their Six to Celebrate program. Through this support and funding, the Historical Society worked with preservation consultant Chris Brazee, who researched and documented hundreds of properties and came up with a thoroughly comprehensive nomination to submit to the New York State Historic Preservation Office (SHPO). Earlier this year, after reviewing the nomination for many months, the SHPO recommended nomination to the National Register of almost 200 of the most well-preserved Victorian homes. The district was officially listed in the National Register of Historic Places on March 7, 2019, to the delight of many in the community, especially activists in the Historical Society. Despite this happy occasion, National Register designation does not confer any legal protections against alterations or demolitions of historic properties, and so the community would still like to become a local, New York City historic district.

In private meetings, it has seemed unlikely that we will gain the LPC’s support any time soon. In one preservation event in 2016, I asked the then-Director of Preservation and current Chair of the LPC, Sarah Carroll, if she believed that Richmond Hill would ever be listed on the local register. She replied that it would be difficult, because almost all the houses in the neighborhood are old and wood-frame construction, whereas the Commission


prefers nominating houses built with masonry construction. In the most recent meeting with the LPC and the HDC to see the viability of filing a new nomination application and using the same very thorough report that Chris Brazee had compiled for the SHPO, the LPC staff presented what seemed to be a new obstacle, asking for additional images of the historic properties showing them as streetscapes to demonstrate a “sense of place,” itself a subjective and not legally-defined term. An additional problem is the use of precedent for the LPC’s internal deliberations; a contact of mine who worked at the Commission as a preservation researcher recounted that whenever the LPC received a nomination, they first looked through their files to check if they have received the same property nomination before. If they see that they have, and have denied the nomination, that is used as a benchmark for future deliberations, to our detriment. By categorically ignoring new and improved nominations, this LPC practice hurts communities that are trying to acquire landmark protection. Despite these difficulties, the Historical Society remains ever-optimistic that the LPC might someday accept the most recent nomination and grant the community local historic district status. Meanwhile, some homeowners have become more open to considering private preservation solutions such as the ones proposed in this thesis.

Among these homeowners are two of the staunchest supporters of local preservation efforts, Joanne Tanzi and Helen Day, both members of the Historical Society. In conversations and interviews with them, I have put forth my ideas of private preservation

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205 This seemed to us to be an excuse, considering how much of Victorian Flatbush has been landmarked, as have other neighborhoods with majority wood-frame construction.
206 Critics of the LPC’s recent policy changes allege that the Commission has created subjective obstacles for new properties to be designated, among other significant procedural changes. See The Society for the Architecture of the City, *Undoing Historic Districts: A Report from the Society for the Architecture of the City* (New York: The Society for the Architecture of the City, 2017), 63-64.
through deed restrictions and real covenants with likeminded neighbors, and they have been very interested in these extra-governmental solutions. Tanzi believes that the idea of a private, internal regulatory system among several neighbors is possible because of the close ties through the local Catholic church and the block association. She is among the most willing to personally restrict her property through a covenant or an easement because of the personal trauma she felt when she saw Cataldi’s house altered beyond recognition and stripped of its historic detailing. Tanzi has similarly conserved her Queen Anne home and would hate to see it meet the same fate.207 On the other hand, Day has pointed out several times that convincing people of willingly diminishing their property values in New York City is a hard ask, and would only work if a large area of historic properties and their owners mutually consented to internal self-regulation in the ways described in section 3.

Another homeowner, Diane Freel, owns a modest Dutch Colonial Revival house where 1920s vaudeville star John Steel once lived. In board meetings, some members discussed nominating individual houses piecemeal to the local register in an attempt at somehow finding a loophole around the lack of success with citywide historic district nominations. It was decided, with her consent, to nominate her house to the local register because it was the residence of a minor celebrity and because she has preserved it through the years. However, in a series of conversations with Freel during August of 2018, it became clear to me that she did not fully understand the differences between local and National Register designation; once she did, she did not support the local designation process for her property as had been agreed upon at the board meeting because she felt it

207 This information was gathered from an interview with Joanne Tanzi in August of 2017.
would encumber future owners, and remains undecided on the entire matter to this day. This demonstrates the very high transaction costs when it comes to having individual property owners overcome their fears of lost property values through either private or public protections. They are a significant barrier in any community, but it is possible that as time passes and a community unites more strongly, these costs could be overcome.

Kew Gardens – History

Kew Gardens was originally a hilly region just north of Richmond Hill, and was used as a golf course for residents, with a clubhouse that became a private house, and a lake hazard that was drained to make way for the new Long Island Railroad (LIRR) station in 1910. Kew Gardens’ siting helped to protect it from the early years; it is bounded by Forest Park and Forest Hills Gardens to the west, Flushing Meadows Corona Park to the north, the Victorian and bucolic Maple Grove Cemetery to the northeast, and Richmond Hill to the south. Similarly to Richmond Hill, the Man family imposed restrictive covenants and regulated their application and enforcement through their development corporation, the Kew Gardens Corporation [Image 8].

The Mans donated some land and created community institutions to serve as central gathering spaces to create community, such as the neighborhood church, the Country Club, the elementary school, a hotel, and commercial buildings running along the main thoroughfares of Lefferts and Metropolitan, all of which are still standing (except the Clubhouse, demolished in the 1930s and now the site of a historic Art Deco theater). Instead of imposing a regular grid of streets, they

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208 Lewis, Kew Gardens, 17.
planned curving streets, a cul-de-sac, dead ends, and general variation in form to flow with the hilly topography. The railroad line, running through the center of the town, which so often divides communities, was instead overcome by a series of three bridges, the main one being the Lefferts Avenue bridge, with shops on either side. This was called the ‘Ponte Vecchio’ Bridge of Kew Gardens because the stores were hung from steel ceiling beams and set over the passing trains; it is the center of the community to this day [Image 9].

In terms of architectural design, most of the commercial buildings were either Tudor Revival or Art Deco, and there was great variety of architectural styles for the houses and the apartment buildings, from Tudor Revival, Dutch Colonial Revival, Georgian Revival, Spanish or Italian Revival, and even Anglo-Japanese. The Mans decided to generate variety in architectural styles with an Arts-and-Crafts sensibility and Beaux-Arts language of craftsmanship to set it apart from the resolutely Victorian Richmond Hill and the neo-Tudor Forest Hills Gardens next door, and to be more welcoming of people of various tastes. Similarly, the Mans wanted to attract people of varying social classes and wealth, which is still reflected in the varying sizes and types of properties, from the grandest houses on very large lots to medium-sized homes on smaller lots, to rowhouses, to apartment buildings for renters and condominiums. Throughout all areas, regardless

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210 For a look at the architecture in Kew Gardens, check out the Kew Gardens Preservation Alliance Instagram page @kewgardensnyc.
211 Lewis, Kew Gardens, 36-39. Kew Gardens is more expensive to live in than Richmond Hill, because it is better served by trains (the LIRR takes 15 minutes to get into Penn Station) and because of higher property values. The most expensive houses regularly sell for anywhere from $1-3 million. Forest Hills Gardens is even more expensive because of its very well-preserved housing stock and private self-regulation.
of building type, the Mans were careful to make this a true garden suburb by planting hundreds of trees and covenanting the same twenty-foot setbacks with verdant and united lawns for visual and neighborly cohesion.213

Before the construction of the Interboro Parkway in 1935 that divided the two neighborhoods, Kew Gardens and Forest Hills Gardens were much more united, sharing in community as evinced through their social journal, The Kew-Forest Life. There exists another remnant of this shared heritage, through the Kew-Forest School, a private school on Union Turnpike where our nation’s current president studied. In the 1920s, Kew Gardens became the choice of residence for dozens of writers, Broadway stars, movie agents, because of its proximity to Manhattan and its village feel. It was home to celebrities such as the celebrated pianists Josef and Rosina Lhevinne, Broadway actress Marjorie Gateson, comedian and actor Will Rogers, Charlie Chaplin’s agent, at least one of the Ziegfeld Follies, author Dorothy Parker, George Gershwin, and Nobel-laureate Ralph Bunche, to name a few.214

After the 1930s, the neighborhood began to change as the Kew Gardens Corporation, which enforced all the covenants, went bankrupt during the Great Depression, as did the Country Club in 1933.215 The Kew Gardens Civic Association (KGCA), which had been formed in 1914 to represent the interests of the homeowners, in particular against the development of apartment houses in the 1920s, became the only community

215 A stable source of funding is always of the utmost importance for private communities, which can become insolvent and go bankrupt if not well managed and without the continual support of homeowners through their dues.
organization; however, it was unable to legally enforce any restrictions as there was only a “gentleman’s agreement” regarding development.\textsuperscript{216} The 1930s also saw the arrival of thousands of Jewish refugees who could not live in nearby Forest Hills Gardens because of their racial deed restrictions. The community continued to thrive, and after the 1970s and 1980s, saw the arrival of thousands of immigrants from Latin America, Asia, and Eastern Europe, making the community incredibly diverse.\textsuperscript{217} This diversity again makes it very difficult for there to be unity in community organization and goals. Furthermore, many community organizations have sprouted up since the 1960s, beginning with the Kew Gardens Improvement Association (KGIA), founded in 1970, which represents the apartment dwellers and has done important work in protecting against overdevelopment and lobbying for improvements.\textsuperscript{218}

In addition to these two groups, there are a plethora of smaller community associations, such as the Kew Gardens Council for Recreation and the Arts, Inc. (which published Barry Lewis’ book), the Kew Gardens Youth Empowerment Program, the Forest Park Barking Lot (which advocates for dog park improvements), my own Kew Gardens Preservation Alliance (advocating for preservation efforts), the Save Kew Gardens Coalition (specifically advocating for the saving of the Lefferts Boulevard Bridge), the


\textsuperscript{218} Much of this information was gathered from an interview I conducted with KGIA founder and president Sylvia Hack, on August 9, 2018. Since the KGCA only allows membership from property owners, there is some resentment by some KGIA members, who feel that the KGCA is elitist and powerful, as they have the ear of the councilperson.
Friends of Maple Grove (representing the historic Victorian cemetery in the neighborhood), the Kew Gardens CSA (Community Supported Agriculture – advocating for a food market), the No Kew Gardens Jail (fighting against a borough jail in the community), among several others. Clearly there is a spirit for community organizing and for being proactive about topics which residents are passionate about; the downside is that there is factionalism and less cohesion than would be ideal.

Public Preservation Issues

For preservation purposes, there is no organization except the Preservation Alliance currently advocating for historic preservation because of a complicated history of preservation advocacy efforts in the community. According to art historian and community resident Barry Lewis, in the 1980s he approached the KGCA suggesting that Kew Gardens look into historic district protection to prevent non-contextual change. The then-president disdainfully replied that “Kew Gardens [didn’t] need that,” presumably because of the gentlemen’s agreements that had perhaps suggested that nothing might ever change.219 However, there was a push for raising awareness in the 1990s, culminating with the publication of Lewis’ book *Kew Gardens: Urban Village in the Big City* (1999) and followed up by a town hall meeting at the community center where the KGCA floated to its members the idea of potentially beginning a nomination to the LPC for historic district status. That meeting in early 2000 was allegedly heavily attended by Orthodox Jews from

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219 This information was gathered from an interview with Barry Lewis on May 29, 2017. The ‘gentlemen’s agreement’ was not an actually legally binding contract, but just a tacit understanding of how things should function and remain in the community. With rising property values and displacement of original homeowners, this agreement failed to exist.
the neighborhood who adamantly opposed historic district designation. Apparently, that was enough to shut down conversation about preservation, since the KGCA felt that it did not have the support of the homeowners.\textsuperscript{220}

An alternate version of the story, as told by several members of the KGCA and the KGIA is that they invited Robert Tierney, then-Landmarks Commissioner, to Kew Gardens to ask for his support in landmarking Kew Gardens. Nothing came of that, so several residents place blame on the LPC for failing to take action in the early 2000s, when in fact no consensus among Kew Gardens residents was ever reached, no research was conducted, and no application was ever formally submitted.\textsuperscript{221} There seems to have been an erroneous belief among too many homeowners and residents that the onus was on the LPC to suddenly landmark Kew Gardens without any political effort from the community, which is simply not how the system works. For instance, after a KGCA meeting in 2008, the newsletter stated that “Efforts have been underway to preserve the Kew Gardens neighborhood by having appropriate areas designated as a Historic District. In his welcoming remarks, Dominick Pistone, President of the Kew Gardens Civic Association, invited guests who support such efforts to write to the Chairman of the Landmarks

\textsuperscript{220} This recounting of the events was corroborated by Simeon Bankoff, director of the Historic Districts Council, in a person conversation in August of 2017. According to him, the KGCA and the HDC were “shouted down” by the homeowners who opposed landmarking.

\textsuperscript{221} According to Murray Berger of the KGCA, “The landmarking idea originated four or five years ago, but didn’t go very far, Berger said. At that time, the Landmarks Preservation Commission was mostly focused on Manhattan, but in recent years it seems to be giving more attention to the rest of the city, and an application may have a better shot, he said.” Rick Archer, “Kew Gardens Residents Consider Landmarking.” \textit{The Queens Chronicle}, February 23, 2006, https://www.qchron.com/editions/central/kew-gardens-residents-consider-landmarking/article_c5490d57-bebc-5320-a299-08f7b1cdeb969.html?mode=story. In my interview with Sylvia Hack of the KGIA, she also said that “nothing came of the meeting with Tierney,” but she does acknowledge that the lack of community consensus on preservation was a major source of the problem.
Preservation Commission, urging him to consider the landmark designation that would ensure that architecture would be preserved, and tear-downs curbed.”

It is not clear what such efforts were, besides writing and sending letters, because no actual historic district nomination has ever been submitted for Kew Gardens. Queens preservation advocate Jeffrey A. Kroessler has a similarly skewed understanding of how landmarking works; in a defense of landmarking for communities such as Kew Gardens, he wrote that the neighborhood never had a governing authority to oversee aesthetic regulations (which is factually incorrect), and “For generations, the quality of the architecture, combined with a common value system among the residents, seemed sufficient to maintain the character of Kew Gardens,” a widely held and frankly ingenuous belief in the goodwill of people. He goes on, writing that

According to association president Sylvia Hack, ‘For over eighty years, the people of Kew Gardens have valued what they had and have. Now it is all too apparent that unless we achieve historic designation and recognition, the next generation may inherit only a shell of what exists.’ Unfortunately, their campaign gained no traction at the Landmarks Preservation Commission (LPC), and Kew Gardens remains vulnerable to market forces and the vagaries of individual taste.

Clearly, there is an erroneous and unfair belief that the traction had to be gained at the LPC, when in fact the community itself had no preservation traction and no consensus.

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Rezoning

The KGCA and the KGIA did try to fight for the neighborhood in other ways, mainly through zoning agreements. The city decided to rezone Kew Gardens in 2005, but through the Community Board and the other organizations, an agreement was reached whereby only a stretch of Queens Boulevard would be upzoned, as would 116th Street, a low-density residential street that now has very large and uncontextual apartment buildings after 14 years. In return, the residential areas were downzoned ostensibly to protect the scale and character; however, that has not prevented new homeowners from tearing down historic houses and building non-contextual “McMansions” in several parts of the neighborhood that are allowed because they conform with zoning regulations. Another effort in recent years was the push to have the city declare Kew Gardens a special zoning district, but that recently failed as well. Indeed, Kew Gardens has lost significant amounts of historic fabric already, so much that the Historic Districts Council has designated it a neighborhood at risk.

Lefferts Boulevard Bridge

The most recent community battle has been to save the historic Lefferts Boulevard Bridge stores, which span the LIRR tracks on either side and as such are owned by the

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The severely deteriorated and historic bridges had already been threatened in 1993, with the MTA proposing the construction of 12-story condominiums on either side of the Boulevard, but a large community-wide advocacy effort back then saved the bridges and stores from demolition.\footnote{Steven Lee Myers, “Kew Gardens Sighs for its Bridge of Stores,” \textit{The New York Times}, January 10, 1993, https://www.nytimes.com/1993/01/10/nyregion/kew-gardens-sighs-for-its-bridge-of-stores.html.} In an almost identical scenario, in 2017 the MTA did not renew the management company’s lease, and said that the bridges were beyond repair and could be torn down, drawing the ire of many residents who criticized the MTA and the management company’s decades-long dereliction. Ultimately, through an enormous advocacy campaign wherein all major elected representatives were involved, the MTA declared in 2018 that the bridges would be repaired with the councilperson’s $1 million that had originally been slated for a feasibility study.\footnote{Jason Cohen, “MTA is Considering Demolishing Lefferts Blvd Bridge, Businesses Fight for Their Future,” \textit{Forest Hills Post}, June 1, 2017, https://foresthillspost.com/mta-is-consider-demolishing-lefferts-blvd-bridge-businesses-fight-for-their-future; “July 19, 2019 Update,” \textit{The Save Kew Gardens Coalition}, July 19, 2018, https://www.savekewgardens.com/; Also see Sarah Maslin Nir, “A Bridge, the Rickety Heart of Kew Gardens, Gets a Reprieve,” \textit{The New York Times}, July 12, 2018, https://www.nytimes.com/2018/07/12/nyregion/queens-kew-gardens-bridge-repair.html.} The reason the historic bridge inspires such outpouring of support is because the two store bridges stand at the very heart of the community, being among the earliest structures built to accommodate the railway
and give the community a commercial center that is still the center of community activity. When iconic structures are threatened, communities like Kew Gardens place their internal differences aside and move quickly to save them for posterity. These are valuable lessons on the strength of advocacy work, although it is disconcerting that such outpouring of support only really occurs when it is almost too late.

*Kew Gardens Management Trust*

As member of the Save Kew Gardens Coalition, I am helping draft a nomination for these store bridges to add them to the National Register of Historic Places.²³⁰ The Coalition board members were angered to discover in 2019 that the MTA was thinking of renewing the Zee N Kay’s lease, which prompted calls for alternative solutions. I proposed that the community itself manage the bridge and the leases, since we still cannot directly own the bridge, as it spans over MTA property. This is where the applicability of communal property ownership (or in this case management) and holding property in trust for beneficiaries – the community itself – relates from the previous section. A few board members picked up the idea and we have only recently founded the Kew Gardens Management Trust (KGMT), an innovative public-private partnership approach to non-profit property management. Lawyers who we consulted told us that they had never before heard of a non-profit commercial property management organization, so in this case this would be a significant first.²³¹ As of today, the KGMT has only just been proposed to the

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²³⁰ I have suggested submitting a local landmark designation, which would protect the bridge, but I have been met with opposition on that front.
²³¹ Nonprofits that manage property usually manage housing to make it affordable, not commercial buildings in this proposed manner.
MTA as a management firm alternative to Zee N Kay or any other master leaseholder that might apply, and we are still waiting to hear back from the MTA. As a non-profit, the KGMT would take all available rent monies (the MTA gets 30% of the shops’ rent) and completely reinvest them into the bridge, making thorough repairs to the entire structures, ensuring the stability of the stores and the storekeepers for decades to come. In contrast, Zee N Kay conducted almost no repairs for years because of a great deal of conflict with the MTA, and in addition simply pocketed the rent collected from the stores. Some storekeepers support this proposal because it would mean the almost total reinvestment of their rental payments to the properties’ improvement and perhaps the lowering of some of their rents. Other storekeepers are skeptical of any new leaseholder, including a community-led nonprofit – they would prefer to deal with the MTA directly and not through a middle-man. These are some of the recent obstacles that the Coalition has found in these attempts at saving the bridges.

Critiques of the LPC

Despite these realities for communities like Kew Gardens where residents have not reached a consensus on preservation goals, there are still legitimate problems with the LPC and the general pro-development culture in New York City. Dozens of articles reflect

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232 Zee N Kay alleges that under their own leaseholder contract with the MTA, it was not their responsibility to fix any damages, something that the MTA also alleges. As a result, no work was done for decades. The situation was so dire that there were holes in some of the stores, and storekeepers could see trains passing below them – the only solution storeowners had was doing the repairs themselves as they could, for example by placing plywood to cover up said holes. See for example Benjamin Fang, “Kew Gardens Merchants Demand Landlord be Removed,” Forest Hills/Rego Park Times, September 27, 2016, http://www.foresthillstimes.com/view/full_story/27278830/article-Kew-Gardens-merchants-demand-landlord-be-removed?instance=home_news_bullets.
concerns and frustrations that preservationists have with the LPC. Since the Bloomberg administration, preservationists have generally felt that the LPC has been derelict in its duty to protect New York City’s built heritage by refusing to consider buildings or historic districts (which have filed nomination applications), and by changing the rules of landmarking and regulation. Simeon Bankoff, executive director of the Historic Districts Council, a citywide advocacy group, believes that the “‘commission is laboring under some fairly hostile environmental conditions and that doesn’t make it easy on them… complicated by an active and rapacious real estate development market which reflexively [bridles] at regulation.’”

Similarly, Andrew Berman, executive director of the Greenwich Village Society for Historic Preservation stated that “‘the whole point of historic district/landmark designations is to preserve and protect the special historic character of an area… when large, out-of-context new buildings and additions are allowed in such areas, that special character and those special qualities are diminished.’”

In recent years, the preservation groups felt that the LPC was becoming too permissive in the allegedly non-contextual alterations that it allowed on historic properties in terms of size, scale, and design. Preservationists believe that this pro-development attitude came from Mayor De Blasio himself, who has received millions in campaign contributions from the Real Estate Board of New York.

234 Ibid.
When an application for an alteration of a historic property comes to the LPC, if it is small-scale, the staff will usually deal with it privately; for larger or more significant alterations, it comes before the Commission and the public. In the past, if an alteration was not approved by the Commission, the developer had to fix the plans and resubmit. Nowadays, some developers will resubmit the same application with very few changes and receive a notice of “no action” from the LPC, which would have not occurred before; instead this term is now understood by the real estate industry that the plans have been tacitly approved. The concern is that quiet approval of significant alterations will create a precedent for developers to continue. As an anonymous preservationists reflected, “‘The LPC won’t designate buildings because they are too altered, but will allow alterations to buildings that are designated.’”

In 2014, the LPC underwent a thorough internal review of their backlog of properties that had been waiting for years to receive a hearing. While preservation advocates praised this because it meant that properties were finally getting a hearing (some after 40 years of being ‘calendared’), there was also intense criticism from the preservation community for the way that the LPC handled the situation. The Commission wanted to quietly remove two historic districts and 95 properties from consideration for nomination without any public input whatsoever, which greatly alarmed preservationists. Although they argued that by removing the sites from the backlog, they allowed communities to re-nominate them, the lack of transparency did not help the LPC’s public relations, and the


236 Hubert, “Shaken by Recent Decisions.”
move was criticized as bad public policy. Ultimately, after backlash from the preservation community, the LPC looked through all the properties and narrowed down the priorities, and only 26 of the sites were landmarked. During this process, the mayor signed a new law which allows the LPC only one year to landmark or pass up calendared sites, and two years to decide on historic districts. If those limits ran out, the site must be de-calendared or removed from consideration, and the nomination process restarted by the nominator. The LPC supported this measure because it would streamline the process, while preservationists claimed it would adversely hurt advocacy groups by pressuring their research and hurt the LPC staff as well.

Furthermore, in 2018, the LPC overhauled its internal rules relating to the nomination process and applications for alterations of historic properties, alleging that it would streamline the process and make it more transparent by letting staff handle most applications for alterations. Preservationists were again up in arms because one of the most significant rule changes called for less public oversight, thereby limiting the opportunity for providing testimony. After the backlash, the LPC amended its rule changes to focus

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on rules regarding materiality and lesser alterations, and this iteration passed unanimously last year.241

Among the most thorough critiques of the LPC’s current work has been from the preservation advocacy group The Society for the Architecture of the City, which in 2017 privately published a book, *Undoing Historic Districts*, outlining the many ways the LPC has forgotten its mission. For instance, in recent years the LPC has begun listing more and more properties in new historic districts as ‘non-contributing’ structures that have ‘no style,’ which essentially makes it easier to make a case later on for their alteration or even demolition.242 The Society takes umbrage and sees a serious problem with how the LPC has begun relying on new, subjective yet legally-binding terms and applying them in limiting ways that bode well for developers and badly for preservationists. Such terms include ‘non-contributing,’ ‘style: none,’ ‘period of significance,’ and, as we saw in Richmond Hill, the subjective ‘sense of place.’243 In a broad sense, critics believe that the LPC has put aside its mission to protect the built heritage of New York City in favor of aiding development and of streamlining internal administrative and managerial systems.244

Although Kew Gardens has never formally applied for historic district status, and the LPC is not to blame for that situation, there have been many communities and buildings that have been nominated and have either sat in a backlog for years and even decades or

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243 Ibid., 35-40.
244 Ibid., 61-62.
have been repeatedly denied, as in the case of Richmond Hill. The neighborhood of Sunset Park in Brooklyn has been a National Register Historic District for 30 years and submitted a local historic district nomination in 2013 with intense community support for preservation; they only recently heard back from the LPC that four smaller districts are being calendared, after six years of silence and loss of historic fabric. Therefore, while the job that the LPC does is truly commendable, and does protect thousands of historic properties throughout New York City, in many instances preservation advocates and communities feel frustrated at the slow bureaucratic and political situation that does not allow them to save historic structures in time. Preservationists throughout New York City would like the city to better fund the LPC so that staff members could more adequately research and process nominations and applications for alterations. This would go a long way to supporting a municipal preservation agenda and convincing New Yorkers that the LPC is fighting for their heritage, which perhaps it cannot adequately do in its underfunded state that results in slow results. Until these improvements in the public arena come to fruition, it is important to explore private preservation tools that are available to property owners and communities.

Feasibility of Proposals and Conclusion

As we have explored in this thesis, alternatives to public preservation solutions do exist and can expanded upon through private legal methods and common land ownership.

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Inspired by Howard and George’s visions and by the real-life example of Forest Hills Gardens, residents and communities can use private preservation tools to protect their heritage and their communities. While it is indeed difficult because of the high transaction costs, namely the political, social, and economic tasks of convincing people of these radical proposals, I have seen several steps in favor of private preservation in these two case studies back home.\(^{247}\)

Faced with the reality of preservation in New York City, we can address the feasibility of proposing private preservation solutions, namely in these two case studies in Queens. In Richmond Hill, we have the case of homeowners who have actively appealed to the LPC for decades to protect their Victorian community to no avail. It was not until a powerful ally in the form of the new councilman funded a very thorough study that Richmond Hill received noteworthy recognition as a National Register Historic District. However, the community is still seeking local designation to legally protect the properties. In speaking to some of the homeowners there over the years, I have proposed the idea of self-regulation through deed restrictions, real covenants, or easements. Some homeowners have been willing to consider these solutions, as development continues threatening the built heritage, but others are more uneasy and are understandably concerned with losing their property values. It is easier to garner support in Richmond Hill because the Victorian section represents a tight-knit community of like-minded preservation advocates, but true private preservation could only come through widespread and united homeowner support for private self-regulation through covenants and easements.

\(^{247}\) MacCallum, “The Case for Land Lease versus Subdivision,” 373.
In Kew Gardens, homeowners are less open to landmarking their properties because of their higher return values, and because of cultural biases toward governmental regulation. The community has historically remained divided on the issue of historic district status, as I have learned through my own advocacy work. The task of educating people about the merits of preservation and the value of saving our built heritage is a long and difficult one, and one which I am working on through my own Alliance. However, because of the Lefferts Bridge situation, some community activists have grown tired of fearing the loss of irreplaceable heritage that sits at the core of the community, and are very open to establishing the nonprofit management trust that can hopefully take charge of the bridge stores and commit to their substantial repair. In this way, this represents one step forward towards the vision of community ownership of heritage assets; perhaps one day residents will be able to pool their resources together to collectively buy shares and properties in the community and make a small profit from it.

Together, Richmond Hill and Kew Gardens tell a narrative of public preservation advocacy efforts to protect property that have not worked out. These two historic, garden suburb communities sit in close proximity to Forest Hills Gardens, the perfectly preserved, garden city-inspired, privately regulated garden suburb. Because of Richmond Hill’s more tight-knit and pro-preservation community of homeowners, there is greater potential for the feasibility of preservation through covenants regulated among homeowners. In Kew Gardens, there is more potential for communal land management with the Lefferts Boulevard Bridge, using the legacy of communal stake in land that Howard and George proposed. Despite any hope for private preservation, there are significant social, political, economic, and cultural transaction costs to overcome, including the systemic preference
for private land ownership and the desire to protect high property values. Community unity
is of the utmost importance, as are continued education and advocacy efforts to teach
residents of their shared heritage and raise awareness of the importance of preservation,
and of the preservation solutions that exist, both public and private.
Section 6 – Conclusion

When Ebenezer Howard published his *Garden Cities of To-Morrow*, audiences at first were skeptical of the work, but it was soon widely read and enthusiastically received, allowing him to go through with the creation of the first garden city at Letchworth within the decade. His vision of radical social transformation through a new system of land tenure, however, proved too revolutionary for most garden city-inspired communities, and throughout the world only the shell and not the substance of his vision remains.\(^{248}\) Despite this, elements of his ideas for this private socialism through entrepreneurial cooperation continued to live on and multiply in the form of private communities and land trusts.\(^{249}\)

Although private legal land ownership tools and ideas of communal ownership and management of land have existed before and apart from Howard’s vision, the heritage of planned garden communities such as Richmond Hill and Kew Gardens makes his legacy all the more relevant. As communities struggle to adapt to the realities of development, displacement, and lost heritage and community, we can look at Howard’s vision for a radical approach to land tenure and management that helps us envision novel ways of preserving heritage and community through the private realms.

This thesis aims to join the growing conversation around the search for new ways of thinking about the ownership and management of property, not only for the benefit of people in their fight against income inequality and displacement but also through the narrower lens of the preservation of built and intangible heritage.\(^{250}\) There is already a

\(^{248}\) Hall, *Cities of Tomorrow*, 141.


growing trend toward the privatization of municipal services throughout the nation, most salient in the proliferation of private governments for residential development and corporations for commercial growth.²⁵¹ Several real or perceived failures on the part of municipalities and their agencies to deliver results to communities are a source of inspiration for residents to look at private, extra-governmental cooperative solutions. This was evident in both Richmond Hill and Kew Gardens, where frustrations with the LPC and the MTA through the decades have led residents to look at new ways of thinking about property restrictions and management tools outside the government.

The field of historic preservation has since its beginnings been very reactionary to the loss of heritage. Part of the benefit with using private legal tools and new forms of land ownership and management is that it gives preservationists the power to be proactive and to take control of the situations that threaten communities’ fabric and heritage. The movement toward privatization in the United States is a controversial one because it is part of a larger conversation about the appropriate size, role, and interventions of government; for the use of private governments and new forms of land tenure as proposed here, support can come from both sides of the political spectrum. From a conservative or libertarian perspective, a call to privatization is encouraged because it limits the role of government and encourages private associations; from a liberal or progressive perspective, the radical idea of communal property ownership is championed as a private socialist endeavor that serves the people’s common interests.

In such a way, this was the genius of Howard’s radical proposal – it sought to balance different interests from the social, economic, and political spectrums. In the same way, by reappropriating his ideas to modern-day uses, we can try to mitigate the harm being inflicted upon people and communities by income inequality, displacement, and heritage loss. Scholars throughout the political spectrum agree that something must be done to fix crises such as the affordable housing crisis, which is also tied to income inequality and lack of agency. As social justice advocate Chuck Matthei wrote, now is the time “to move from a policy of subsidy to one of equity,” by helping individuals and communities rise up through direct ownership and acquire direct profits from the ownership and management of property and land.252

By looking at how private contractual agreements can be used in existing communities that desire internal regulatory protections, this thesis proposed that like-minded neighbors join forces to self-regulate through the law of real covenants and/or easements. Public regulation may simply not be the solution for all neighborhoods that want to stop or control change, and internal private management of heritage resources may be the best solution.253 Inspired by Howard’s vision of communal land ownership, we explored a host of tools available to communities under the umbrella land trust system that use single-ownership, land-lease and limited equity cooperatives structures to remove speculation and preserve communities. The use of REITs in a preservation, social-impact framework has potential as well, as it gives shareholders a reason to invest in heritage and a desire to maintain it.

253 Nelson, Private Neighborhoods, 176-177, 309.
These proposals are not without significant drawbacks, and I acknowledge that high transaction costs are notable obstacles to real reform. These costs come in the form of social, economic, and political hurdles, on both a personal or local and broader or societal level. Convincing property owners to forget their property values for the greater communal good is a difficult task, although as shown, there have been some examples of residents and communities that donate easements for the conservation of heritage and land. In addition, there are educational and advocacy efforts that we as preservation advocates must engage in to inform residents of how preservation in the public and private realms functions. Educating potential stakeholders on the value of buying shares in heritage or non-heritage properties is another notable obstacle, but crowdfunding precedents have shown promise for local investment alternatives.

There are valid arguments to be made in favor of fixing the areas of government that we are unsatisfied with, and of investing in the public realm through increased funding in people and resources. However, the proposal for private preservation solutions is not a call for substituting the public realm’s important and historic job, but for serving as an additional tool that preservation and communities can use. The field of preservation stands at an important point in time, with calls to be more inclusive of more people, stories, and ideas. By learning from the past and incorporating new private solutions for the future, we can ensure that preservation helps communities manage change through time for the greater good.
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Appendix of Images

Image 1 Howard's Garden City vision as a diagram, 1902. Source: Research Gate.
The three communities in Queens, with Kew Gardens highlighted at center, from Google Maps.
Image 3 View of a house in Forest Hills Gardens, via Creative Commons.

Image 4 Gramercy Square in New York, via Creative Commons.
Image 5 Louisburg Square in Boston, circa 1920s, via Creative Commons.

Image 6 Bacatá Tower in 2015. Bogotá, Colombia, via Creative Commons.
Image 7 1873 Beers Map of Richmond Hill and golf course, courtesy of Richmond Hill Historical Society.
Image 8 Map of Kew Gardens circa 1920 showing where development was prohibited, courtesy of the KGCA.
Image 9 "Ponte Vecchio" bridges and stores, circa 1940, courtesy of KGCA.
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