

Land Covenants in Auckland and Their Effect on Urban Development

Craig Fredrickson

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Executive summary

A covenant is a contract or promise between parties that binds them to obligations in a contract for a fixed period of time, or in perpetuity. Covenants ‘run with the land’, meaning they bind owners of the land to a covenant’s condition. In recent decades they have become a common method for developers to control how future owners of land develop and maintain land in New Zealand (Quality Planning, 2013; New Zealand Productivity Commission, 2015). As such, covenants create a private planning regime that is enforceable in the civil courts (Mead & Ryan, 2012; Toomey, 2017).

Strong population growth in Auckland is expected to remain high in coming years, putting pressure on housing supply in the region. Council’s high-level strategy, The Auckland Plan, and the Auckland Unitary Plan seek to use both urban intensification and expansion to supply new dwellings to accommodate the increasing population. But will property level constraints such as land covenants affect the city’s ability to grow as and where is needed?

Land covenants in New Zealand are commonly used in modern residential subdivisions, which are the focus of this research. They are used as a mechanism to control land use and development, and to create and maintain neighbourhood amenity. There has been little research on land covenants on residential land in New Zealand, and this report seeks to understand their numbers, location, and nature in Auckland. The effects of land covenants include acting as a barrier to development and redevelopment, increasing house prices and decreasing affordability, and being used to stifle competition, as a method of social exclusion, and as a form of land control. While covenants present a number of disbenefits to some parties, they create benefits to others, including increased property value, and maintained or increased amenity. Land covenants are also used to protect heritage, and for conservation purposes.

Land covenants are spread across the Auckland region, where there are 151,170 land covenants on 96,261 titles. The land area of titles with a covenant covers 60,757 hectares or 12 per cent of Auckland’s land area. Residential zones contain 83,068 titles that are affected by land covenants, or 19 per cent of the total number of titles in residential zones; these titles cover an area of 8685 hectares, 23 per cent of the total area of residential zones. Residential zoned titles with land covenants are concentrated in greenfield suburbs that have been developed over the last few decades. Analysis shows the proportion of titles with land covenants in residential zones has been increasing over time. Less than 10 per cent of titles issued in the early 1980s in current residential zones had a land covenant on them; for titles issued in 2017 it is over 50 per cent. Furthermore, over three-quarters (86 per cent) of the covenants in residential zones are on titles that have been created in the last 30 years. Properties in residential zones with a land covenant have commercially

feasible capacity for 13,243 additional dwellings, or 12 per cent of the total commercially feasible capacity for all residential zones.

Centre zones contain 2529 titles affected by covenants; they cover a land area of 336 hectares, or 23 per cent of the total combined area of centre zones. In the Future Urban zone, 897 titles have covenants or 26 per cent of the total titles in the zone. The land area of the titles with covenants in this zone is 10,674 hectares, or 26 per cent of the total land area of the zone. Over 5800 titles in rural zones have a land covenant or 19 per cent of the total tiles in these zones. The Countryside Living zone has the highest number (2507) and the highest proportion (34 per cent) of titles with land covenants of any of the rural zones.

Analysis of the data by local board area shows that Howick Local Board has the largest number of titles with land covenants (18,261). Other local boards with high numbers are Hibiscus and Bays (11,746) and Upper Harbour (11,414). Upper Harbour Local Board has the highest proportion of titles with covenants with 46 per cent. Auckland's two rural local boards, Rodney and Franklin, each have just under 9000 titles with covenants, accounting for 29 per cent and 28 per cent of the total number of titles in each respectively.

Covenants present a number of barriers to development and redevelopment in an urban context. In Auckland the presence of covenants in residential areas earmarked for intensification, or future urban expansion, will have an effect on the ability of these areas to change. While land covenants will have an effect on urban development in the future, they can also have a number of benefits such as providing assurance to prospective buyers on the quality of development and neighbourhood amenity. Covenants may be a barrier to urban development, but there are also a number of solutions that could be employed to overcome them. These include the use of time limits or sunset clauses on new covenants, the introduction of an easy process for those with benefits from covenants to agree to have them modified or removed, and legislative change to allow for public planning documents to override covenants – as is done in New South Wales.

The contents and effects of land covenants are difficult to understand, given the way information about them is stored by Land Information New Zealand, and further research on the topic may be required to fully comprehend their present and future impacts.

Figure: Titles with land covenants in Auckland

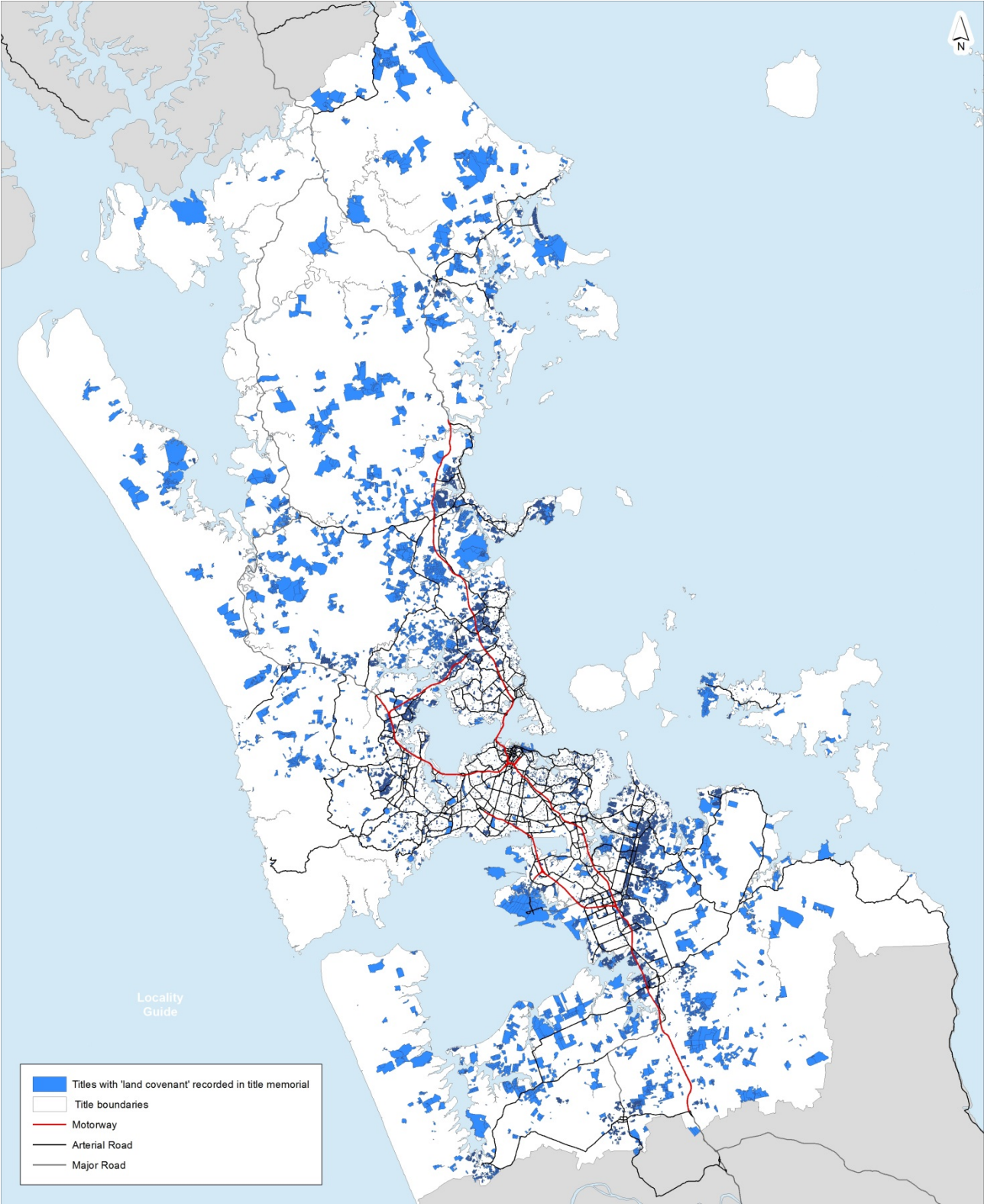


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1.0 Introduction

Land covenants are a legal mechanism that can be used to control land, what it can be used for, and can stipulate the types of development that can occur on it. Covenants placed on land either restrict or require a land owner to do or not do something, depending on the terms of the covenant deed. In New Zealand over the last few decades, land covenants have become a popular way for developers to control land use, building style, and other aspects of neighbourhoods, as a way to increase or maintain perceived value (Mead & Ryan, 2012; Rikihana Smallman, 2017; Land Information New Zealand, n.d.). Land covenants have also been a popular mechanism in New Zealand to protect for conservation land which is privately owned, through the Queen Elizabeth the Second National Trust (QEII Trust) (Saunders, 1996), through the Reserves Act 1977, or by consent notice under the Resource Management Act 1991 (RMA).

Land covenants play an important but often hidden role in our planning system, with their abundance and impacts little understood. In New Zealand there is little evidence to understand how land covenants, and other barriers, slow down the delivery of housing to the market (Johnson, Howden-Chapman, & Eaqub, 2018). Land covenants in effect are private planning rules that are enforceable through civil courts (Mead & Ryan, 2012), and at times do not match, or are counter to, both strategic plans and the district planning rules.

Auckland has had strong population growth in the last decade, with it increasing by 180,700 people to a total of 1,657,200, between 2008 and 2017 (Statistics New Zealand, 2017). The city's population growth is also expected to remain strong into the future, with the region projected to accommodate 60 per cent of the country's population growth to 2043 (Ross, 2015). Rather than keeping pace with population growth, dwelling growth in the city has not been as strong, creating what is being widely called a "dwelling shortfall" (New Zealand Government & Auckland Council, 2013; Alexander, 2015). In order to overcome the shortfall, and increase dwelling growth, Auckland Council's spatial plan (known as The Auckland Plan), set out a development strategy that built on legacy regional planning approaches that were based on the compact city model. The plan sought to accommodate 400,000 new residential dwellings, or between 60-70 per cent of projected dwelling growth to 2040 in the existing urban area (as at 2012) (Auckland Council, 2012). A new updated version of the spatial plan (still in draft form, and known as Auckland Plan 2050) continues the strategy of both urban intensification and expansion (Auckland Council, 2018). Given the importance of both the intensification and the expansion of Auckland's urban area to increase dwelling numbers, will constraints at the individual

property level, such as land covenants, affect the city's ability to grow as and where is needed?

New planning rules enabled by the Auckland Unitary Plan came into effect over most of the city in November 2016. The plan indicated that many areas that are currently rural or semi-rural on the urban fringe, often typified by large lot residential and countryside living will be the site of future urban development. In addition, more permissive rules increasing dwelling densities across most of the suburban area were also introduced; this will likely see dwelling intensification through infill development, redevelopment, addition of minor household units (granny flats), and internal subdivision of dwellings. But will the presence of land covenants that restrict owners on what they can do with their properties affect the ability of the city to develop as planned?

1.1 Scope of this report

The analysis undertaken and reported in this study explores the location and quantity of property affected by land covenants across the entire Auckland region. The focus of comment and discussion in this report is on how covenants may affect urban development, redevelopment, expansion, and change, and understanding how the possible future effects of covenants may impact on the city's long-term growth strategy and the planning rules.

2.0 Background

2.1 What is a land covenant?

A covenant is a contract or promise between parties that bind them to obligations in a contract for a fixed period of time, or in perpetuity. Covenants, or private deed restrictions, have featured in England and Wales land and property law since the 16th century (Taylor & Rowley, 2017), but their modern origins began in England in 1848 with the case of *Tulk v Moxhay* (1848). Many of New Zealand's laws are derived or have evolved from statutes enacted in the United Kingdom, including laws around covenants. Covenants 'run with the land', meaning they bind owners of the land to a covenant's conditions, often in perpetuity. In recent decades they have become a common method for developers to control how future owners of land develop and maintain land in New Zealand (Quality Planning, 2013; New Zealand Productivity Commission, 2015). As such, covenants create a private planning regime that is enforceable in the civil courts (Mead & Ryan, 2012; Toomey, 2017).

In the context of this research, land covenants refer to those which affect freehold land. Covenants relating to leases and leasehold land form a distinct area of land law and as such are not addressed in this research.

Land covenants that require a land owner to do something are positive covenants, and those that prohibit or prevent an owner from doing something are known as restrictive covenants. In New Zealand, land covenants may be private agreements between parties, or imposed by councils as conditions of the land use and subdivision consenting process (Mead & Ryan, 2012; Quality Planning, 2013). Official records of covenants and their details are documented against a title in Land Information New Zealand's (LINZ) computer register.

Land covenants between two or more parties have a grantor and a grantee (also known as a covenantor). The grantor of the covenant (also called the covenantor) agrees to have a burden on their land, to the benefit of another piece of land. The grantee (also known as a covenantee) agrees that their land will have the benefit associated with the covenant. Land that has the burden of a covenant is known as the servient land, while land that has the benefit of the covenant is known as the dominant land. Under the provisions of the Property Law Act 2007, land covenants give the grantee a legal interest in the land (Property Law Act 2007, 2007).

Mutual land covenant schemes impose restrictions or control land use or building styles, with the scheme allowing each lot to be both dominant and servient land for the covenants in relation to all the other lots in the scheme (Land Information New Zealand, n.d.). Mead and Ryan (2012) note that in New Zealand it is common for

large residential subdivisions to have a building scheme, which LINZ refers to as 'mutual land covenant scheme'. Schemes place restrictions on the use of the land, and aim to maintain the quality of the neighbourhood; any owner of land within the scheme may enforce against another any of the covenants made under the scheme (McMorland *et al.*, 2017).

Covenants can also be applied on a property as a condition of resource consent under the Resource Management Act 1991.

Covenants on land can be created through three mechanisms enabled by the Land Transfer Act 1952¹. Covenants are added to a piece of land's Certificate of Title through the creation of an easement instrument. Section 90 of the Act outlines that this can be done in one of three ways (Land Transfer Act 1952, 1952). The first is through a transfer instrument. This is when a covenant is created when the ownership of land is transferred from one party to another. The second is through an easement instrument. This is when a covenant is created and is registered on the title using an easement instrument. Thirdly, covenants can be created through a deposited plan. This is when a new property is created through a subdivision and the plans are registered, with any covenants, and new Certificates of Title are issued.

Cross lease titles, the terms of their leases, and related covenants, are registered in an easement instrument just like any other other covenant. While covenants relating to cross leases are land covenants, due to their unique nature and complex issues (Fredrickson, 2017) they have been excluded from analysis with other land covenants in this research,

While land covenants can prevent land owners from undertaking certain activities, they are not permitted, or can be voided, if they breach the provisions of legislation, specifically the Human Rights Act 1993, the Residential Tenancies Act 1986, the Property Law Act 2007, or the Commerce Act 1986 (Hinde, McMorland, & Sim, 2018).

Land covenants can be revoked or modified under Section 307 of the Property Law Act 2007, and must be executed by the registered proprietors of the affected dominant and servient titles (Land Information New Zealand, n.d.). The High Court also has jurisdiction to modify or extinguish land covenants under Section 3017 of the Act, when an application is made to the Court by someone bound or burdened by a positive or restrictive covenant (Property Law Act 2007).

¹ Aspects of the Act relating to the creation of easement instruments was amended by the Land Transfer (Computer Registers and Electronic Lodgement) Amendment Act 2002

2.2 Use of land covenants in New Zealand

The most common uses for land covenants in New Zealand are those associated with residential subdivisions, the focus of this research. Covenants are also used to protect heritage, and for conservation purposes. Covenants can also be used for water and soil, forest research areas, and wahi tapu, all in respect of Crown forestry licences, and for purposes under the Resource Management Act 1991 in connection with resource consents and subdivisions (Hinde *et al.*, 2018).

2.2.1 Residential subdivision

There is little academic literature on the use of the land covenants on residential land in New Zealand, but there has been much coverage in local media on the subject in recent years, and comment by the New Zealand Productivity Commission in their report on using land for housing published in 2015. For Auckland there has been no research on land covenants to date. Hattam and Raven (2011) undertook research on the extent of the use of land use covenants in the Rolleston area in Canterbury, and found that 75 per cent of new residential properties had a restrictive covenant requiring a minimum dwelling size of at least 160 square metres, with 180 square metres being a typical requirement. Also observed was that only three per cent of the properties in the area created in Rolleston since 1990 had no covenants specifying the minimum size of dwellings that could be built (Hattam & Raven, 2011).

Examples of the restrictions used in covenants in new residential subdivisions include subdivision controls, stipulations on the size of dwellings, their form, and their construction material, and directions on landscaping and fencing. The following part of this report presents a synthesis of restrictions observed, from a variety of sources, including (New Zealand Productivity Commission, 2015), reports in online media (for example, Dally, 2013; Simpson, 2016; Rikihana Smallman, 2017), analysis supplied by the Ministry of Business, Innovation and Employment (S. Jacobs, personal communication, March 1, 2018), developer/ development websites (for example, Addison, 2010; Beach Grove, 2013; Silverwood Corporation, 2014), and from personal inspection of covenant schedules on Certificates of Title. While this summary is not extensive, it provides some insight into the types of restriction that have been used.

Subdivision and land use

- No further subdivision allowed, or no further subdivision without the consent of the developer.
- Developer approval of house plans required before construction (although one case cited noted that this clause expired a few years after the subdivision went on sale).
- No commercial activity in residential properties.
- No state housing is allowed.

Dwellings and construction

- Minimum floor area of the dwelling; some include the floor area of a required garage, others do not.
- Time limits on the length of the construction period, for example the exterior completed within six months from the start of work, and the interior completed within 12 months.
- Conditions that the dwelling may only be occupied as a residence, once a Code Compliance Certificate has been issued.
- Requirement for the completed dwelling to be of at least a minimum value.
- Restrictions on look, shape, and form. This includes no dwelling should have the same plan, building shape or use the same materials as any other within 250 metres of the land, only single level dwellings permitted, or in another case have a minimum of two levels. No bright or vibrant colours can be used on dwellings. Many covenants have a requirement for a garage, and for it to be attached to the dwelling.
- Controls on the types of construction materials that can be used, including the prohibition of recycled or reused materials. Some include rules on the types of cladding and roofing to be used e.g. roofing can only be slate, tile or a pre-coloured steel.
- The requirement to ensure regular maintenance to dwellings and to ensure they look neat and tidy.
- No accessory dwellings (also called minor household units or granny flats) are permitted.
- No prefabricated houses, or relocatable houses; in some cases they were permitted, but only with developer approval.

- No structures other than dwellings are to be built on the land; this includes shed, huts, or carports. Storing of caravans is also prohibited.
- If a dwelling is damaged or destroyed, any rebuilt dwelling must be to substantially the same specifications, be materially the same in look, and use materials not unlike the original.

Amenity

- Rules on landscaping and fencing, including landscaping plan must be approved by the developer, minimum and maximum number of trees allowed in the front yard, along with minimum and maximum heights of the trees. Also, for fencing, restrictions on the location (some ban fences in front yards), heights, and types of materials (for example, no corrugated iron or fibrolite) that can be used. In some cases no garden sheds permitted, or restrictions, such as they cannot be seen from the road, or from a neighbouring property.
- Clotheslines are only permitted if they cannot be seen from the road.
- Restrictions on the size and location of aerials/antennae and satellite dishes, including rules stating that they cannot be visible from the street.
- Limitation on the size of letterboxes, including the types of material that can be used.
- Signs and advertising are banned, except for signs used to market the property for sale (size limits may apply). 'For rent' signs are forbidden.
- Occupants of houses are not allowed to park caravans, boats, trailers, trucks, commercial vehicles or vans. One stated that owners are not permitted to park on the street, ever. Also vehicles that are in a poor state of repair, damaged, used for agriculture, or heavy, are prohibited.
- Requirement to remove graffiti within 48 hours of it being carried out.
- No outdoor furniture of any kind in the front yard.

Other

- Owners won't permit noise which might be found to be offensive or a nuisance to others.
- Owners are not permitted to object or impede to any future plans of the subdivision's developer.
- Restrictions on animals, including a ban on cats, and animal that may cause nuisance or annoyance, and a ban on certain dog breeds.

- Restriction on utility operators that can be used, one covenant viewed only permitted the use of Telecom New Zealand as the telephone provider.

Enforcement²

- Often covenants include fines for non-compliance, such as \$500 per day of breach, a one off penalty of at least \$20,000, or a penalty of 25 per cent of the dwelling's value.
- Permission for the developer to enter the land with 48 hours' notice to monitor compliance with the covenant.

An example of a schedule of covenants for a residential subdivision in Auckland can be found in Appendix A.

The passing of the Property Law Act in 2007 meant that both positive and negative covenants could apply to land (Hinde *et al.*, 2018). Prior to this, all covenants needed to be expressed in negative terms, even if they required the owner of the land to do something (Norris Ward McKinnon, 2011). In most other jurisdictions only restrictive (negative) covenants are permitted.

2.2.2 Heritage

Covenants can also be used to protect heritage, under the Reserves Act 1977. The Act allows for private land owners to protect private land that “possesses such qualities of natural, scientific, scenic, historic, cultural, archaeological, geological, or other interest that its protection is desirable” (Reserves Act 1977, p. 121). Such covenants are included in the Christchurch City Council's Heritage Conservation Policy, which states that the council will use them as a mechanism to “protect buildings, places and objects of heritage value” (Christchurch City Council, 2007). The Heritage New Zealand Pouhere Taonga Act 2014 also includes specific provisions for heritage covenants as a mechanism to protect historic places, such as private homes and other buildings, archaeological sites, and sites of significance to Maori (Heritage New Zealand Pouhere Taonga, n.d.).

² A number of the covenants around enforcement are designed to be applied during the construction period and would be enforced by the subdivision developers, but others would require enforcement by owners of dominant land under a covenant, or other land owners in a mutual covenant scheme. All of these would need to be done through an application to the Court.

2.2.3 Conservation

Given their widespread use in New Zealand, land covenants for conservation should also be mentioned. Land covenants for conservation include those for open space, conservation purposes, to preserve the natural environment, for heritage, sustainable management, and in relation to Crown forestry licences for protection of sites that have archaeological, historical, spiritual, emotional, or cultural significance, water and soil, forest research areas and wahi tapu (Hinde *et al.*, 2018). Areas of private land, deemed to “preserve the natural environment, or landscape amenity, or wildlife or freshwater-life or marine-life habitat, or historical value” can be covenanted for conservation purposes under section 77 of the Reserves Act (Reserves Act 1977, p. 122).

The most widely known covenants for conservation in New Zealand are those related to Queen Elizabeth II National Trust, known colloquially as QEII covenants. The QEII Open Space Covenant scheme, sees QEII partner with land owners to voluntarily protect land and water bodies that are of “aesthetic, cultural, recreational, scenic, scientific or social interest or value” (Queen Elizabeth II National Trust, 2011). QEII covenants are put in place by land owners who want to help protect areas of their property that they and the QEII trust consider of ‘value’. While owners often covenant the land for selfless reasons to protect areas, there are also a number of benefits. These include the QEII Trust advising property owners on the management of the land, providing monitoring of the land, and support for fencing, weed and control, restoration planting, and even rates relief (Queen Elizabeth II National Trust, 2018). Other benefits to the land owner can include covenanted areas providing shade and wind protection (Johnston, 2003), bush can help prevent slips and erosion and bring back native birds, and wetlands can act as water filters and act as run-off retainers (Orr, n.d.). The QEII trust has protected around 180,000ha (at 30 June 2014) of land with covenants, protecting features including native forest, wetlands, high country, coastlines, and cultural and archaeological sites (Queen Elizabeth II National Trust, 2011).

2.2.4 Condition of resource consent

Another use for covenants is under Section 108 of the RMA. While most land covenants are between two private parties, covenants can also be required as a condition of a resource consent issued by a consenting authority (local or regional council). This is done through a consent notice, which is registered against a property title, and includes the conditions required to be complied with under the consent (Quality Planning, n.d.). Under section 221 of the RMA, a consent notice is deemed

to be “a covenant running with the land when registered under the Land Transfer Act 1952, and shall, notwithstanding anything to the contrary in section 105 of the Land Transfer Act 1952, bind all subsequent owners of the land” (Resource Management Act 1991, p. 457). Examples of covenants being used as part of the resource consenting process in Auckland include the rural subdivision rules in the former Rodney District. Aspects of the rules required the protection of vegetation and other areas by covenant (Auckland Council, 2011). Similar provisions requiring covenants to protect areas are also proposed in the rural subdivision rules of the Auckland Unitary Plan³ (Auckland Council, 2016).

2.2.5 Non-complaint

Covenants can also be used to address reverse sensitivity issues, though the use of a 'restrictive non-complaint covenant'. Central Auckland's Britomart Precinct has restrictive non-complaint covenants preventing complaints about noise effects generated by Ports of Auckland, with the covenant required under council's planning documents (Auckland Council, 2016). A second example of a restrictive non-complaint covenant is in Albany, where North Shore City Council required land owners looking to develop apartments next to North Harbour (QBE) Stadium to future proof against noise complaints (Thompson, 2007).

2.3 Land covenants in overseas jurisdictions

Land covenants are a popular mechanism of private land use control in the United Kingdom. While covenants are widely used, unlike New Zealand, there are processes in place to cancel or modify covenants where they are deemed to be out of date. In Scotland a tribunal system is used, to assess the modification or cancellation of covenants. (Adams, Disberry, Hutchison, & Munjoma, 2001) note that there are cases where covenants that prevented redevelopment in the centre of towns being cancelled to facilitate higher-density developments. In England applications can be made to a tribunal for restrictive covenants to be discharged or modified if it can be shown that the restriction is obsolete on the basis of changes in the neighbourhood or the property (Brading & Styles, 2017). Covenants can also be discharged or modified by the tribunal where covenants are shown to limit or impede some reasonable use of the land for public or private purposes, with decisions on applications taking into account any relevant planning documents (Lee, 2017).

³ The rural subdivision rules of the Auckland Unitary plan are not yet operative, and at the time of writing this report were still under appeal in the Environment Court.

Edmonton, in Alberta, Canada has been struggling with the redevelopment of parts of the city where restrictive covenants only allow single stand-alone houses, or have been used to exclude grocery stores (Ziff & Jiang, 2012). Currently, like New Zealand, there are few options available to discharge covenants that prevent redevelopment, except through expropriation schemes⁴ (Ziff & Jiang, 2012). Suggestions for law reform to allow judicial power to discharge out of date covenants has been mooted, along with proposals that would allow municipal authorities to impose time limits for new covenants, or allow them the ability to respond to covenants that affect their power (Ziff & Jiang, 2012).

Restrictive covenants have a long history in the United States, and were used before the development of public zoning by local governments as a method of land use control, often by land developers (Deng, 2003). The covenants were used as a way to prevent incompatible land use conflicts and their potential effects of property devaluation (Fischel, 2004). In Houston, Texas, there are still large swathes of the city that have no zoning, instead privately established covenants are used to control land use (Buitelaar, 2004) and also to control aesthetics (Korngold, 2001). Covenants have also been used to bar commercial activities in residential areas, to shape physical characteristics of suburbs, as well as their historical use to influence the social sphere – particularly through the now illegal use as a method to prevent sales to non-white buyers (Dehring & Lind, 2007). The near-universal use of land use planning in towns and cities across the country has led to complex conflicts between covenants and planning rules, but with covenants often outweighing planning rules when tested in the courts (Berger, 1964). Most states have no statutory mechanism to remove covenants or for their modification, but common law doctrine of ‘changed conditions’ has led to their modification or termination (Walsh, 2017). Many states currently use covenants ‘not to sue’ on contaminated brownfield sites⁵. The covenants are used to encourage redevelopment by the State waiving the right to sue for clean-up costs from innocent purchasers of polluted sites (those not responsible for causing the contamination) (Andrew, 1996). Restrictive covenants, like in New Zealand, are being used in modern subdivisions, with covenants used to empower homeowner associations to administer and enforce covenants (Korngold, 2001). In 1975 estimated that 2.85 per cent of housing units in United States were in homeowner association developments, in 1998 that estimate has risen to 14.67 per

⁴ An expropriation scheme is similar to New Zealand’s compulsory acquisition powers under the Public Works Act 1981.

⁵ In the United States the term brownfield is defined by the United States Environmental Protection Agency (n.d.) as “property, the expansion, redevelopment, or reuse of which may be complicated by the presence or potential presence of a hazardous substance, pollutant, or contaminant”.

cent (Korngold, 2001). Covenants have also been used for conservation purposes, as in here in New Zealand (Mahoney, 2002), and as a method to protect solar and wind resources (Newman, 2000)

Covenants are also used in Australia, particularly for private residential estates (Kenna, Goodman, & Stevenson, 2017), and both New South Wales and Victoria, unlike New Zealand, have mechanisms to remove covenants (with varying levels of effectiveness). In New South Wales, the Environmental Planning and Assessment Act 1979 specifically enables planning instruments to override restrictive covenants (Environmental Planning and Assessment Act 1979). Research by Taylor and Rowley (2017) notes that in Victoria, prior to 2000, covenants were treated external to planning and were dealt with through property law. Legislative changes made in 2000 included provisions allowing planning instruments and processes to be used to remove or vary covenants, but poorly devised legislation meant that a number of issues still remained. Further changes have meant that the outcome is that covenants now have a privileged status in the planning process, and they are hard to remove and continue to trump public interest arguments (Taylor & Rowley, 2017).

2.4 The effects of land covenants

2.4.1 Form of land use control

Covenants act as a form of land control. In Houston, Texas, private restrictive covenants are widely used to control land uses and urban development in the place of a formal planning and zoning system (Buitelaar, 2009). In many parts of the world, including New Zealand, land covenants are used to encourage conformity such as how a house should look (Ziff & Jiang, 2012) or restrict further development (Kenna *et al.*, 2017). In New Zealand covenants sit outside the planning system but often impose more restrictive rules than set out in statutory planning documents. In some cases covenants prevent more intensive use of land than plans allow and there is little councils can do to prevent or alter them (New Zealand Productivity Commission, 2015). While similar examples are also seen overseas (Kenna *et al.*, 2017), some jurisdictions have introduced processes that prevent rules of public planning documents being undermined by private covenants (Mead & Ryan, 2012; Taylor & Rowley, 2017). Covenants can also be used in New Zealand to control land use, which can also act as a barrier to development and intensification. This includes when the inclusion of a covenant is required as a condition of a resource consent, particularly in rural or peri-urban areas. Covenants in these cases can include requirements to protect vegetation or other natural features, or prevent development through prohibiting further subdivision. While covenants in these cases may prevent

intensification, they could be considered justified as they are used a mechanism to generate other benefits, such as environmental protection.

2.4.2 Barrier to development and redevelopment

The New Zealand Productivity Commission (2015) have identified land covenants and their restrictive nature as a barrier to both development and redevelopment, by restricting the current and future capacity for additional dwellings of land. The Commission also noted that when covenants specify the requirements for types of materials to be used in a development they can prohibit efficient building techniques, including the use of building materials that may be developed in the future. A submission to the Commission in their investigation revealed how land covenants have been used as a barrier to development on neighbouring land, with a covenant in Tauranga used to prevent the provision of road access or services to adjoining land zoned for residential development (New Zealand Productivity Commission, 2015). Mead and Ryan (2012) indicate that they believe that covenants operating in perpetuity could thwart strategic planning objectives for intensification. Mead and Ryan further note that the absence of covenants in older areas but their presence in modern subdivisions “will mean that intensification pressures may be concentrated in areas less suitable for urban change, such as areas with earlier period or character housing” (2012, p. 4). Existing land covenants were also noted as contributing to the challenge of the Christchurch rebuild following the earthquakes that affected the city by MBIE’s chief architect (Joiner, 2012).

Land covenants were also indicated as a barrier to development in overseas jurisdictions. Research in Australia has highlighted that the use of land covenants on residential properties in the City of Darebin, in greater Melbourne, will be a constraint on future housing growth (City of Darebin, 2011). In Sydney the proliferation of private residential estates with covenants are seen as an inhibitor to infill redevelopment and increased densities (Kenna *et al.*, 2017). In England and Scotland, covenants can impact the development process, but can be overcome with relative ease (Adams & Hutchison, 2000; Walsh, 2017). In the United States covenants are noted as a constraint, particularly to ‘brownfield’ redevelopment⁶ (Adams *et al.*, 2001), and in the Netherlands heritage covenants were identified as a barrier to redevelopment, with an example noted where they had a “large impact on the estimated for land development costs, causing a delay in the planning process” (Baarveld, Smit, & Dewulf, 2018, p. 109).

⁶ Refer to footnote 4.

2.4.3 Effects on house prices and affordability

In residential areas, land covenants can affect house prices and affordability. Given covenants are put in place to either restrict what can happen or require an action, it is unsurprising. The NZPC in their report on housing affordability noted that in New Zealand, land covenants increased the cost of housing by often having direct requirements that minimum costs or size be met, and also by requiring the use of certain building techniques and materials (New Zealand Productivity Commission, 2012). Covenant restrictions mean that it is often impossible for affordable housing options to be constructed, either through requirements for a minimum floor space size or restrictions on housing typology (Easton, Austin, & Hattam, 2012). Covenants can also add to transaction costs in the development process, adding expense and time (Buitelaar, 2004; Dally, 2013), and so increasing the cost of housing. Over the last decade there have been numerous comments in New Zealand media about how covenants prevent affordable housing. Some of the commentary includes:

- Developers using covenants, in conjunction with development staging, as a mechanism to stop the construction of smaller or affordable houses, and thus increasing the value of land and sale price of homes for later stages (Stevenson, 2018).
- The use of covenants that restrict smaller houses, increasing build costs and therefore increasing unaffordability (McDonald, 2017). One example is of a retiring couple wanting a smaller home but finding that new subdivision covenants prevent them from building a home to fit their needs (Rikihana Smallman, 2017).
- The exclusion of pre-made, pre-fabricated, or relocatable houses, all of which are often cheaper methods of building, from new subdivisions (Dally, 2013; Heyward, 2018).
- Neighbouring residents of a proposed co-housing development in Flaxmere want it to be subject to the same covenants as their properties, which include minimum dwelling size requirements, integrated garages and internal boundary fencing (Harper, 2018).

While there has been no economic assessment of the effects of covenants in New Zealand, there has been in the United States. Research by Speyrer (1989) showed that in Houston, Texas, houses that were in neighbourhoods which had private covenants had significant premiums compared to identical houses without covenants. Speyrer also found that the use of covenants to protect from externalities were more valuable than any forgone development opportunities – this means that the benefits

of being in a covenant scheme were greater than the disbenefits of having to comply with covenant rules. In Louisiana, analysis by Hughes and Turnbull (1996) revealed a number of relevant points, including:

- That restricting utilities (such as power and phone) to being underground increased house prices
- The requirement to mow lots, decreased prices
- Restrictions on prefabricated houses and on drilling had no effects
- Constraints such as no signs, and parking and dumping restrictions also increased house prices.

Hughes and Turnbull also observed that stricter restrictions have a diminishing price effect as neighbourhoods mature, and perhaps most importantly covenants increased house price by about six per cent in 10-year-old neighbourhoods and by two per cent in 20-year-old neighbourhoods. A note here that covenants in Louisiana can only have a 20-year lifespan, after which they can be renewed, perhaps accounting for the low margin on their benefits after that length of time. Analysis by Rogers (2006, 2010) showed that properties with covenants governed by residential community associations had a premium of about two to three per cent, and that the marginal price of covenants falls to zero after 25 years if a covenant is not renewed.

2.4.4 Covenants used to stifle competition

Covenants are sometimes used as a mechanism to control or restrict business activity, and can be used to stifle or reduce competition in a market (OECD, 2010). In Edmonton, Canada, research by Ziff and Jiang (2012) notes an example where supermarket firms relocate their stores to a new location and sell the existing site, placing a covenant on the land that prevents any future owner from operating a supermarket on the site. Other examples of covenants used for these purposes include a fast food chain selling a restaurant site and inserting a covenant that prevents beef-based fast food being sold, or a former private hospital site having a covenant preventing another hospital operating on the land in the future (OECD, 2010). Ziff and Jiang (2012) further note that such uses of covenants have contributed to reduced competition and customer choice, and the creation of what are referred to as 'food deserts'⁷.

⁷ A food desert is defined in United States of America legislation as being an area "with limited access to affordable and nutritious food, particularly such an area composed of predominantly lower-income neighbourhoods and communities" (Food, Conservation, and Energy Act of 2008).

As noted in earlier, in New Zealand covenants can be ruled invalid if they violate the Commerce Act 1986. The Act states that covenants shall not have the effect of “substantially lessening competition in a market” (Commerce Act 1986). Although covenants cannot be used to *substantially* lessen competition, they can be used to lessen it none the less. An Auckland example of the use of a covenant to prevent competition is the former Village 8 cinema site on Crown Lynn Place in New Lynn (Figure 1). The owner closed the cinema complex in June 2001, when it opened a new cinema complex in Henderson’s WestCity Waitākere mall (then known as Westfield WestCity). When the site was sold, including the cinema complex building, a covenant was placed on it preventing any future land owner operating a cinema complex on the site (and interestingly any single retail shop with a floor area less than 400 square metres) (Figure 2).

Figure 1: Former Village 8 cinema complex site in New Lynn



Figure 2: Covenant text for former Village 8 cinema site, New Lynn (CT# NZ960/262)

Restrictive Covenant

The Transferee covenants with and for the benefit of the Transferor that the Transferee shall observe and perform all the stipulations and restrictions contained in the Schedule of Covenant in respect of the land (**Servient Tenement**).

The Transferee covenants to observe in perpetuity these stipulations and restrictions, to the intent that the Servient Tenement shall be forever subject to this restrictive covenant.

This restrictive covenant shall be for the benefit in perpetuity of the Transferor and the Transferor's successors in title in respect of the land contained in the certificates of title listed under the heading "St Lukes" in the Schedule of Dominant Land and known as Westfield St Lukes ShoppingCentre (**St Lukes**) and for the benefit in perpetuity of Westcity Shopping Centre Limited and its successors in title in respect of the land contained in the certificates of title listed under the heading "WestCity" in the Schedule of Dominant Land and known as Westfield WestCity ShoppingCentre (**WestCity**). (**Dominant Tenement**) to which land this covenant should benefit.

The Transferor and the Transferee agree that, for the purposes of section 4 Contracts (Privity) Act 1982, this restrictive covenant in respect of WestCity is intended to confer a benefit on Westcity Shopping Centre Limited and its successors in title to WestCity and is enforceable by them. For the sake of clarity, Westcity Shopping Centre Limited and its successors in title do not have the benefit of this restrictive covenant in respect of St Lukes.

Schedule of Covenant

The Transferee shall not use the Servient Tenement for any use as:

- a. a cinema; or
- b. any retail use whereby any single shop has a retail floor space of less than 400m².

2.4.5 Covenants as a mechanism of exclusion

Covenants can be used as a method of exclusion, either explicitly or surreptitiously. An historic example, and perhaps the most well-known, use of land covenants to exclude was their application across the United States to exclude non-whites from some suburbs (Jones-Correa, 2000). By 1940, 80 per cent of property in Chicago and Los Angeles had restrictive covenants excluding black families (United States Commission on Civil Rights, 1973). Despite racial restrictive covenants being ruled unenforceable in 1948, Berry (2001) poses that other types of private covenants may play a part in racial and economic segregation in residential areas of Houston and Dallas. Covenants mandating that homeowners pay for amenities in a development, have been raised as a method of exclusion – deterring undesired residents, that is lower-income households, from purchasing homes (Strahilevitz, 2006). Restrictive covenants only allowing single-family homes have been used to prevent the establishment of group homes or shelters for people with mental disabilities in the US, although a few states have enacted laws to counter such covenants (Salsich, 1986).

3.0 Method to identify titles with land covenants in Auckland

The datasets used to identify titles that had land covenants, as at February 2018, are listed below (Table 1).

Table 1: List of data sources and descriptions used in modelling

Data	Description	Format	Organisation; source
NZ title memorials list	List information relating to a transaction, interest or restriction over a piece of land, including mortgages, discharge of mortgages, transfer of ownership, and leases. Data in table is for both current and historic memorials, and also provides a high-level memorial description. (Land Information New Zealand, 2017)	Table	Land Information New Zealand; LINZ Data Service
NZ property titles	Spatial extent of property titles, including a record of all estates, encumbrances and easements that affect a piece of land. (Land Information New Zealand, 2017)	Spatial/GIS	Land Information New Zealand; LINZ Data Service
Auckland Council local board boundaries	Polygons indicating the extents of the local board areas for Auckland.	Spatial/GIS	Statistics New Zealand; 2013 census-based geographic boundary files
Zoning (Auckland Unitary Plan, operative in part)	Extents of zoning defined by polygons for the Auckland Unitary Plan, operative in part (as at November 2016)	Spatial/GIS	Auckland Council; SDE ⁸

⁸ SDE refers to Auckland Council's ArcGIS geospatial repository

The creation of a dataset of titles with land covenants in Auckland is a multi-step and multi-output process (Table 2). Each dataset output is an intermediate dataset used for further processing, or an output dataset in its own right, that is used for analysis.

Table 2: Method for creating land covenant dataset for Auckland

Step No.	Name	Description
One	Create core dataset	Joining current ⁹ memorial text to titles (spatial file), and extracting only those that have a 'land covenant' recorded (Output 1). This output creates one polygon per land covenant.
Two	Tag core dataset with additional data	Take land covenant dataset (Output 1) and tag the titles (spatial file) with the Auckland Unitary Plan (operative in part) zone and local board (Output 2). This dataset is used as the input for steps three, four and five.
Three	Number of covenants	Take tagged land covenant dataset (Output 2) and filter out those not on land (in the General Marine Zone), and those that are cross leases (Output 3). This dataset is used to calculate the number of land covenants.
Four	Number of titles	Take tagged land covenant dataset (Output 2) and remove duplicate titles, i.e. those that have more than one covenant on them (Output 4). This dataset is used to calculate the number of titles with land covenants.
Five	Land area	Take tagged land covenant dataset (Output 2) and remove duplicate titles that have more than one covenant on them, and then "flatten" the title dataset (remove duplicate title shapes, where there is more than one title per shape, such as with unit titles) (Output 5). This dataset is used to calculate the land area covered by land covenants.

Each of the datasets outputted is saved as a geodatabase file (a spatial or GIS file that can be used in mapping software), and then if required exported and saved as an MS Excel file for creating tables for analysis.

3.1 Caveats, limitations, and notes on outputs

As with many datasets and analysis, there are a number of important things to note about the data. For the data and analysis created for this report, the following should be noted:

- The title data downloaded from the LINZ data portal was dated 27 January 2018.
- Auckland Unitary Plan (operative in part) zoning data was as at 8 November 2016.

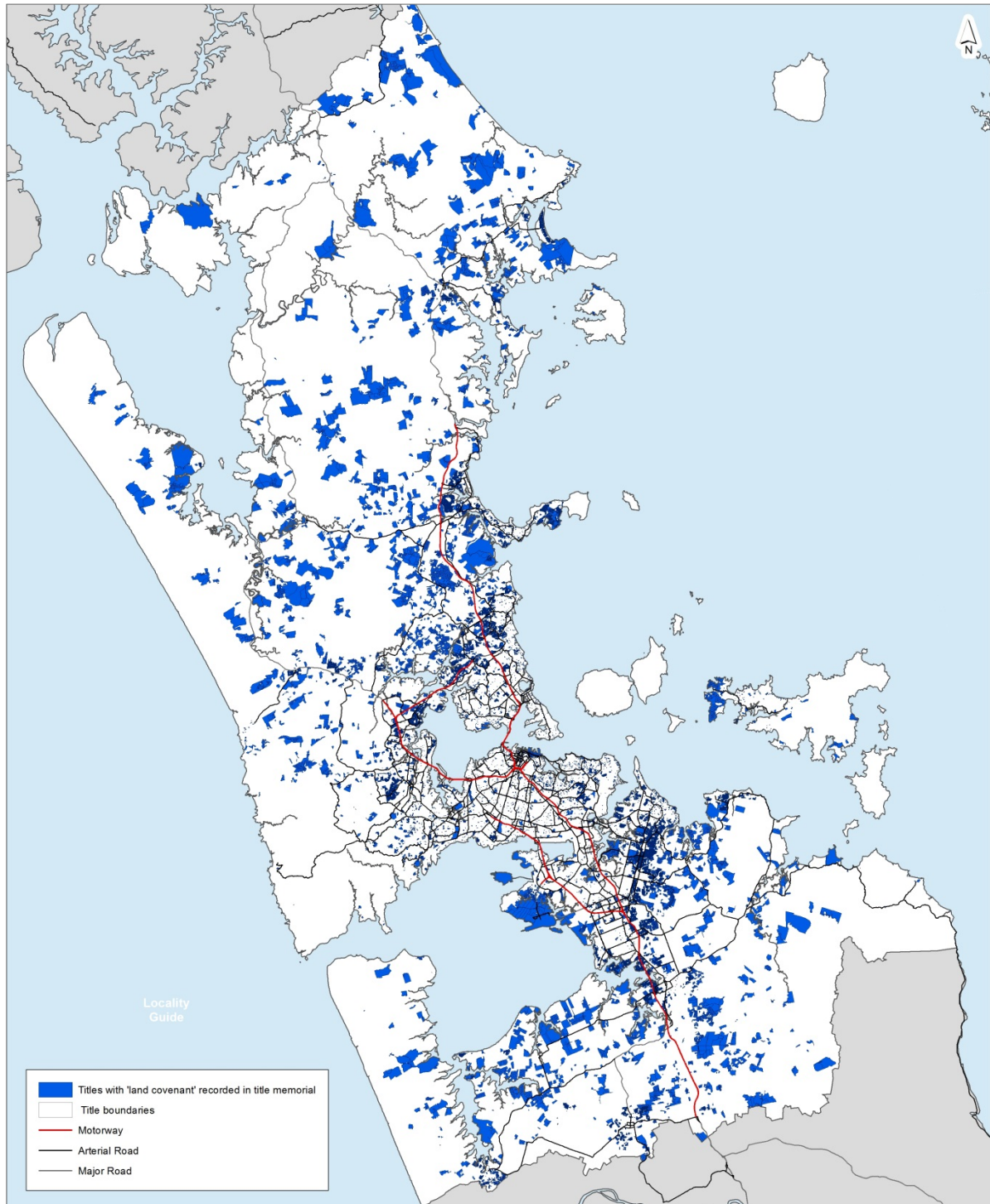
⁹ The NZ title memorials list dataset from LINZ contains all current *and* historic memorials. Current memorials are those that are currently in effect and/or are for titles that presently exist. Historic memorials are those that are no longer in effect and/or for titles that no longer exist. As part of this process all historic memorials were filtered out.

- All titles that are registered as a cross lease have been filtered out of analysis, as all cross lease titles have a land covenant registered in their memorial. Cross leases have been excluded from this analysis as they have been addressed in Fredrickson (2017); that analysis showed that there were 99,829 cross lease titles in Auckland on 39,636 properties.
- For analysis, the results exclude those titles that were identified as being in the 'General Coastal Marine' zone; this was because these titles are not on land.

4.0 Analysis

Land covenants, excluding those on cross lease titles, are spread across the entire region, in areas of both rural and urban character (Figure 3Figure 2). In Auckland there are 151,170 land covenants on 96,261 titles. Seventeen per cent of titles in the region have a land covenant on them. The land area of titles with a covenant on covers an area of 60,757 hectares, or 12 per cent of Auckland's land area.

Figure 3: Titles with land covenants in Auckland



4.1 Land covenants by local board

All 21 of Auckland's local boards have titles that are affected by land covenants, but two-thirds of the titles with covenants are in just six local board areas. Howick Local Board has the largest number of titles affected by land covenants, 18,261, which is 38 per cent of the total titles in that area and 19 per cent of the regional total of titles affected by land covenants. Two other local board areas have more than 30 per cent of titles in their area with covenants; Upper Harbour Local Board area has 46 per cent (11,414), or 12 per cent of the region total, and Papakura with 34 per cent (6,618, or seven per cent of the region total). All of these areas have large residential areas that have been developed in the last 20 years. Other local boards with high numbers of titles with land covenants are Hibiscus and Bays (11,741, or 12 per cent of the regional total), and the two rural local boards, Rodney (8,981) and Franklin (8,893, or nine per cent of the regional total). Conservation covenants and covenants preventing further subdivision, both often used as conditions in the resource consenting process, may be the cause for this.

Table 3: Number of titles, land covenants, and titles with land covenants in Auckland, by local board area

Local board name	Total number titles in local board	Number of land covenants	Number of titles with a land covenant	Proportion of total titles with a land covenant	Proportion of regional total of titles with a land covenant
Albert - Eden	34,663	960	817	2%	1%
Devonport - Takapuna	22,545	1,076	907	4%	1%
Franklin	31,127	11,096	8,893	29%	9%
Great Barrier	1,538	109	83	5%	0%
Henderson - Massey	38,048	8,841	6,673	18%	7%
Hibiscus and Bays	41,644	17,990	11,746	28%	12%
Howick	47,507	23,180	18,261	38%	19%
Kaipātiki	30,866	1,838	1,564	5%	2%
Mangere - Otahuhu	19,416	21,580	1,694	9%	2%
Manurewa	24,360	7,045	6,225	26%	6%
Maungakiekie - Tamaki	28,644	1,393	914	3%	1%
Ōrākei	32,856	4,416	3,409	10%	4%
Otara - Papatoetoe	21,770	2,909	885	4%	1%
Papakura	19,556	10,601	6,618	34%	7%
Puketāpapa	17,615	822	756	4%	1%
Rodney	32,061	14,337	8,981	28%	9%

Local board name	Total number titles in local board	Number of land covenants	Number of titles with a land covenant	Proportion of total titles with a land covenant	Proportion of regional total of titles with a land covenant
Upper Harbour	24,573	14,871	11,414	46%	12%
Waiheke	6,902	490	392	6%	0%
Waitakere Ranges	19,165	1,908	1,678	9%	2%
Waitematā	54,402	4,284	3,102	6%	3%
Whau	25,676	1,424	1,249	5%	1%
Total	574,934	151,170	96,261	17%	-

The local board areas where the land area of titles with a land covenant add up to the most hectares are Rodney and Franklin which together comprise three-quarters of the region's total land area affected by land covenants. Titles with land covenants in Rodney add up to 28,703 hectares, which is 13 per cent of the total area of the board and half the regional total of affected land area, while Franklin's titles with land covenants cover 14,955 hectares, 12 per cent of the board's land area – a quarter of the regional total. The land area of titles with land covenants in the Howick Local Board cover close to half (48 per cent) of the board's land area, but only five per cent of the regional total. The only other local board with more than 30 per cent of land area affected by covenants is Mangere-Otahuhu (39 per cent), but its affected area (2031 hectares) is only three per cent of the regional total. Hibiscus and Bays has 29 per cent of its land affected, or 3147 hectares (five per cent of the regional total).

Table 4: Total land area of titles with a land covenant, by local board area, in Auckland

Local board name	Total land area in local board (ha)	Land area of titles with covenant (ha) in local board	Proportion of total land area of titles with covenant in local board	Proportion of total area of titles with covenant in region
Albert - Eden	2,834	138	5%	0%
Devonport - Takapuna	2,113	72	3%	0%
Franklin	119,752	14,955	12%	25%
Great Barrier	32,066	518	2%	1%
Henderson - Massey	5,321	566	11%	1%
Hibiscus and Bays	11,006	3,147	29%	5%
Howick	6,969	3,376	48%	6%
Kaipātiki	3,384	226	7%	0%
Mangere - Otahuhu	5,247	2,031	39%	3%
Manurewa	3,712	735	20%	1%
Maungakiekie - Tamaki	3,642	137	4%	0%

Local board name	Total land area in local board (ha)	Land area of titles with covenant (ha) in local board	Proportion of total land area of titles with covenant in local board	Proportion of total area of titles with covenant in region
Ōrākei	3,225	299	9%	0%
Otara - Papatoetoe	3,706	562	15%	1%
Papakura	4,072	858	21%	1%
Puketāpapa	1,872	110	6%	0%
Rodney	227,495	28,703	13%	47%
Upper Harbour	6,973	1,861	27%	3%
Waiheke	15,476	702	5%	1%
Waitakere Ranges	30,403	1,345	4%	2%
Waitematā	1,939	163	8%	0%
Whau	2,685	255	9%	0%
Total	493,891	60,757	12%	-

4.2 Land covenants by zoning

Assessing titles and land covenants by their zoning allows some insight into how areas of the city are affected, either now or in the future. This section breaks down a number of zoning groups and analyses the number of titles in each zone, the numbers with a land covenants, and the area that they cove. A full table of all Auckland Unitary Plan (operative in part) zones and statistics can be found in Appendix B (numbers of titles) and Appendix C (land area of titles).

4.2.1 Residential zones

Residential zones contain 83,068 titles that are affected by land covenants, or 19 per cent of the total number of titles in those zones; 86 per cent of all titles affected by covenants in Auckland are in residential zones (Table 5). These titles cover an area of 8685 hectares, 23 per cent of the area of the zones; 14 per cent of total land area affected by covenants in Auckland is in residential zones (Table 6). Residential zoned titles with land covenants are concentrated in greenfield suburbs that have been developed over the last few decades, such as Long Bay, Greenhithe, West Harbour, Flat Bush, and Karaka. Close to half (42,450, or 44 per cent) of all titles with land covenants are located in the Mixed Housing Suburban zone, another quarter (23,567, or 24 per cent) being in the Single House zone, and a tenth (9,992) being in the Mixed Housing Urban zone.

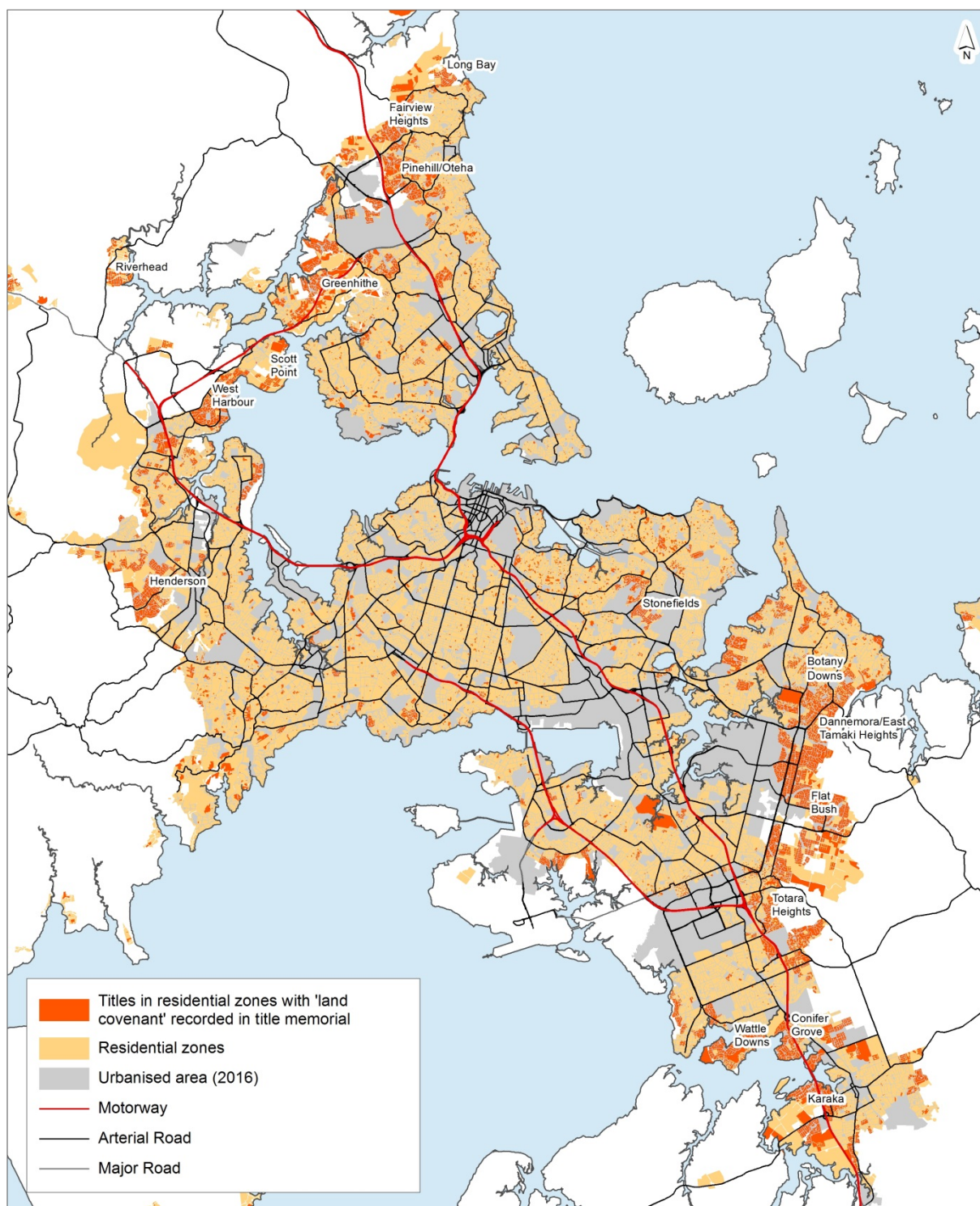
Table 5: Number of titles, land covenants, and titles with land covenants in Auckland, 2018, by residential zones of the Auckland Unitary Plan (operative in part)

Zone name	Number titles	Number of land covenants	Number of titles with a land covenant	Proportion of total titles in zone with a land covenant	Proportion of total titles with a land covenant in region
Large Lot	6,879	1,622	24%	<1%	2%
Mixed Housing Suburban	199,468	42,450	21%	10%	44%
Mixed Housing Urban	100,687	9,992	10%	2%	10%
Rural and Coastal settlement	5,841	727	12%	<1%	1%
Single House	86,191	23,567	27%	5%	24%
Terrace Housing and Apartment Buildings	42,415	4,710	11%	1%	5%
Total	441,481	83,068	19%	19%	86%

Table 6: Area zoned and area covered by land covenants in Auckland, 2018, by residential zones of the Auckland Unitary Plan (operative in part)

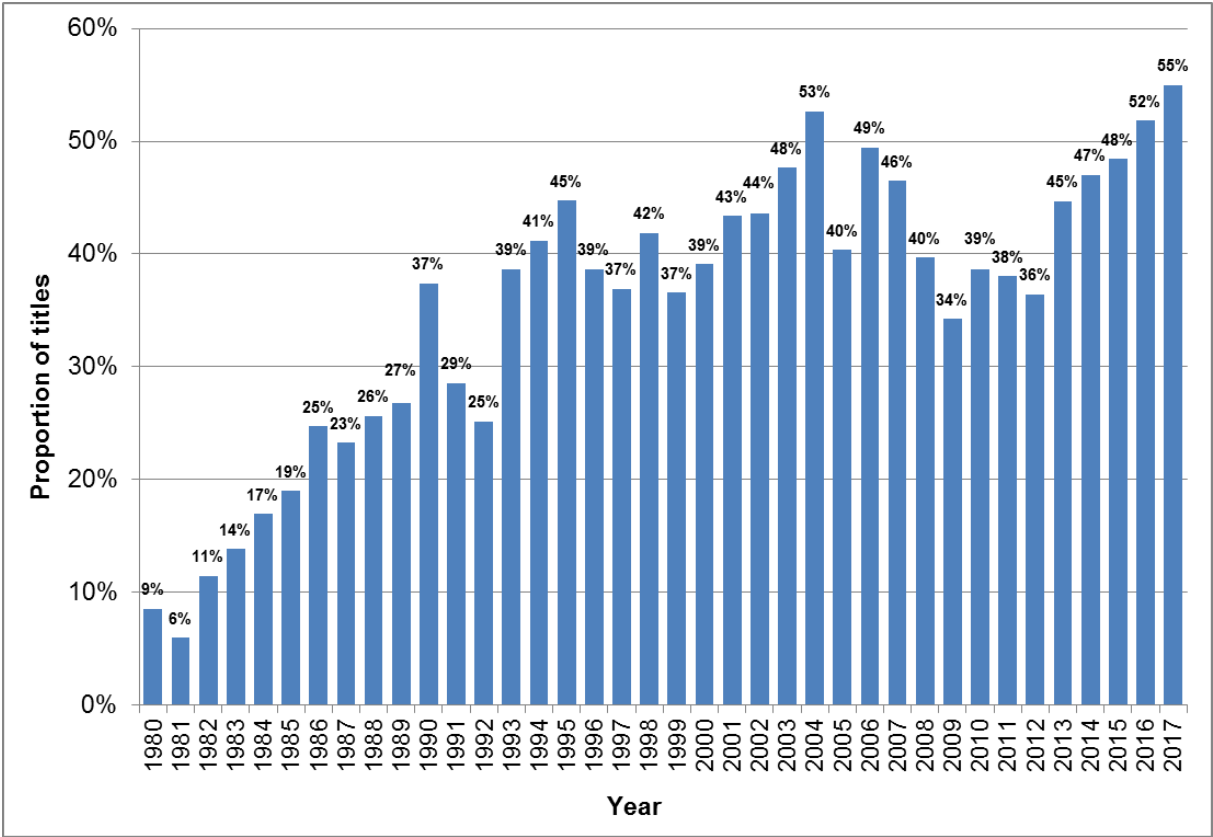
Zone name	Total zoned area (ha)	Zoned area that has land covenant (ha)	Proportion of total zoned area with land covenant	Proportion of total area of titles with covenant in region
Large Lot	2,912	887	30%	1%
Mixed Housing Suburban	14,970	3,608	24%	6%
Mixed Housing Urban	7,531	851	11%	1%
Rural and Coastal settlement	1,856	399	21%	1%
Single House	8,539	2,604	30%	4%
Terrace Housing and Apartment Buildings	2,485	337	14%	1%
Total	38,293	8,685	23%	14%

Figure 4: Titles with land covenants in residential zones (in Auckland's urban core), 2018



Title issue date can be used to analyse the proportion of titles in residential zones with and without land covenants over time. The analysis shows residential titles the proportion of titles with land covenants has been increasing over time. Less than 10 per cent of residential titles issued in the early 1980s had a land covenant on them. In 2017, over 50 per cent of residential titles issued had a land covenant on them. The proportion of titles issued pre-1980 (not shown on graph) show only small proportions of titles with covenants – two per cent or less prior to 1964, with the proportion increasing through the 1970s. The early 1980s saw a slight dip, but has been increasing steadily since.

Figure 5: Proportion of current titles in residential zones with land covenants, by year of title issue, Auckland, 1980-2017



4.2.2 Centre zone

Centre zones, including the city centre (CBD), metropolitan centres, and other centres are areas of the city that are expected to accommodate large amount of floor space and high numbers of apartments as the city intensifies. These zones contain 2529, or three per cent of the regional total, of the of titles affected by covenants (Table 7); Titles in the centre zones affected by covenants cover a land area of 336 hectares, or 23 per cent of the total combined area of the zones (Table 8). The City

Centre zone has the highest number of titles affected by land covenants, with 1616, with the area of titles with covenants in the Metropolitan Centre zone covering 108 hectares.

Table 7: Number of titles, land covenants, and titles with land covenants in Auckland, 2018, by centre zones of the Auckland Unitary Plan (operative in part)

Zone name	Number titles	Number of land covenants	Number of titles with a land covenant	Proportion of total titles in zone with a land covenant	Proportion of total titles with a land covenant in region
City Centre	28,824	2,573	1,616	6%	2%
Local Centre	2,404	343	150	6%	<1%
Metropolitan Centre	5,436	903	426	8%	<1%
Neighbourhood Centre	1,994	57	43	2%	<1%
Town Centre	6,382	407	294	5%	<1%
Total	45,040	4,283	2,529	6%	3%

Table 8: Area zoned and area covered by land covenants in Auckland, 2018, by centre zones of the Auckland Unitary Plan (operative in part)

Zone name	Total zoned area (ha)	Zoned area that has land covenant (ha)	Proportion of total zoned area with land covenant	Proportion of total area of titles with covenant in region
City Centre	261	104	40%	<1%
Local Centre	246	59	24%	<1%
Metropolitan Centre	382	108	28%	<1%
Neighbourhood Centre	132	12	9%	<1%
Town Centre	442	52	12%	<1%
Total	1,463	336	23%	1%

4.2.3 Rural zones

In rural zones over 5800 titles have a land covenant or 19 per cent of the total titles in these zones (Table 9); they cover a land area of 41,000 hectares or two-thirds of Auckland's total covenanted land area (Table 10). Of all the rural zones, the Countryside Living zone has the highest number (2507) and the highest proportion (34 per cent) of its titles with land covenants. Titles with land covenants in the Rural Production zone cover the largest area of any of the rural zones, covering 19,104

hectares or half of rural zone covenanted land and fully a third of total covenanted land by area.

Table 9: Number of titles, land covenants, and titles with land covenants in Auckland, 2018, by rural zones of the Auckland Unitary Plan (operative in part)

Zone name	Number titles	Number of land covenants	Number of titles with a land covenant	Proportion of total titles in zone with a land covenant	Proportion of total titles with a land covenant in region
Countryside Living	7,299	3,862	2,507	34%	3%
Rural Production	12,579	2,574	1,694	13%	2%
Mixed Rural	4,500	1,240	767	17%	1%
Rural Coastal	3,437	960	593	17%	1%
Waitakere Ranges Foothills	1,200	185	141	12%	<1%
Waitakere Ranges	2,169	134	122	6%	<1%
Rural Conservation	215	44	39	18%	<1%
Total	31,399	8,999	5,863	18%	6%

Table 10: Area zoned and area covered by land covenants in Auckland, 2018, by rural zones of the Auckland Unitary Plan (operative in part)

Zone name	Total zoned area (ha)	Zoned area that has land covenant (ha)	Proportion of total zoned area with land covenant	Proportion of total area of titles with covenant in region
Countryside Living	22,592	6,953	31%	11%
Rural Production	165,169	19,104	12%	31%
Mixed Rural	39,077	6,185	16%	10%
Rural Coastal	77,770	7,397	10%	12%
Waitakere Ranges Foothills	3,141	317	10%	1%
Waitakere Ranges	2,870	314	11%	1%
Rural Conservation	3,093	992	32%	2%
Total	313,714	41,262	32%	68%

4.2.4 Future Urban zone

In the Future Urban zone 897 titles have covenants or 26 per cent of the total titles in that zone. The land area of the titles with covenants in this zone is 10,674 hectares, or 26 per cent of the total land area of the zone; Four per cent of total land area affected by covenants in Auckland is in the Future Urban zone.

Table 11: Number of titles, land covenants, and titles with land covenants in Auckland, in the future urban zone of the Auckland Unitary Plan (operative in part)

Zone name	Number titles	Number of land covenants	Number of titles with a land covenant	Proportion of total titles in zone with a land covenant	Proportion of total titles with a land covenant in region
Future urban	3,464	1,417	897	26%	1%

Table 12: Area zoned and area covered by land covenants in Auckland, 2018, in the future urban zone of the Auckland Unitary Plan (operative in part)

Zone name	Total zoned area (ha)	Zoned area that has land covenant (ha)	Proportion of total zoned area with land covenant	Proportion of total area of titles with covenant in region
Future urban	10,674	2,732	26%	4%

4.2.5 Other notable zones

The airport zone has the highest proportion of titles with land covenants (67 per cent), with the titles with covenants accounting for 84 per cent of the total area of the zone. In this zone there are 85 titles with a total of 16,904 covenants, averaging 199 covenants per title, which is vastly more than any other zone. The Quarry zone also has a high proportion, with 66 per cent of titles in the zone having a land covenant.

4.3 Plan enabled and feasible capacity of parcels with land covenants in residential zones

This section includes analysis on the number of dwellings enabled by planning, and those that are commercially feasible, that could be affected by land covenants in residential zones.

As part of the requirements of the National Policy Statement on Urban Development Capacity (NPS-UDC), Auckland Council undertook several sets of calculations, relating to the capacity for residential properties to accommodate additional dwellings

under the planning rules. The two that have been analysed against land covenants for this study include:

1. **Plan enabled capacity:** The capacity for additional dwellings that a parcels could accommodate under the rules of the Auckland Unitary Plan (operative in part), and
2. **Commercially feasible capacity:** The capacity for additional dwellings that a parcel could accommodate under the rules of the Auckland Unitary Plan (operative in part), that are also commercially feasible¹⁰.

Plan enabled capacity and commercially feasible capacity is for *additional* dwellings, and has been calculated based on the zoning of the Auckland Unitary Plan (operative in part), as at November 2016. A copy of the executive summary of the report can be found in Appendix D, and full results and overview of the methods used in reporting of the NPS-UDC requirements can be found in Auckland Council (2017), *National Policy Statement on Urban Development Capacity 2016: Housing and business development capacity assessment for Auckland*. Further details of the modelling methodology for plan enabled capacity can be found in Balderston and Fredrickson (2014), *Capacity for Growth Study 2013 (Proposed Auckland Unitary Plan): Methodology and Assumptions*.

4.3.1 Plan enabled capacity in residential zones and land covenants

Analysis of plan enabled capacity (PEC) in residential zones shows that 16 per cent of residential zoned parcels assessed for capacity are covered by a land covenant; plan enabled capacity for these parcels is for 119,891 additional dwellings. This capacity¹¹ accounts for 13 per cent of all plan enabled capacity for residential zones. Break down of the capacity results by zone are shown in Table 13.

When the assessed capacity affected by covenants is assessed by each residential zone the Mixed Housing Suburban zone has the most with 65,188 dwellings potentially affected by land covenants, or 54 per cent of total residential zones' PEC with land covenants. A further 26,219 in the Mixed Housing Urban zone affected, 22 per cent of the total residential zones' PEC with land covenants A further PEC for

¹⁰ Commercially feasible capacity is an assessment of the ability of an 'average developer' acting within normal commercial parameters to deliver developments. The approach is a variation on the 'residual value' method, which is a widely used standard commercial methodology to determine the maximum price a developer should pay for a potential development site (the 'residual') given expected development costs, sale prices and minimum return requirements (Auckland Council, 2017).

¹¹ Number of dwellings

23,864 dwellings are affected in the Terrace Housing and Apartment Buildings zone, or 20 per cent of total residential zones' PEC with land covenants.

Table 13: Plan enabled capacity (PEC) in residential zones and land covenants

Residential zone	Number of parcels assessed in zone	Number of parcels with land covenants	Proportion of parcels with land covenants	Total PEC (dwellings)	PEC (dwellings) on parcels with land covenants	Proportion of PEC with land covenant in zone	Proportion of total PEC
Large Lot	623	238	38%	5,808	2,257	39%	<1%
Mixed Housing Suburban	117,920	23,620	20%	333,302	65,188	20%	7%
Mixed Housing Urban	58,801	4,984	8%	258,992	26,219	10%	3%
Single House	1,896	509	27%	11,432	2,363	21%	<1%
Terrace Housing and Apartment Buildings	19,202	1,656	9%	296,730	23,864	8%	3%
Total residential zones	198,442	31,007	16%	906,264	119,891	13%	13%

4.3.2 Plan enabled commercially feasible capacity in residential zones with land covenants

As well as assessing the proportion of plan enabled capacity affected by land covenants, commercially feasible capacity was also analysed. Of the PEC for an additional 906,264 dwellings for on parcels in residential zones across Auckland, 111,510 dwellings were commercially feasible. Twelve per cent of these commercially feasible dwellings are on a title with a land covenant; the properties have commercially feasible capacity (CFC) for an additional 13,243 dwellings. Break down of the capacity results by zone are shown in Table 14.

The Mixed Housing Suburban zone has the largest amount of commercially feasible capacity affected by land covenants, 6838 dwellings, or 52 per cent of the total residential zones' CFC with land covenants. The Mixed Housing Suburban zone having a further 4226 affected or 32 per cent of the total residential zones' CFC with land covenants.

Table 14: Commercially feasible capacity (CFC) in residential zones with land covenants

Residential zone	Number of parcels with CFC in zone	Number of parcels with land covenants	Proportion of parcels with land covenants	Total CFC (dwellings)	CFC (dwellings) on parcels with land covenants	Proportion of EFC with land covenant in zone	Proportion of total EFC
Large Lot	108	48	44%	1,672	389	23%	<1%
Mixed Housing Suburban	19,245	1,836	10%	55,770	6,838	12%	6%
Mixed Housing Urban	11,498	590	5%	41,313	4,226	10%	4%
Single House	216	52	24%	3,250	535	16%	<1%
Terrace Housing and Apartment Buildings	1,086	56	5%	9,505	1,255	13%	1%
Total residential zones	32,153	2,582	8%	111,510	13,243	12%	12%

5.0 Discussion

Covenants present a number of barriers to development and redevelopment in an urban context, including the limited ability to amend or discharge those covenants. In some cases existing covenants that prevent or limit redevelopment or intensification in residential areas may be viewed as no longer suitable, and may cause future issues especially where they have been created in perpetuity. In Auckland the presence of covenants in residential areas earmarked for intensification, or future urban expansion areas, will have an effect on the ability of these areas to change.

Large areas of the city are covered by titles that have a land covenant, just over 8600 hectares in residential zones, around 330 hectares in centre zones, and over 10,600 hectares in the Future Urban zone.

Over four-fifths (86 per cent) of the covenants in residential zones are on titles that have been created in the last 30 years, meaning that the buildings on them are also likely to be of a similar age. The redevelopment of these areas is not likely to happen in the very near future, as the houses on these titles are still too new to be economical to redevelop. When they do come to the end of their economic or physical life, the covenants on the land will prohibit redevelopment at densities higher than are currently there, even if it is permitted under planning rules, due to the restrictive nature of the development controls contained in their covenants. This is likely to affect the ability of the city to reach its intensification goals for the existing urban area. This problem is not limited to residential areas. Places like the city, metropolitan, and town centres that have been indicated as suitable for high density living are also potentially impacted by land covenants. The impacts of land covenants will also be felt in the areas in which the city is expanding; the Future Urban zone. In these areas 26 per cent of current titles have a land covenant, with those titles covering 26 per cent of the land area of the zone. As these areas are planned to be developed into urban uses from their current rural state, the presence and effects of current covenants preventing subdivision and additional dwellings may mean that these areas are planned and developed less efficiently than an area without such covenants, potentially leading to poor urban form outcomes.

Whether a covenant is viewed as good or bad depends on who is looking at it – and time. Land covenants on residential land are viewed as beneficial by the developers who use them to increase the value of their product by ensuring a standard of houses in a development. This benefit is also seen by the buyer, as the covenant will ensure they are buying a product that meets a certain standard, but also the knowledge that the look and feel of the neighbourhood will be maintained into the future. This in turn increases the value of their property. Those who don't benefit from the covenants

though are those who are looking for affordable housing. Covenants may also prove to be a disbenefit to owners who may struggle to comply with covenant rules. While covenants may be seen as a benefit when a house is new, as time passes and houses age they may no longer be of benefit to owners when they are required to spend money and time ensuring they comply with the covenant rules. While this creates a disbenefit to the individual owner, it may provide benefit to other properties in the neighbourhood by ensuring standards are kept. If a house needs to be replaced, as most covenants are in perpetuity, any new houses built will need to comply with the original rules set out in the covenant, even if the suburb has changed and new building techniques or densities are desirable. From the view of the planners trying to ensure changing cities are fit for future generations, and property developers looking to realise that vision, covenants that restrict this happening are bad.

While land covenants will affect urban development in the future, they currently have or will offer a number of benefits. The NZPC noted that covenants can encourage development by placing time limits on construction, provide assurance to prospective buyers on the quality of development and also provide buyers with reduced risk (New Zealand Productivity Commission, 2015). Other benefits from covenants on properties in residential neighbourhoods include higher sales prices over time (Speyrer, 1989; Hughes & Turnbull, 1996; Rogers, 2006, 2010). Coverage in local media has also shown that residential properties with covenants also improve amenity and the perception of the neighbourhood (Dally, 2013; Simpson, 2016; Rikihana Smallman, 2017), again increasing the value of the property. This increase in value, both initial and over the longer-term is perhaps why land covenants have become increasingly popular on residential properties in the last few decades. Often higher house prices are elicited and maintained through popular covenant clauses such as minimum floor space area, shape and form of the house, minimum house value, and specifications on types of construction materials, all of which prevent lower-cost and affordable houses (McDonald, 2017; Rikihana Smallman, 2017; Stevenson, 2018). In addition, some covenants explicitly prohibit state houses, thus excluding other parts of society from living in the suburb.

Covenants may be a barrier to urban development, but are there some solutions to the problems they present? The NZPC's report on using land for housing (2015) outlined a number of shortcomings with covenants, but suggested that no need for reform was required on the matter, or for local authorities to have the ability to overturn covenants. The report did make two recommendations relating to covenants. The first, that time limits be placed on covenants of a period of 25 to 30 years, and secondly, that reforms be introduced to make it easier for land owners to

modify or remove them. The first suggestion, to place time limits on covenants is one that is used overseas in the likes of Louisiana. While this might be useful for covenants in residential areas that may inhibit or prevent development and redevelopment (which was the scope of NZPC's inquiry) no mention is given to whether such a suggestion would also apply to other types of covenants such as those for heritage or conservation. No mention is also given on whether such a measure should apply to existing covenants, or only those created after changes to relevant legislation. If the changes only applied to covenants created after changes, the effects of covenants already in place would still be in effect and be a large problem.

The NZPC also suggest there is merit in making it simpler for land owners to extinguish covenants, noting the current requirement for covenants to be modified or discharged is for all landowners with benefit to agree, or by court order. Lowering the agreement from unanimous to a super-majority (75 per cent), as suggested, would make it easier to discharge covenants restricting redevelopment, especially where mutual covenant schemes have been used for residential areas. Such a rule change may also have unintended consequences, by allowing impact on other types of covenants such as those for conservation.

The interaction between planning documents and covenants is complex, and differs depending on the jurisdiction. In New Zealand covenants take precedence over public planning documents like regional policy statements and district plans, often creating a conflict that limits redevelopment and intensification goals of such documents. In Australia, New South Wales has had legislation that allows covenants to be superseded by planning documents since 1979, and Victoria has tried to incorporate covenants into the planning system (Taylor & Rowley, 2017). In England the Law of Property Act 1925 allows for the discharge of covenants through a tribunal, if the covenant is deemed to impede reasonable use of land for public or private purposes, taking into account any plans that may affect planning permissions (Lee, 2017). In the aftermath of the Christchurch earthquakes, it was suggested by MBIE's chief architect that a way to overcome redevelopment constraints such as covenants was to enable special powers allowing the district plan to override residential covenants, and that this might be needed as part of the rebuild (Joiner, 2012), but no such powers were enacted. Easton *et al.* (2012) suggested that allowing planning documents to override covenants in New Zealand was a good idea, citing NSW as an example of where such a system was in place, but this idea was rejected by the NZPC, stating that such a move would "limit the opportunity for private individuals to make welfare-enhancing arrangements" (New Zealand Productivity Commission, 2015, p. 117).

The precedence of private property rights and the private planning system (in the form of covenants) over public planning documents may cause a barrier to redevelopment and intensification in some locations. In order to facilitate future development in areas where it has been determined appropriate through planning documents, some changes may be required to ensure that this can occur despite the presence of barriers related to covenants. To what degree public planning documents can influence the effects of covenants would need to be determined – it need not be an all or nothing situation. The opposite case to New Zealand is New South Wales, where public planning documents override covenants, but in Victoria they have tried to find a balance between public planning and private covenants by trying to incorporate the modification and discharge of covenants into the planning process, arguably relatively unsuccessfully (Taylor & Rowley, 2017). In Alberta, Canada, Ziff & Jiang, (2012) propose that local governments be given the ability to respond to restrictive covenants that interfere with municipal powers.

Another option proposed by submitters to the NZPC was giving councils the ability to void covenants, but the NZPC also rejected this option, as it would increase workloads for councils and undermine the overall effects of covenants (New Zealand Productivity Commission, 2015). Rather than just voiding covenants, the ability to modify them may also be an option. While the ability to void or modify covenants would allow councils to ensure that covenants did not contravene their plans, an equitable framework to assess the merits of a covenants rules would need to be put in place to enable this to happen. It might be beneficial if such decisions didn't sit with a council, but instead with another body, such as in England and Scotland where a legal tribunal system is used. Another option is for the decision to sit with the court, as is currently the case for some covenant changes or discharges.

The ability for councils to create conditions on residential subdivision consents that would prevent the use of covenants, which in theory is a covenant that there will be no other covenants, was mooted by Easton *et al.* (2012). While this would prevent situations where development or redevelopment is prevented, and that is admirable, it would put in place the same issue that they are trying to alleviate – a future constraint on the land, and one that may have unintended consequences. It is also unclear how councils would impose such conditions under the current legislation.

It has been suggested that 'developer agreements' be used as a method to control development as an alternative to covenants (Easton *et al.*, 2012; New Zealand Productivity Commission, 2015). Developer agreements are a contract between the subdivision developer and house builders, which require builders to construct dwellings to a certain standard similar to those seen in covenants, such as materials to be used, dwelling floor area minimums, and construction time limits. While

agreements could keep the type of houses in a suburb of a certain type and quality, it is hard to see subdivision developers using them in place of covenants. The terms of the contract would only apply to the dwelling construction, and would not be effective after the builder sells the property, and some of the increased value that a developer could sell a section for is from the perceived value that purchasers have for some of the amenity and land use controls that covenants provide. If perceived future value is less, then the amount that a subdivision developer could command for a section would be less.

Housing affordability in Auckland has decreased (Eaqub & Eaqub, 2015), as well as the provision of state housing (Housing New Zealand, 2015, 2018). Covenants can add to the cost of housing where they include requirements for minimum floor area and the use of certain materials, which can impede the provision of affordable housing. Some covenants even explicitly prohibit social or state housing. Given these issues, a mechanism to overcome such constraints to limit the effects of covenants on these housing types may need to be investigated. The Affordable Housing: Enabling Territorial Authorities Act 2008 was a piece of legislation that tried to do just this. Section 30 of the Act stated that “a covenant over land is void if one of its purposes is to stop the provision of affordable housing or social housing on the land” (Affordable Housing: Enabling Territorial Authorities Act 2008). Unfortunately after a change of government the Act was repealed in 2010. As covenants in areas that are developing or redeveloping affect the delivery of housing, perhaps a similar piece of legislation will be required again to ensure the provision of affordable and social housing.

Many of the solutions discussed in this section would require some sort of legislative change. Changes to laws, including the Property Law Act, and potentially others, would not be a simple process and would require both political and public buy-in. The NZPC recommended that the Ministry of Justice and the Ministry of Business, Innovation and Employment review the legislation relating to covenants, but changes to important components of New Zealand law and changes to the Act would not be done lightly. The Property Law Act was last updated in 2007, following a review of the 1952 version of the Act by the Law Commission in the early 1990s (New Zealand Law Commission, n.d.).

Understanding the effects of land covenants is hard to quantify. While it was relatively easy to identify those titles that have a land covenant, it is not possible to easily understand what the contents of the covenants are, or what their effects may be. Covenant information is stored in LINZ’s LandOnline, which provides access to title and property information. If you have direct access to the LandOnline system you can view the content of a covenant by searching for the title you are interested in,

and then open any relevant documentation attached to the title. Using LandOnline also comes at a cost, with a charge being made for every title that is viewed. Covenant information is stored as an image file, often a TIFF or PDF, which means that it is not searchable for keywords using standard software; this analysis must be done by manually reading the covenant text, or perhaps through the use of character recognition software. For these reasons, only a small number of titles had their covenant text reviewed as part of this research. A more thorough review of covenants, to understand their wording and their direct effects, would perhaps provide a better understanding of the impacts of their clauses, but would require a well-defined study scope and sufficient resourcing, but is an area of research that should be explored further.

6.0 Conclusion

Land covenants are a well-established and effective mechanism to control land and land use, forming a set of private planning controls that are often hidden, and sitting outside of New Zealand's public resource planning system.

Land covenants in New Zealand take a range of forms, but are widely used in residential subdivisions. In these cases they are used as subdivision controls, to stipulate the minimum size of dwellings, what form they can take, and their construction material, as well as providing directions on landscaping and fencing. Covenants are also widely used for heritage and conservation purposes.

The effects of covenants in urban areas include: acting as a barrier to development and redevelopment, increasing house prices and decreasing affordability, being used to stifle business competition, as a method of social exclusion, and as a form of land control. While covenants present a number of disbenefits to some parties, they create benefits to others, including increased property value, and maintained or increased amenity.

Land covenants are spread across the Auckland region, where there are 151,170 land covenants on 96,261 titles. The land area of titles with a covenant covers an area of 60,757 hectares or 12 per cent of Auckland's land area. Residential zones contain 83,068 titles that are affected by land covenants (19 per cent of the total). Residential zoned titles with land covenants are concentrated in suburbs that have been developed over the last few decades. Analysis shows the proportion of titles with land covenants in residential zones has been increasing over time. Less than 10 per cent of residential titles issued in the early 1980s had a land covenant on them. In 2017 over 50 per cent of residential titles issued had a land covenant on them, and over three-quarters (86 per cent) of the covenants in residential zones are on titles that have been created in the last 30 years. Properties in residential zones with a land covenant have commercially feasible capacity for 13,243 additional dwellings, or 12 per cent of the total commercially feasible capacity for all residential zones. Centre zones have 2529 titles affected by covenants, and over 5800 titles in rural zones have a land covenant. The Countryside Living zone has the highest number (2507) and the highest proportion (34 per cent) of titles with land covenants of any of the rural zones.

While the impacts of land covenants in residential and commercial areas of the region may not be felt currently, they are likely to have a future impact on the city's ability to develop and redevelop efficiently or in line with strategic planning goals. A number of solutions to the problems they present include recommendations from the

NZPC for legislative change. The NZPC in its findings on an investigation into using land for housing noted that overall they did not see any need to substantially change how land use covenants operate in New Zealand, but did recommend statutory sunset clauses or time limits for covenants (though they did not specify if that should apply to only new covenants or also existing ones), and reducing the proportion of covenant beneficiaries' permission required to modify and discharge them. Both of these suggestions have merit, but in the longer term will have little impact on the effects of covenants already in place in residential areas that will affect redevelopment. Another option would be adopting a regime similar to that of New South Wales, where planning documents override covenants, or adopting a tribunal system as used in Scotland or England to assess covenants through a formal process. Other solutions, which could be viewed as less favourable include providing councils with the ability to discharge covenants.

Land covenants, particularly in existing residential suburbs and in areas earmarked for future urban expansion, will limit the ability for these areas to grow and change as the population of Auckland increases.

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8.0 Appendices

Appendix A – Example of schedule of covenants for a residential subdivision

Form L

Annexure Schedule

Page 1 of 9 Pages

Insert instrument type

Land covenant and Fencing covenant see clause 3.6

Continue in additional Annexure Schedule, if required

The Grantor as registered proprietor of the land contained in Computer Freehold Registers 670543 (**Land**) ("Land" includes the servient tenements or covenanting lot(s) or residential land) has subdivided the Land into residential lots in the manner shown and defined on Deposited Plan 485061

It is the Grantor's intention to create, for the benefit of the Benefiting Lots, the land covenants set out in Schedule B (**Covenants**) over the Covenanting Lots TO THE INTENT that:

- (a) the Covenanting Lots will be bound by the stipulations and restrictions set out in the covenants; and
- (b) the Grantee and the owners and occupiers for the time being of the Benefiting Lots may enforce the observance of the Covenants against the owners for the time being of the Covenanting Lots.

So as to bind the Covenanting Lots, and for the benefit of the Grantee and the respective owners of the Benefiting Lots, the Grantor DOES HEREBY COVENANT AND AGREE in the manner set out in Schedule A so that the Covenants run with the Covenanting Lots for the benefit of the Grantee and the respective owners of the Benefiting Lots PROVIDED HOWEVER that:

- (a) the Grantee will not be required or obliged to enforce all or any of the stipulations and restrictions contained in the Covenants; and
- (b) the Grantor will not be liable to the Grantee for any breach of any of the Covenants by any of the other registered proprietors of the Covenanting Lots; and
- (c) the Grantor will as regards the stipulations and restrictions contained in the Covenants be liable only in respect of breaches which occur while the Grantor is registered proprietor of any of the Covenanting Lots in respect of which any breach occurs.

Insert instrument type

Land covenant

Continue in additional Annexure Schedule, if required

SCHEDULE B**DEFINITIONS AND INTERPRETATION**

1. In this instrument, unless the context requires otherwise:

Access Way means any land in the Development which is currently or subsequently defined as a legal access way or access lot on any registered instrument, deposited plan or by the Property Law Act 2007;

Benefiting Lots means any one of lots 1-22 (inclusive), 29-39 (inclusive), 51-61 (inclusive) Deposited Plan 485061 or any lots into which those lots are further subdivided if applicable;

Covenanting Lot(s) means any one of lots 1-22 (inclusive), 29-39 (inclusive), 51-61 (inclusive) on Deposited Plan 485061 or any lots into which those lots are further subdivided if applicable;

Development means the residential use development carried out by Mountain City Developments Limited on land formerly comprised in Computer Freehold Register 670543 (North Auckland) and includes the Land;

Stage 2 Development means the residential development carried out by Mountain City Developments Limited on land formerly partially comprised in Computer Freehold Register 670543 (North Auckland) and includes the Land being 1-22 (inclusive), 29-39 (inclusive), 51-61 (inclusive) on Deposited Plan 485061

Erect means place, build, erect, install, attach, situate or construct or permit to be placed, built, erected, installed, attached, situated or constructed;

Grantee means the registered proprietor of the Benefiting Lots;

Grantor means the registered proprietor of the Covenanting Lots and includes the agents, employees, contractors, tenants, licensees and other invitees of the grantor.

Insert instrument type

Land covenant

Continue in additional Annexure Schedule, if required

Continuation of "Schedule B"

Improvements means any residential dwelling and commercial and associated buildings or structures, fencing and landscaping to be Erected or incorporated on any of the Covenanted Lots;

Relevant Authority means any corporation, including any government, local or regional territorial authority, statutory or non-statutory authority or body having jurisdiction over the Covenanted Lots or the Land or any part thereof; and

Satellite Dish means any satellite dish or other communication dish, device, antenna or aerial which is greater than 1 metre in diameter.

Residential Land means any one of lots 1-22 (inclusive), 29-39 (inclusive), 51-61 (inclusive) Deposited Plan 485061 or any of them, any lots into which those lots are further subdivided if applicable.

LAND COVENANTS TO ENURE

2. The Grantor for itself and its successors in title covenants and agrees with the Grantee for the benefit of each and all of the Benefiting Lots and also separately with each and all of the registered proprietors of the Benefiting Lots contained in Stage 2 Development to always observe and perform all of the agreements, stipulations and restrictions set out in the Covenants to the intent that they shall forever enure to benefit the Benefiting Lots.

GRANTOR'S COVENANTS

3. The Grantor for himself and his successors in title hereby covenant with the Grantee for and on behalf of the Grantee and its successors in title and the registered proprietors for the time being of all residential lands contained in Stage 2 Development as follows:-
 - 3.1 Shall not construct any building on the land with an external wall cladding (except for soffits and/or in association with textured finishes) of unrelieved flat sheet fibrolite, Hardiflex, galvanized steel, metal sheeting, Hardiplank or similar materials.

Insert instrument type

Land covenant

Continue in additional Annexure Schedule, if required

Continuation of "Schedule B"

- 3.2 Shall not use or occupy any building as a residence until such time as construction has been completed.
- 3.3 Shall not construct or permit to be erected any fence or boundary wall nor permit any hedge, shrubs or trees to be planted or grown as a living fence unless it is no more than 1.8 metres in height.
- 3.4 Shall not erect or permit second-hand, relocated or temporary buildings to be placed on the land.
- 3.5 Shall not erect or permit to be erected any fence or boundary wall nor permit any hedge shrubs or trees to be planted or grown as a living fence at any time within one metre of the road boundary in order to maintain an open environment other than with the Grantee's prior written consent, which consent shall be entirely at the Grantee's discretion in all respects.
- 3.6 Shall not call upon the Grantee to pay or contribute towards the cost of erection or maintenance of any boundary fence between the property and any adjoining lot owned by the Grantee, provided that this covenant shall not endure for the benefit of the subsequent transferee of such adjoining land.
- 3.7 Shall not allow the building to be constructed with a basement or subfloor space that does not have exterior walls of the basement subfloor sheeted with cladding in compliance with the provisions of clause 3.1 above.
- 3.8 Upon possession of the property shall not permit any rubbish to accumulate and/or to be placed upon the land or permit grass or weeds to grow in excess of 100 mm in height or to become unsightly, or allow any waste, soil or other matter to foul the roadway, footpaths or berms.
- 3.9 Shall not permit or allow rubbish, junk, car bodies, litter or other similar unsightly items to accumulate or be placed upon the land or otherwise allow the land to become unsightly.

Insert instrument type

Land covenant

Continues in additional Annexure Schedule, if required

Continuation of "Schedule B"

- 3.10 Shall not erect or permit to be erected upon the land any caravan, bus, hut or shed to be used as a dwelling house, temporary dwelling or to be stored on the land except such caravan, hut or shed as will be used as a builders shed in conjunction with the construction of the permanent dwelling which will be placed on the land at the commencement of construction of the permanent dwelling and removed immediately on completion of the construction of the permanent dwelling.
- 3.11 Shall not use or permit the land to be used for any trading or commercial purposes except for the display of the land and buildings for resale purposes or show home display.
- 3.12 Shall not construct a vehicle crossing and driveway unless they are completed to the Territorial Authority's standard and specifications prior to occupation of the residence and unless they are in sympathy with the subdivision.
- 3.13 Shall not subdivide the lot without the prior written consent of the Grantee which will be granted entirely at the sole discretion of the Grantee who shall not be obliged to give any reasons for refusing to grant consent. Further the Grantor will require a resource consent to be granted by the Auckland Council at the cost of the Grantor; and the development must comply in all respects with the general terms of the building enhancement covenant but entirely at the sole discretion of the Grantee.
- 3.14 Shall complete building (i.e. ready for occupation including drives, paths, fences, letterbox, landscaping and rotary hoe) within twelve months of commencing construction.
- 3.15 Shall not erect on the property any other building other than a single dwelling house.
- 3.16 Shall be entirely responsible to obtain his own resource and building consents in respect of the dwelling house.
- 3.17 The floor area for single dwelling houses for all the lots with a section area over 250m² should be not less than 180m² including garage.

*Insert instrument type***Land covenant***continue in additional Annexure Schedule, if required*

continuation of "Schedule B"

- 3.18 The floor area for Single dwelling houses for Stage 2 Development of Lot 9 to Lot 13 inclusive should have a floor area of not less than 160m² including garage.
- 3.19 The Purchaser as Grantor of Lot 30 to Lot 38 (inclusive) and Lot 52 to Lot 60 (inclusive) agrees that they will not commence construction of any dwelling house prior to submitting to the Vendor as Grantee and obtaining approval from the Vendor as Grantee of the final building plans of any such dwelling house (as intended to be submitted for a building consent) including full details of all exterior colour schemes and finishes and details of fencing and front yard landscaping. Such approval shall be entirely at the Vendor as Grantee's discretion in all respects.
- 3.20 Satellite dishes are not allowed to be in the front yard and are not to be visible at the front of the properties. The Grantor should obtain relevant consent from the local authority if applicable.
- 3.21 If there should be any breach or non observance of any of the covenants and conditions contained in the above clauses and without prejudice to any other liability which a Grantor may have to any Authority or any person having the benefit of such covenants and conditions and without in any way restricting the remedies available to any Grantor or any person having the benefit of such covenants and conditions, the Grantor will upon written demand made by the Grantee or his nominee or by any registered proprietors of the lots within Stage 2 Development:
- (a) The Grantor shall remove or cause to be removed from the section (s) any building used, erected, commenced or repaired in breach or non observance of covenants and conditions;
 - (b) The Grantor shall on demand by the Grantee replace any building material used or permitted to be used in breach or non observance of covenants and conditions with building materials which comply with the Grantee's requirements under these covenants and with any approval of any proposal submitted by the Grantor.
 - (c) Pay to the person making such demand as Liquidated Damages the sum of \$200.00 per day for each day that such breach or non-observance continues after the date upon which written demand has been received. The said amount of \$200.00 shall be increased annually by reference to the Consumer Price Index (CPI) (All Groups) or equivalent replacement index.

Insert instrument type

Land covenant

Continue in additional Annexure Schedule, if required

Continuation of "Schedule B"

- 3.22.1 The Grantor agrees that the value of all or some of the other lots will be diminished if the Grantor fails to observe and perform the Covenants. The Grantor will pay damages to the Grantee as Liquidated Damages if the Grantor fails to observe or perform any of the Covenants within 14 days of receiving written notice of any breach of the Grantor's obligations under the Covenants. For the purpose of this clause:
- (a) "Damages" means the sum of \$200.00 per day of breach or an amount equal to 20% of the market value of the property at the time the breach occurs (whichever is the greater);
 - (b) The market value will be fixed by a registered valuer appointed by the Grantee or the Grantee's nominee. The cost of the valuation will be paid by the Grantor.
- 3.22.2 Payment of Damages by the Grantor will not relieve the Grantor of the Grantor's obligations under the land covenants.
- 3.22.3 The Grantor will remain liable to observe and perform the Covenants until the property is transferred out of the Grantor's name.
- Grantor and any future registered proprietors of the property will be liable to observe and perform the Covenants only while they are registered as proprietors of the property. A transfer of the property by them will not however relieve them from any liability which has arisen before the date of the transfer.

Insert instrument type

Land covenant

*Continue in additional Annexure Schedule, if required***Continuation of "Schedule B"**

3.23 To clarify the Vendor as the developer and the Grantee is not liable to pay Watercare infrastructure growth charge and the Purchaser as Grantor understands it is the Purchaser's liability to pay any costs to the local authority if required.

DISPUTE RESOLUTION

4. If a dispute arises in connection with these Covenants, the parties will endeavor to settle the dispute by mediation before resorting to arbitration. Either party may initiate mediation by giving written notice to the other party. The mediator will be agreed on by the parties, but if the parties cannot agree on a mediator within 7 working days after the mediation has been initiated, then the mediator will be appointed by the President for the time being of the Auckland branch of the New Zealand Law Society whose decision as to the appointment of the mediator will be final and binding on the parties.
5. If the dispute has not been settled within 14 working days after the appointment of the mediator, or within any longer period agreed on in writing by the parties, then the parties agree that resolution of the dispute will be determined by arbitration under the Arbitration Act 1996. Either party may commence the arbitration by giving a written notice to the other party stating the subject matter and details of the dispute and the party's requirement to have the dispute determined by arbitration.
6. The arbitration will be conducted by a single arbitrator. If the parties cannot agree upon a single arbitrator within 14 working days of a party receiving a notice under this clause, then the arbitrator will be appointed by the President for the time being of the Auckland branch of the New Zealand Law Society and his/her decision will be final and binding on the parties as to the appointment of the arbitrator.
7. The parties agree that the arbitrator's award will be final and binding on them.

Insert instrument type

Land covenant

Continue in additional Annexure Schedule, if required

Continuation of "Schedule B"

SEVERABILITY

8. If any part of the instruments is held by any court or administrative body of competent jurisdiction to be illegal, void or unenforceable, such determination shall not impair the enforceability of the remaining parts of this instrument.

Appendix B – Number of titles, land covenants, and titles with land covenants in Auckland 2018, by Auckland Unitary Plan (operative in part) zone

Zone name	Number titles	Number of land covenants	Number of titles with a land covenant	Proportion of total titles in zone with a land covenant	Proportion of total titles with a land covenant in region
Airport	127	16,904	85	67%	<1%
Business Park	161	76	37	23%	<1%
City Centre	28,824	2,573	1,616	6%	2%
Coastal Transition	24	0	0	0%	0%
Countryside Living	7,299	3,862	2,507	34%	3%
Defence	1	0	0	0%	0%
Ferry Terminal	5	0	0	0%	0%
Future Urban	3,464	1,417	897	26%	1%
General Business	1,675	243	203	12%	<1%
Green Infrastructure Corridor	0	0	0	0%	0%
Hauraki Gulf Islands	8,438	599	475	7%	<1%
Healthcare Facility	220	0	0	0%	0%
Heavy Industry	2,983	264	219	8%	<1%
Large Lot	6,879	2,200	1,622	24%	21%
Light Industry	13,476	5,885	1,350	12%	1%
Local Centre	2,404	343	150	9%	<1%
Major Recreation Facility	147	17	13	9%	<1%
Maori Purpose	144	3	2	11%	<1%
Marina	103	14	2	2%	<1%
Metropolitan Centre	5,436	903	426	8%	<1%
Minor Port	7	0	0	0%	0%
Mixed Housing Suburban	199,468	52,366	42,450	37%	44%
Mixed Housing Urban	100,687	12,536	9,992	27%	10%
Mixed Rural	4,500	1,240	767	17%	1%
Mixed Use	17,111	1,522	1,146	10%	1%
Mooring	1	0	0	0%	0%
Neighbourhood Centre	1,994	57	43	5%	<1%
Public Open Space - Civic Spaces	21	3	3	14%	<1%
Public Open Space - Community	204	2	2	1%	<1%

Zone name	Number titles	Number of land covenants	Number of titles with a land covenant	Proportion of total titles in zone with a land covenant	Proportion of total titles with a land covenant in region
Public Open Space - Conservation	2,659	50	38	2%	<1%
Public Open Space - Informal Recreation	3,712	151	104	3%	<1%
Public Open Space - Sport and Active Recreation	895	40	26	3%	<1%
Quarry	114	137	75	66%	<1%
Road	553	111	74	15%	<1%
Rural and Coastal settlement	5,841	872	727	13%	1%
Rural Coastal	3,437	960	593	17%	1%
Rural Conservation	215	44	39	19%	<1%
Rural Production	12,579	2,574	1,694	13%	2%
School	293	27	22	9%	<1%
Single House	86,191	34,770	23,567	36%	24%
Strategic Transport Corridor	446	33	26	7%	<1%
Terrace Housing and Apartment Buildings	42,415	7,643	4,710	25%	5%
Tertiary Education	13	0	0	0%	<1%
Town Centre	6,382	407	294	7%	<1%
Waitakere Ranges	2,169	134	122	6%	<1%
Waitakere Ranges Foothills	1,200	185	141	12%	<1%
Water	17	3	2	12%	<1%
Total	574,934	151,170	96,261	17%	-

Appendix C – Area zoned and area covered by land covenants in Auckland 2018, by Auckland Unitary Plan (operative in part) zone

Zone name	Total zoned area (ha)	Zoned area that has land covenant (ha)	Proportion of total zoned area with land covenant	Proportion of total area of titles with covenant in region
Airport	1,542	1,292	84%	2%
Business Park	61	18	29%	<1%
City Centre	261	104	40%	<1%
Coastal Transition	1,493	0	0%	0%
Countryside Living	22,592	6,953	31%	11%
Defence	17	0	0%	0%
Ferry Terminal	8	0	0%	0%
Future Urban	10,674	2,732	26%	4%
General Business	357	88	25%	<1%
Green Infrastructure Corridor	6	0	0%	0%
Hauraki Gulf Islands	47,153	1,220	3%	2%
Healthcare Facility	164	0	0%	0%
Heavy Industry	1,869	610	33%	1%
Large Lot	2,912	887	30%	1%
Light Industry	4,586	1,064	23%	2%
Local Centre	246	59	24%	<1%
Major Recreation Facility	454	126	28%	<1%
Maori Purpose	87	0	1%	0%
Marina	265	8	3%	<1%
Metropolitan Centre	382	108	28%	<1%
Minor Port	17	0	0%	0%
Mixed Housing Suburban	14,970	3,608	24%	6%
Mixed Housing Urban	7,531	851	11%	1%
Mixed Rural	39,077	6,185	16%	10%
Mixed Use	984	132	13%	0%
Mooring	1,247	0	0%	0%
Neighbourhood Centre	132	12	9%	<1%
Public Open Space - Civic Spaces	3	2	52%	<1%
Public Open Space - Community	91	1	1%	<1%

Zone name	Total zoned area (ha)	Zoned area that has land covenant (ha)	Proportion of total zoned area with land covenant	Proportion of total area of titles with covenant in region
Public Open Space - Conservation	34,660	101	<1%	<1%
Public Open Space - Informal Recreation	8,411	1,411	17%	2%
Public Open Space - Sport and Active Recreation	3,084	340	11%	1%
Quarry	1,682	1,223	73%	2%
Road	17,377	21	<1%	<1%
Rural and Coastal settlement	1,856	399	21%	1%
Rural Coastal	77,770	7,397	10%	12%
Rural Conservation	3,093	992	32%	2%
Rural Production	165,169	19,104	12%	31%
School	668	80	12%	<1%
Single House	8,539	2,604	30%	4%
Strategic Transport Corridor	2,564	4	<1%	<1%
Terrace Housing and Apartment Buildings	2,485	337	14%	1%
Tertiary Education	40	0	0%	0%
Town Centre	442	52	12%	<1%
Waitakere Ranges	3,141	317	10%	1%
Waitakere Ranges Foothills	2,870	314	11%	1%
Water	1,836	1	<1%	<1%
Total	494,869	60,757	12%	-

Appendix D – National Policy Statement on Urban Development Capacity 2016: Housing and business development capacity assessment for Auckland. Executive summary. (Auckland Council, 2017)

Executive summary

The National Policy Statement on Urban Development Capacity 2016 requires the completion of a housing and business development capacity assessment. The first of these is due by 31st December 2017. This report contains the methods and results of the assessment. The key conclusions of the assessment are specified below.

Housing assessment

Overall forecast population growth and demographic change related housing demand is assessed to be between 239,000 (low) and 397,000 (high) over the period 2016 to 2046. Under a medium growth scenario, additional demand is projected to be 319,000 dwellings. In addition to population driven demand a shortfall of 35,000 dwellings has been added.

Plan-enabled capacity in residential zones in the urban area ranges between 120,000 (infill – where no existing structure is removed) and 1.07 million (redevelopment, where sites are cleared and redeveloped to the maximum).

Plan enabled potential for dwellings in centres and mixed-use business areas is at least as much as the residential zone redevelopment figure, depending on the split of enabled floor space between business activities and assumed apartment size.

Estimated feasible dwelling development capacity in the urban areas (business and residential zones) is 140,000 residential dwellings.

Additional feasible capacity of 15,000 dwellings in the rural areas is assumed. This number will be revised pending the completion of Rural Subdivision appeals on the Auckland Unitary Plan.

Feasible capacity for 25,000 dwellings from Housing New Zealand has been assumed.

Feasible dwelling development capacity in the future urban areas is 146,000 residential dwellings, assuming a Mixed Housing Suburban zoning on all non-business areas.

Overall, currently feasible supply is expected to be sufficient to meet forecast demand for the short and medium terms. Longer term currently feasible supply is less than demand.

Given the changes in feasibility identified in the last 12 months due to factors other than 'planning regulations', the significant amount of plan enabled capacity that exists, significant alternation to planning policy and strategy to address this is not recommended.

Business assessment

The plan enabled business space capacity ranges from approximately 4500 hectares (business land capacity) to over 30,000 hectares (floor space capacity).

There is no shortfall of feasible business land/ space in the short or medium term. However, there is a shortfall in some locations in the long term.

Business land or floor space that is feasible for residential development in mixed use zones is not included in the final feasibility assessment

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