



BBHTC RESEARCH BULLETIN

Covenants and Risks to the Supply of Land for Modest Homes and Affordable Housing

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New Zealand has an acute and persistent under-supply of housing. Most acute is an under-supply of affordable housing (Johnson, Howden-Chapman and Eaqub, 2018). Opinions for that under-supply and New Zealand's heated house prices are many. For the last decade, particular attention has been given to land costs and claims around the restrictive nature of land use planning and consenting carried out by local and regional councils. In 2013, the then government enacted the Housing Accords and Special Housing Areas Act 2013 (HASHAA) to release land from planning constraints. There have been low levels of take-up among developers and some developments that are now labelled Special Housing Areas (SHAs), such as Hobsonville, would clearly have been active without the HASHAA. In addition, SHAs are not producing significant, if any, affordable housing and are likely to have only a minor impact on housing affordability in general (Murphy, 2016; James, 2018).¹

New Zealand shares with many other countries the tendency to cite the land-use planning regime as the major driver of decreasing affordability and housing under-supply. Similar discourses are evident in Australia and the United Kingdom and those jurisdictions have also seen a preoccupation with public planning as the critical driver of the under-supply of affordable housing (Gurran and Phibbs, 2015; Barker, 2004). Recent Building Better Homes Towns and Cities BBHTC research into the exit of the building industry's production of affordable housing suggests that the strangling of government capital investment in affordable housing since the early 1990s provides a different view of the dynamics around the under-supply of affordable housing (Saville-Smith, 2018a and b). This BBHTC Research Bulletin explores another aspect of the factors influencing affordable housing and housing affordability. That is, the impacts of privately imposed covenants on residential land.

Covenants are a powerful tool, which go beyond the public planning regime. Their use has only attracted sporadic and limited attention in New Zealand (Easton, Austin, and Hattam, 2012; Early *et al.*, 2015; Mead and Ryan, 2012) and overseas (Dehring and Lind, 2007; Hattema and Raven, 2011; Brading and Styles, 2017; Kenna *et al.*, 2017). One component of the Architecture of Decision-making Strategic Research Area explores the impact of covenants on the supply of land for housing, the type of housing covenants promote, the impact of covenants of our settlements, and the implications for meeting New Zealand's affordable housing and housing affordability needs. This BBHTC Research Bulletin presents findings on the prevalence of covenants with a particular, but not exclusive, focus on the Auckland region.

Covenants – A Quick Overview

Land covenants can be imposed to control land use and the development on it. 'Positive covenants' require a land owner to do something while 'restrictive covenants' prohibit or prevent an owner from doing something. Covenants are not imposed through the public planning system. They are a private arrangement between, typically, existing landowners and future users or owners. It binds them to obligations for a fixed period or in perpetuity. If demonstrated to breach the Human Rights

¹ Affordable housing is defined as housing affordable to low and modest income households. Housing affordability refers to the cost of housing relative to some measure of prevailing incomes – typically median housing costs relative to median incomes. In many countries, including New Zealand, there is a significant under-supply of affordable housing that minor improvements in housing affordability will not resolve.

Act 1993, Residential Tenancies Act 1986, Property Law Act 2007, or Commerce Act 1986 (Hinde *et al.*, 2018) covenants may be rescinded. Removal of covenants or changes in their conditions requires action in the High Court.

Covenants have been cited by the NZ Productivity Commission as having a potentially negative effect on land supply, house prices, and as a barrier to the supply of affordable housing. In the context of residential developments, covenants are variable but frequently involve restrictions on: the building of lower-cost housing, two-storey dwellings, or smaller houses; the use of lower-cost materials; visible solar energy systems; placement of utility structures such as washing lines, storage sheds, or garages and ramps. Sometimes developers require designs, materials, and values-to-market be approved by the developer.

Use of residential land covenants - a New Zealand overview

Across the entire country 16% of titles have a land covenant on them. In Auckland, 19% of all titles in residential areas have a covenant, accounting for 23% of residential land. The imposition of covenants is most evident in territorial authorities who have seen recent expansion of residential land:

- Selwyn (48% of all titles are covenanted)
- Waimakariri (40% of all titles are covenanted)
- Queenstown-Lakes (36% of all titles are covenanted).

Covenants are also a feature of councils that have traditionally had a very flexible district planning to enable development. 35% of all titles in Tauranga are covenanted (Figure 1).

Auckland’s experience and future

In Auckland, the imposition of covenants on residential titles has increased from 9% of residential titles struck in 1980 to covenants on 55% of residential titles struck in 2017 (Figure 2). Over two thirds (68%) of covenants were struck in the last 20 years. Covenant restrictions are particularly prominent in newer residential areas such as Howick. Howick has 48% of its land under covenant.

Covenants may present a significant restraint on development and re-development within the existing urban area, with 19% of titles in Auckland’s residential zones, and 23% of the land area of those zones covered by a land covenant (Table 1). It is likely that covenants will present a challenge to the provision of additional housing and especially affordable housing in the areas of Auckland identified for future urban development. Over a quarter of titles and a similar proportion of the land area in the Future Urban Zone, the areas earmarked to accommodate future urban expansion, are affected by covenants. Of the 10,674 hectares of land marked for Auckland’s Future Urban Zone, 2,732 hectares have covenants.

Table 1. Covenants in Auckland’s Existing Urban Zones

Auckland Existing Urban Zones	% titles with land covenant	% area with land covenant
Large Lot	24%	30%
Mixed Housing Suburban	21%	24%
Mixed Housing Urban	10%	11%
Rural and Coastal settlement	12%	21%
Single House	27%	30%
Terrace Housing and Apartments	11%	14%
Total residential zones	19%	23%

Figure 1 Proportion of all titles with land covenant, by territorial authority 2017

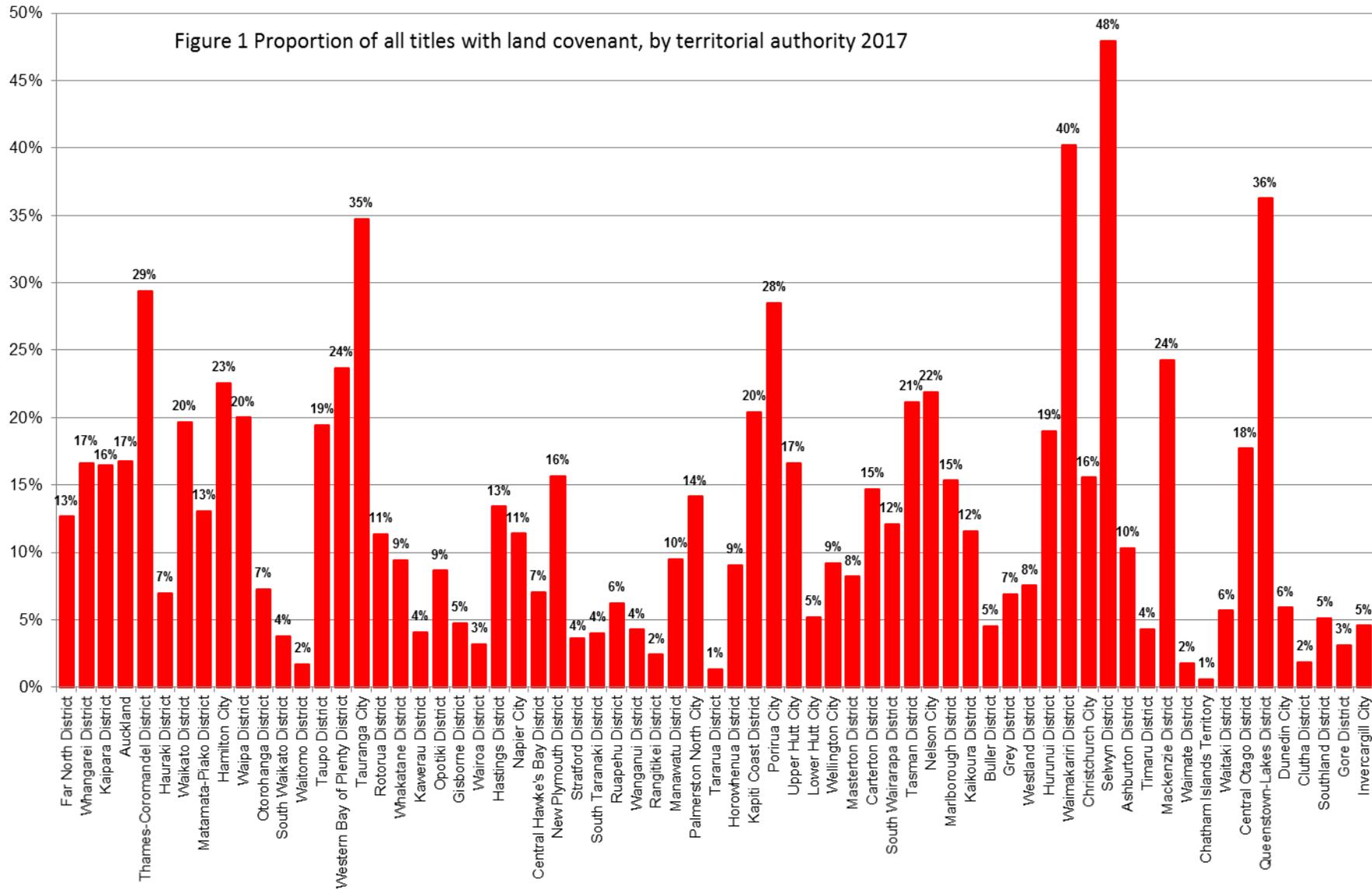
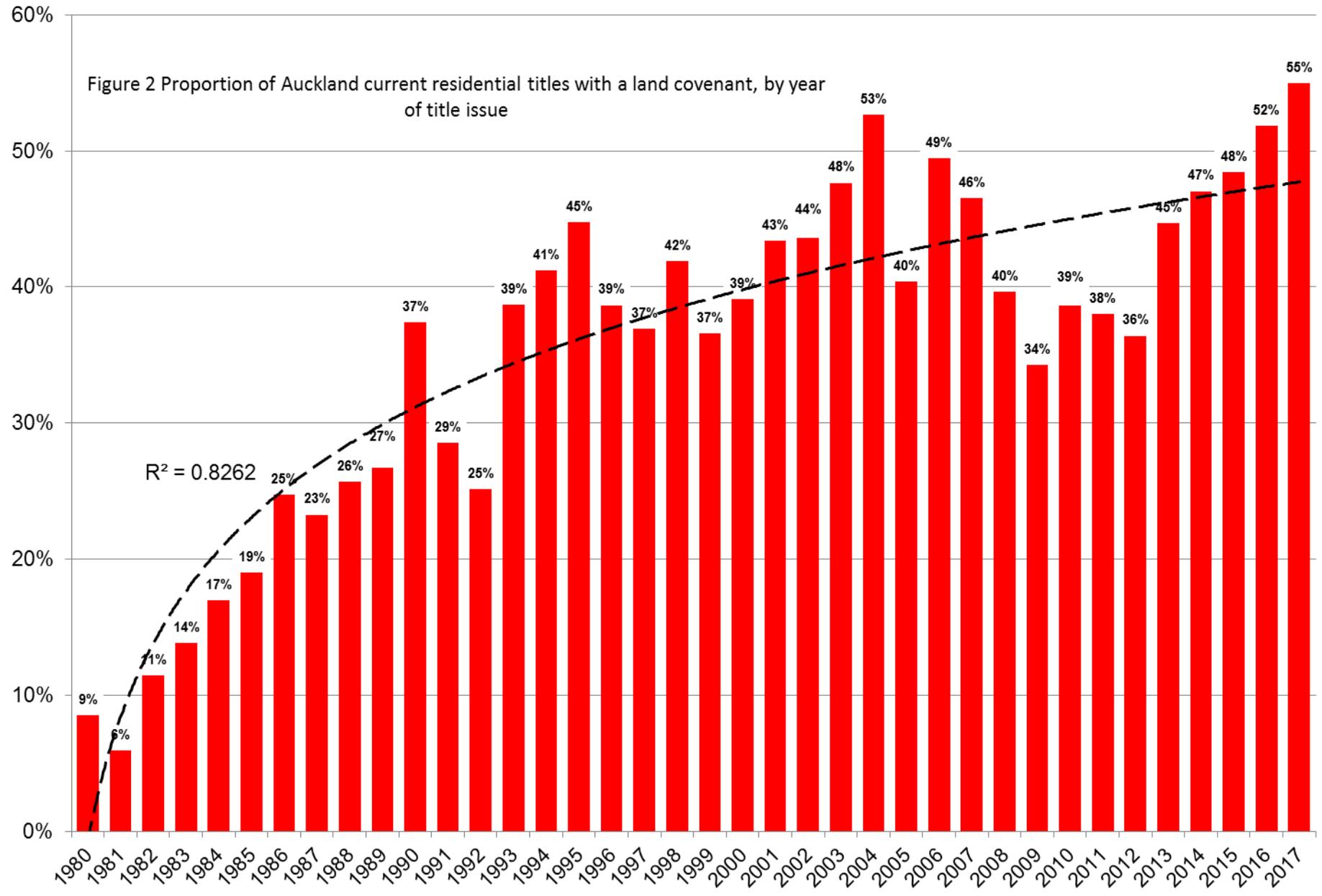


Figure 2 Proportion of Auckland current residential titles with a land covenant, by year of title issue



Conclusions

Land covenants place restrictions on current and future use of land that go beyond district planning. No public benefits, mitigation of public costs, or consultation is required from developers imposing covenants. There is no simple mechanism for the removal of land covenants. The prevalence of land covenants being struck on residential land appears to be increasing. The conditions associated with residential land covenants is the subject of further research, but indications are that they tend to demand dwelling sizes and designs that fuel high house prices and are likely to restrict the building of affordable housing on covenanted land.

References and further reading

- Barker, K. (2004) *Delivering stability: securing our future housing needs Barker Review of Housing Supply - Final Report*, HM Treasury, London
- Brading, S., and J. Styles (2017). Restrictive covenants. *RICS Land Journal*, May/June 2017, 21.
- Early, L., Howden-Chapman, P., Russell, M., Hamer-Adams, A., and Ombler, J. (2015). *Drivers of Urban Change*. Wellington, New Zealand: Steele Roberts Aotearoa.
- Dehring, C. A., and M. Lind (2007). Residential Land-Use Controls and Land Values: Zoning and Covenant Interactions. *Land Economics*, 83(4), 445-457.
- Easton, L., Austin, T., and D. Hattam, (2012). Covenants affecting affordability. *Build*, 32-33.
- Fredrickson, Craig (2018). *Land covenants in Auckland and their effect on urban development*. Auckland Council technical report, TR2018/013
- Gurran, N., and P. Phibbs, (2015), Are Governments Really Interested in Fixing the Housing Problem? Policy Capture and Busy Work in Australia, *Housing Studies*, 30(5), pp: 711-729
- Hattam, D., and J. Raven (2011). My House, My Castle. *Planning Quarterly* (September).
- Hinde, G., McMorland, D., and K. Buchanan (2018) *Hinde, McMorland, and Sim Land Law in New Zealand* (Online looseleaf ed.). Wellington, New Zealand: LexisNexis.
- James, B. (2018) *Special Housing Areas: A practical pathway to livable homes?* in E. Tracada and G. Cairns (eds) *Proceedings Cities, Communities and Homes: Is the Urban Future Livable?* AMPS, Architecture, University of Derby, 22-23 June 2017
- Johnson, A., Howden-Chapman, P., and S. Eaqub (2018) *A Stocktake of New Zealand's Housing*, New Zealand, Government, Wellington.
- Kenna, T., Goodman, R., and D. Stevenson (2017). Privatising the suburbs: examining the trends and implications of 20 years of private residential development in Sydney, Australia. *Geographical Research*, 55(3), 269-282.
- Mead, D., and S. Ryan (2012). *Restrictive Covenants – Is There A Case For Public Plans To Control Private Planning Instruments In New Zealand?* Paper presented at the New Zealand Planning Institute Conference, 1-4 May 2012, Blenheim, New Zealand.
- Murphy, L. (2016), The politics of land supply and affordable housing: Auckland's Housing Accord and Special Housing Areas. *Urban Studies* 53(12), pp: 2530-2547.
- New Zealand Productivity Commission (2012) *Housing Affordability Inquiry*, Productivity Commission, Wellington.
- Rogers, W. H. (2006). A Market for Institutions: Assessing the Impact of Restrictive Covenants on Housing. *Land Economics*, 82(4), 500-512.
- Rogers, W. H. (2010). The Housing Price Impact of Covenant Restrictions and Other Subdivision Characteristics. *The Journal of Real Estate Finance and Economics*, 40(2), 203-220.
- Saville-Smith, K. (2018a) Revitalising the production of lower value homes: Researching dynamics and outcomes. Paper presented to European Network of Housing Researchers Conference, Uppsala, Sweden, 27-29 June 2018. http://www.buildingbetter.nz/publications/SRA1/Saville-Smith_2018_revitalising_production_lower_value_homes.pdf
- Saville-Smith, K (2018b) *Following the money: Understanding the building industry's exit from affordable housing production*. Research Bulletin, Wellington: Building Better Homes, Towns and Cities.

http://www.buildingbetter.nz/publications/contestable_research_projects/Saville-Smith_2018_following_the_money.pdf

- Taylor, E., and Rowley, S. (2017). *Written in pencil or in ink: Private covenants and their legacies for housing and planning in Victoria*. Paper presented at the State of Australian Cities Conference, 28-30 November, Adelaide, Australia.
- Walsh, E. (2017). Public versus private land use controls in England and the USA. *International Journal of Law in the Built Environment*, 9(1), 18-31.
- Ziff, B., and Jiang, K. (2012). Scorched earth: the use of restrictive covenants to stifle competition. *Windsor Yearbook of Access to Justice*.

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This research was conceived by Dr K. Saville-Smith, CRESA, as part of the *Architecture of Decision-making* BBHTC programme, funded by the BBHTC National Science Challenge and developed and executed by Craig Fredrickson, RIMU, Auckland Council.