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THE PRIVATE CITY: IRVINE (COMPANY), CALIFORNIA

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Irvine, California is often described as the quintessential privatized suburb.¹ Though cities are traditionally conceptualized as public entities,² characterized by government control, elected officials, and safeguards protecting citizen participation, Irvine was privately controlled and developed long before the “public” city government was incorporated.³ Although many would identify the Irvine Company as the controlling force behind the city’s master planned, mostly beige, and carefully landscaped environment, Irvine’s private character is also explained by the strong foundation of private ownership established by the Spanish land grant system and strengthened by changes in sovereignty following the Mexican War of Independence and the Mexican-American War. The massive private ranchos created under Spanish and Mexican rule made it possible for a single group of investors to package together more than 100,000 acres into the Irvine Ranch in the 1860s. This parcel of land has remained under unified private control ever since, which has allowed the Irvine Company to exercise broad control over land use in a broad area.

¹ As environmental historian William Cronon describes it, Irvine “takes inspiration in part from that amazing planned environment in Anaheim a few miles to the north: Disneyland.” William Cronon, *Introduction*, in UNCOMMON GROUND, 40 (1996); see also Edward Soja, *Inside Exopolis: Scenes from Orange County*, in VARIATIONS ON A THEME PARK: THE NEW AMERICAN CITY AND THE END OF PUBLIC SPACE 94 (Michael Sorkin, ed. 1992) (echoing Cronon’s comparison on a slightly broader scale, describing Orange County in Disney’s terms as “Tomorrowland and Frontierland, merged and inseparable.”) Much like the Walt Disney Company, the Irvine Company meticulously planned and controlled Irvine even years before the City of Irvine municipal government was incorporated. See also Lewis Baltz, *THE NEW INDUSTRIAL PARKS NEAR IRVINE, CALIFORNIA* (1974) (documenting Irvine’s anonymous, prefabricated buildings as showing “landscape as real estate”); *Lewis Baltz – Biography*, THE EUROPEAN GRADUATE SCHOOL, available at <http://www.egs.edu/faculty/lewis-baltz/biography> (last visited Apr. 27, 2012).

² Hendrik Hartog, PUBLIC PROPERTY AND PRIVATE POWER, 2-3 (1983) (describing John F. Dillon’s “classic version of municipal corporation law”). However, some company towns east of the Mississippi also followed a similar model to Irvine. See Margaret Crawford, *BUILDING THE WORKINGMAN’S PARADISE: THE DESIGN OF AMERICAN COMPANY TOWNS* (1995) (noting that George Pullman’s company town on the outskirts of Chicago was described as “the most perfect city in the world”).

³ Some may argue that company control over an area should not be a concern because a resident “consumer” retains the ability to “vote” because s/he is free to take or leave the “product” of residence in Irvine in favor of other jurisdictions. However, even assuming for the sake of argument that people make decisions about where to live based on how the city is run, privately governed cities offer no more freedom of choice than publicly governed cities. Residents may choose to leave any city, whether publicly or privately governed. See William A. Fischel, *THE HOMEVOTER HYPOTHESIS: HOW LOCAL VALUES INFLUENCE LOCAL GOVERNMENT TAXATION, SCHOOL FINANCE, AND LAND-USE POLICIES* 59 (2001) (arguing that “people move for reasons that typically have little to do with local government”). This safeguard does not excuse privatized cities from procedural requirements in land use decision-making. See Charles M. Tiebout, *A Pure Theory of Local Expenditures*, 64 J. POL. ECON. 416 (1956) (asserting that resident “consumers” choose between cities by moving to express their preference for a particular way of providing public services). Whether the solution is from citizens, the legislature, or the courts, there must be a check on the local government-like powers that private entities are able to exercise without review.

The Irvine Company began to use its government-like powers in the late 1960s, developing the land but retaining control by leasing rather than selling land, and carefully resisting incorporation of its land into rival cities like Newport Beach. Since the 1960s, it has become clear that citizens lack a legal vehicle to hold the Irvine Company accountable for its decisions. Although many scholars have debated the nature of the public-private distinction,⁴ and many others have debated the merits and drawbacks of privatization of government functions,⁵ this paper describes privatization of land

⁴ See, e.g., Henry J. Friendly, *Public-Private Penumbra-Fourteen Years Later*, 130 U. PA. L. REV. 1289 (1982); Paul Brest, *State Action and Liberal Theory: A Casenote On Flagg Brothers v. Brooks*, 130 U. PA. L. REV. 1296 (1982); Frank I. Goodman, *Professor Brest On State Action and Liberal Theory, and a Postscript to Professor Stone*, 130 U. PA. L. REV. 1331 (1982); Duncan Kennedy, *Stages of the Decline of the Public/Private Distinction*, 130 U. PA. L. REV. 1349 (1982); Karl E. Klare, *Public/Private Distinction in Labor Law*, 130 U. PA. L. REV. 1358 (1982); Morton J. Horwitz, *History of the Public/Private Distinction*, 130 U. PA. L. REV. 1423 (1982); Robert H. Mnookin, *Public/Private Dichotomy: Political Disagreement and Academic Repudiation*, 130 U. PA. L. REV. 1429 (1982); Christopher D. Stone, *Corporate Vices and Corporate Virtues: Do Public/Private Distinctions Matter*, 130 U. PA. L. REV. 1441 (1982); Regina Austin, *Problem of the Legitimacy of the Welfare State*, 130 U. PA. L. REV. 1510 (1982); Robert C. Ellickson, *Cities and Homeowners Associations*, 130 U. PA. L. REV. 1519 (1982); Frank Michelman, *Universal Resident Suffrage: A Liberal Defense*, 130 U. PA. L. REV. 1581 (1982); Gerald E. Frug, *Cities and Homeowners Associations: A Reply*, 130 U. PA. L. REV. 1589 (1982); Robert C. Ellickson, *Reply to Michelman and Frug*, 130 U. PA. L. REV. 1602 (1982).

⁵ See, e.g., Jody Freeman, *The Contracting State*, 28 FLA. ST. U. L. REV. 155 (2000-2001) (arguing that “[w]idespread contracting out of services or arguably ‘public’ functions could have dire consequences under some circumstances”); Lauren B. Edelman and Mark C. Suchman, *When the “Haves” Hold Court: The Internalization of Disputing in Organizational Fields*, 33 LAW & SOC’Y REV. 941 (1999) (arguing that shifts in the relationship between organizations and the courts have created “a full-fledged private legal system in its own right”); Joel B. Grossman, Herbert M. Kritzer, Stewart Macaulay, *Do the “Haves” Still Come Out Ahead?* 33 LAW & SOC’Y REV. 803 (1999) (arguing at 808 that “[a]rbitration thus looks like a progressive method of dispute resolution, but too often it serves to reinforce the power of the repeat players who draft the constitution of a private government that they call a contract.”); Orly Lobel, *The Renew Deal: The Fall of Regulation and the Rise of Governance in Contemporary Legal Thought*, 89 MINN. L. REV. 342 (2004) (arguing at 343 that “[n]ew legislation in areas such as eco-management and information technology provides opportunities for private parties to opt out of the conventional legal regime and manage their environment through collaborative and dynamic planning.”); Shauhin A. Talesh, *The Privatization of Public Legal Rights: How Manufacturers Construct the Meaning of Consumer Law*, 43 LAW & SOC’Y REV. 527 (2009) (describing “how private entities influence the meaning of legislation through both political and institutional mechanisms”). In the municipal governance context specifically, see, e.g., E.S. Savas, *The Practice of Privatization*, PRIVATIZATION AND PUBLIC PRIVATE PARTNERSHIPS (2000) (promoting the cost-savings of privatization of municipal government functions); See, e.g. Gerald E. Frug, *The City as a Legal Concept*, 93 HARV. L. REV. 1057 (1979-1980) (comparing cities to corporations as “intermediate” entities between the individual and the state, and challenging the idea that cities should be powerless creatures of the state subordinate to state law); Robert C. Ellickson, *Alternatives to Zoning: Covenants, Nuisance Rules, and Fines as Land Use Controls*, 40 U. CHI. L. REV. 681 (1972-1973) (arguing that private covenants and nuisance rules are more efficient and equitable than public zoning); Gerald E. Frug, *Cities and Homeowners Associations: A Reply*, 130 U. PA. L. REV. 1589 (1982) (criticizing Ellickson’s argument that homeowners associations are superior to cities as lacking empirical support, and noting that Ellickson wrongfully assumes that all homeowners associations are formed in the same way); Carol M. Rose, *Planning and Dealing: Piecemeal Land Controls as a Problem of Local Legitimacy*, 71 CAL. L. REV. 837 (1983) (advocating for a dispute-resolution model of land use decision-making, and noting that market-based models of zoning reform have been academically popular but not widely adopted); Robert H. Nelson, *Privatizing the Neighborhood: A Proposal to Replace Zoning with Private Collective Property Rights to Existing Neighborhoods*, 7 GEO. MASON L. REV. 827 (1999) (advocating for privatization of land use decision-making through the formation of neighborhood groups); Stephen J. Eagle, *Privatizing Urban Land Use Regulation: The Problem of Consent*, 7 GEO. MASON L. REV. 905 (1999) (criticizing Nelson’s proposal as having negative effects on private property rights and liberty); Hannah

use regulation as a descendant of the technique of using private companies to undertake government colonization functions,⁶ arguing that privatization of land use decision-making originated far earlier than the waves of privatization, or lessening of government involvement, often associated with the United States President Ronald Regan and British Prime Minister Margaret Thatcher in the 1980s.⁷

The Irvine Company is able to exercise tremendous control over the city of Irvine in large part because of the strong foundation of private ownership established under the Spanish colonial regime. Founded in 1864 and incorporated in 1894, the Irvine Company assembled its massive “Irvine Ranch” from three ranchos: Rancho San Joaquin, Rancho Lomas de Santiago, and Rancho Santiago de Santa Ana.⁸ When Spanish colonists began permanent settlements in California in the 18th century, the Irvine Ranch area was populated by a diverse group of native peoples who settled in three major centers of population called Pahav, Moyo, and Lukup.⁹ Spanish colonial law “emptied” the space of any existing property claims, recognizing the Spanish king as the sole owner in fee simple of all colonial territorial occupations.¹⁰ Alongside the military presidio, the civilian pueblo, and the religious mission, which granted land from the crown for particular functions that

Wiseman, *Public Communities, Private Rules*, 98 GEO. L. REV. 697 (2010) (evaluating zoning overlays, covenants, and public-private hybrid rule-based communities as alternatives to traditional zoning and promoting the public-private hybrid as the best model).

⁶ Private entities, such as the Massachusetts Bay Company, and the first multinational corporation the Dutch East India Company, assisted colonial projects by settling land and establishing commercial links. *See, e.g.*, Christopher Tomlins, FREEDOM BOUND: LAW, LABOR, AND CIVIC IDENTITY IN COLONIZING ENGLISH AMERICA 174 (discussing the Massachusetts Bay Company); *see* Adrian Vickers, A History of Modern Indonesia (2005) (describing the establishment of Jakarta by the Dutch East India company to protect its financial interests).

⁷ *See* Michal Laurie Tingle, *Privatization and the Reagan Administration: Ideology and Application*, 6 YALE L. & POL’Y REV. 229-257 (1988); William L. Megginson and Jeffrey M. Netter, *History and Methods of Privatization*, in INTERNATIONAL HANDBOOK ON PRIVATIZATION 25 (David Parker and David Saal, eds. 2003) (detailing private performance of government services as early as ancient Greece).

⁸ *Master Planning*, THE IRVINE COMPANY, <http://www.goodplanning.org/Master-Plan/default.aspx> (last visited Apr. 26, 2012). The Irvine Ranch includes parts of the contemporary cities of Irvine, Newport Beach, Tustin, and Laguna Beach.

⁹ Robert Glass Cleland, THE IRVINE RANCH OF ORANGE COUNTY: 1810-1950, 6 (1962). Cleland calls this group of native peoples “Gabrelino California Indians,” but contemporary groups representing their descendants describe themselves using the word “Tongva,” and identify themselves as Gabrielino-Tongva (the “hyphen group”) or Gabrielino/Tongva (the “slash group”). *See, e.g.*, *Gabrielino Tribe*, <http://www.gabrielinotribe.org> (last visited Apr. 23, 2012); *The Gabrielino/Tongva Tribe of the Los Angeles Basin: The Official Tribal Council*, <http://tongvatribenet.net> (last visited Apr. 23, 2012). Note that Brower, *infra* note 26, asserts that Cleland’s book “was published with the complete support and authorization of The Irvine Company, and therefore is complimentary – or at the least lacks any critical observations – of the Company, its officers, the James Irvine Foundation and the Irvine Family.”

operationalized colonial control,¹¹ the colonial governor of California also had the power to make royal grants of ranchos to private individuals. The first was made in 1784.¹²

Through the middle of the 19th century, a rapid succession of legal regime changes¹³ strengthened rather than destabilized private land claims in California. During each regime change, landowners could reify their existing claims or gain additional land¹⁴ by following the new government's legal procedure for documenting real property ownership.¹⁵ In some cases, an impending change in sovereignty encouraged property owners to formalize their property claims under the existing regime.¹⁶ By the time the United States engaged in its conquest of California during the Mexican-American War of 1846-1848, "all but a small remnant of the once vast...areas of the public domain were in the hands of private owners."¹⁷ When it ended the Mexican-American

¹⁰ Cleland at 12.

¹¹ Cleland at 12; *see also* Mary Floyd Williams, *Mission, Presidio and Pueblo: Notes on California Local Institutions under Spain and Mexico*, 1 CALIFORNIA HISTORICAL SOCIETY QUARTERLY 23-35 (1922). Cleland notes that the presidios and pueblos were granted in fee simple and included a limited area of land (about 17,000 acres), while missions were far larger but involved no transfer of title.

¹² Cleland at 13; *see also* Patricia Seed, *CEREMONIES OF POSSESSION IN EUROPE'S CONQUEST OF THE NEW WORLD, 1492-1640* (1995); Anthony Pagden, *LORDS OF ALL THE WORLD: IDEOLOGIES OF EMPIRE IN SPAIN, BRITAIN AND FRANCE C.1500-C.1800* (1995); Anthony Pagden, *Dispossessing the Barbarian: the Language of Spanish Thomism and the Debate Over the Property Rights of the American Indians*, in *THE LANGUAGES OF POLITICAL THEORY IN EARLY-MODERN EUROPE* (Anthony Pagden, ed. 1987); Anthony Pagden, *SPANISH IMPERIALISM AND THE POLITICAL IMAGINATION: STUDIES IN EUROPEAN AND SPANISH-AMERICAN SOCIAL AND POLITICAL THEORY 1513-1830* (1998).

¹³ In the span of 30 years, a private landowner's plot may have been part of three different sovereign nations: part of Spain until 1821, part of Mexico until 1848, and part of the United States thereafter.

¹⁴ Cleland at 13-14. After gaining control, Mexico added to the 30 existing private ranchos in California by secularizing missions and distributing the landholdings to Mexican citizens. The Irvine Ranch's Rancho San Joaquin was one of these former missions granted to private owners following the Secularization Act of 1833; the final grant was given to Don José Andrés Sepúlveda in 1842. Cleland at 27, 31.

¹⁵ Cleland at 15-17. Procedures for applying for land grants sometimes involved building a house on the land, stocking it with cattle, and/or planting trees on the property boundary lines. Cleland describes an elaborate ceremony of scattering handfuls of dirt, pulling up grass, and breaking off branches of trees that "closely resembl[es] the rite that was followed by the conqueror or explorer who took possession of a new country in the name of the crown." Cleland at 16.

¹⁶ Such was the case for two of the ranchos that formed the Irvine Ranch. The Rancho Santiago de Santa Ana was one of the early Spanish land grants to Antonio Yorba. His son, Don José Antonio, grew anxious about the validity of the land grant after the change from Spanish to Mexican sovereignty, and petitioned the new Californian governor to confirm his title, which it did in 1839. Cleland 17-19. A similar process occurred on the Rancho Lomas de Santiago during the next regime change from Mexican to American sovereignty. Teodosio Yorba had lived for many years on this land without completing the legal formalities required when he finally did so when sensing the impending United States annexation. In fact, the governor at the time, Pío Pico, also rushed to grant parcels of land to himself, his friends, and relatives before the United States could annex the land. Cleland at 32.

¹⁷ Cleland at 45.

war, the Treaty of Guadalupe Hidalgo required the United States to honor private property claims recognized under previous regimes.¹⁸ The United States Congress passed a bill requiring all California titles held under Spanish or Mexican grants to be submitted before a Public Land Commission within two years to determine the claims' validity.¹⁹ Again, rather than destabilizing private control over the region, this process formalized and ossified existing private party landholdings gained under the Spanish and Mexican regimes.

Two decades after the United States annexed California, a single group of investors²⁰ assembled the massive 110,000-acre Irvine Ranch from three existing ranchos.²¹ One of the investors, James Irvine, bought out his partners in 1876 to continue a sheep ranching business on his own.²² For the next eight decades, land use on the Irvine Ranch remained relatively unchanged as Irvine fathers passed down the Irvine Ranch land and the Irvine Company agricultural business to their sons for three generations.²³

The Irvine Company agricultural business bears little resemblance to the contemporary Irvine Company, which runs a booming multifamily and commercial real estate development business

¹⁸ Transcript of Treaty of Guadalupe Hidalgo (1848), Article VIII, *available at* http://www.ourdocuments.gov/print_friendly.php?page=transcript&doc=26&title=Transcript+of+Treaty+of+Guadalupe+Hidalgo+%281848%29 (stating that “Mexicans now established in territories previously belonging to Mexico, and which remain for the future within the limits of the United States, as defined by the present treaty, shall be free to continue where they now reside, or to remove at any time to the Mexican Republic, retaining the property which they possess in the said territories, or disposing thereof, and removing the proceeds wherever they please, without their being subjected, on this account, to any contribution, tax, or charge whatever.”).

¹⁹ Cleland 35-36. Cleland describes that this law was passed because of pressure from the impending Gold Rush.

²⁰ The investors were a partnership of James Irvine and Flint, Bixby and Co., comprised of two brothers and their cousin from Maine who had come to California during the 1849 Gold Rush. Cleland at 43, 53.

²¹ José Sepúlveda sold the Rancho San Joaquin in 1864 to pay off debts during the height of the Great Drought. Cleland at 49-51. William Wolfskill, a sheep rancher who had purchased the Rancho Las Lomas de Santiago in 1860, sold the rancho in 1866 just before his death. Cleland at 51-53. The Rancho Santiago de Santa Ana was held by a large, complicated group of family heirs, many of whom had sold their undivided interests in the tenancy-in-common. The Irvine, Flint, and Bixby investors had purchased one of these interests, and received a parcel when the land was partitioned in 1866 after one interest holder suffered a debt crisis because of the drought and sued to partition the land. Cleland at 40-44.

²² Cleland 75-76.

²³ James Irvine was followed by his son James Harvey “JI” Irvine, Sr., who was followed by his son, Myford Irvine. Martin A. Brower, *THE IRVINE RANCH: A TIME FOR PEOPLE*, 1994, 4-5. Note: Brower was director of public relations for the Irvine Company from 1973 to 1985. Brower writes that his book “was written with neither the support, the

servicing hundreds of thousands of customers.²⁴ The company began to change course in January of 1959, when the president of the Irvine Company, Myford Irvine, was found shot dead in the basement of the Irvine family home.²⁵ At this point the first non-family president, Arthur McFadden, took control of the Irvine Company.

Because McFadden was nearing retirement, he agreed to accept the presidency on the condition that he would only be a temporary “caretaker” president, meaning he would not seek rapid expansion of the company.²⁶ Rather than disadvantaging the Irvine Ranch, the delay in development under McFadden increased pent-up demand for housing and put the Irvine Company in the perfect position to control development of its land in an orderly way. As suburban growth exploded chaotically across Southern California after World War II,²⁷ it began to press on the borders of the Irvine Ranch: almost every day, McFadden received calls from developers or defense contractors hoping the Irvine Company would yield the land up to development.²⁸ The county began to assess property taxes for the land’s “highest and best” use, which meant its value as developed property.²⁹

As a “novice” in real estate transactions the Irvine Company made important mistakes.³⁰ When

authorization – nor even the awareness – of The Irvine Company,” and describes his book as not being a historical document, but reflecting the “author’s conversations” and “personal involvement” and “as an observer.”

²⁴ Note that the Irvine Ranch is now a registered trademark. *The Irvine Ranch*, THE IRVINE COMPANY, <http://www.goodplanning.org/Irvine-Ranch/default.aspx> (“Located in the heart of Orange County, The Irvine Ranch® is less than an hour south of Los Angeles and about 90 minutes north of San Diego.”).

²⁵ Brower at 7-10. However, there seems to be some debate as to the cause of Myford Irvine’s death. Brower claims Myford Irvine shot himself, arguing that, although his niece Joan Irvine Smith insisted he was murdered, the Orange County Sheriff never bothered to investigate that claim. *See also A Chronology Of The Irvine Co.*, THE LOS ANGELES TIMES, http://articles.latimes.com/1990-06-26/news/mn-786_1_james-irvine (last visited Apr. 26, 2012) (noting that Myford Irvine’s death was ruled a suicide). However, *see also What Really Happened to Mike Irvine?*, ORANGE COUNTY COAST MAGAZINE, <http://www.coastmagazine.com/articles/mikeirvine-1500--.html> (last visited Apr. 26, 2012) (noting that Myford Irvine left no suicide note).

²⁶ Brower at 11-12.

²⁷ Some of the pressure was from soldiers who had been stationed in Southern California who came back to settle and take advantage of homebuyer incentives under the G.I. Bill, and some was from employees of aerospace and electronics firms. *See* D.J. Waldie, *HOLY LAND: A SUBURBAN MEMOIR* (1996) (discussing the development of Lakewood, California); *see also* Margot Canaday, *THE STRAIGHT STATE* (2009) (discussing the G.I. Bill as heavily incentivizing returning soldiers to marry and settle down in houses with families as part of a larger project of the state constructing itself).

²⁸ Brower at 11-12.

²⁹ Brower at 11.

³⁰ Brower at 14.

it provided land to the first industrial companies it welcomed onto its land, it did not include reversion provisions in its early land and sale agreements; as a result, the Irvine Company was not able to take land back from its first real estate customers who had failed to use or develop the land.³¹ To prevent this from happening again, the Irvine Company adopted a strategy of leasing rather than selling land with extremely detailed and specific agreements strictly limiting a tenant's rights, which allowed it to retain control over the land in much the same way that a local government would.³²

Because the Irvine Company was slow to respond to the demand to develop, it had time and the guaranteed tenants that allowed it to build an entire master-planned community. The Irvine Company hired William Pereira to develop master plans³³ for the Company to use in developing the area surrounding the University of California, Irvine.³⁴ The Irvine Company has used master planning to its advantage, charging renters a premium for the ability to live within a master-planned community. The Irvine Company structures its commercial leases like a city's sales tax, not only charging a flat fee for square footage and common area upkeep but also claiming a particular

³¹ In hopes of attracting industrial development to support community and job growth on the Irvine Ranch, the Irvine Company provided land for three aerospace and electrical companies: Collins Radio, Lockheed, and Douglas Aircraft. As a result, the companies had the power to hold the land vacant, purchase the land, or re-sell the land to other real estate developers. Collins Radio subleased its site to a real estate developer, the Koll Company, which later purchased the land from the Irvine Company. Lockheed resold its parcel to real estate developers. Douglas Aircraft held its parcel vacant, deciding it did not need it for the aerospace facility that would have brought industrial jobs to Irvine. Instead, to the Irvine Company's horror, Douglas undertook commercial development—along with re-zoning from an industrial designation to commercial that the Irvine Company “unsuccessfully opposed.” Brower at 14.

³² Cleland at 133. For some years, the Irvine Company used ground leases to maintain control of its commercial and residential land. Although the Irvine Company ceased to use the technique in the 1970s, it is still used by the UC Regents in University Hills, which is subsidized faculty housing for the University of California, Irvine. In ground leases, residents own their houses, but lease the land beneath them.

³³ Cities have used master plans for centuries; for example, Pierre Charles L'Enfant developed a plan for Washington, D.C., and Daniel Hudson Burnham planned San Francisco, California, Cleveland, Ohio, and Chicago, Illinois with Edward H. Bennett. However, it is important to note that this master planning initiative did not always originate from the city government—for example, Chicago's plan was commissioned by the anti-labor Commercial Club in Chicago. See Daniel Hudson Burnham, Edward Herbert Bennett, Charles Moore *PLAN OF CHICAGO* (1993 ed.); Richard J. Roddewig, *Law as Hidden Architecture: Law, Politics, and Implementation of the Burnham Plan of Chicago Since 1909*, 43 *J. MARSHALL L. REV.* 375 (2010); Laura E. Baker, *Civic Ideals, Mass Culture, and the Public: Reconsidering the 1909 Plan of Chicago*, 36 *JOURNAL OF URBAN HISTORY* 747-770 (2010).

³⁴ Brower at 15.

percentage of the business tenants' revenues for its rent.³⁵ One economics textbook notes the uniqueness of this arrangement, and proffers an explanation that sounds similar to the rationale for taxation: the store owner allows the Irvine Company to share in its profits because it benefits from the way the Irvine Company controls the surrounding community.³⁶

Not only has the Irvine Company undertaken master planning and used lease agreements that operate like a sales tax, but it has jealously guarded its land use decision-making power against other local government powers in the area. When it gave land to the University of California Regents for the development of the University of California, Irvine in the early 1960s, the Irvine Company required the Regents to refrain from allowing university land to be incorporated into a city government jurisdiction without Irvine Company permission. The term stated that “[n]either party shall, without the consent of the other, initiate or cause to be initiated proceedings for the incorporation of a city or the annexation of the University Community to an existing city.”³⁷ Similarly, in 1970, the Irvine Company resisted the encroachment of the City of Newport Beach on its land use powers when it opposed the efforts of Collins Radio, again a ground lease tenant, to

³⁵ Richard B. McKenzie and Dwight R. Lee, *Competitive and monopsonistic labor markets 12.1: Incentives in the Irvine Company rental contracts*, MICROECONOMICS FOR MBAS: THE ECONOMIC WAY OF THINKING FOR MANAGERS (Second Edition) available at http://www.cambridge.org/resources/0521191475/9598_Chapter%2012%20Reading%2012.1%20Irvine%20Rental%20Contracts%20100909%20after%20LAL.doc (“But why would the stores ever want to sign a contract that enables the Irvine Company to share in its revenues? Store owners understand that the Irvine Company controls much of the commercial space in the Fashion Island/Irvine area. The Irvine Company greatly influences the overall order of things in the area, including the income levels of residents, the distribution of various shopping centers within the area, and the distribution of stores within and across the shopping centers. The company has a substantial impact on the ‘look and feel’ of the community, which means that the company can greatly influence the degree of success of individual store owners.”).

³⁶ *Id.*

³⁷ Agreement, 22 July 1960, page 5, AS-090 Agreements, Photocopies, 1963, Box 1, Folder 13, University of California, Irvine Special Collections, *description available at* <http://www.oac.cdlib.org/findaid/ark:/13030/kt887006q1/>. When the University of California Regents searched for a site for a new campus, it was the Irvine Company that stepped forward to offer 1000 contiguous acres for the campus at the behest of Joan Irvine Burt, later Joan Irvine Smith, who was a strong advocate for the university and pushed for the donation despite an Irvine Foundation restriction that Irvine land was never to be donated to a government institution. Brower at 15.

have the land it leased annexed by the City of Newport Beach.³⁸ Indeed, in that same year, the Irvine Company was so powerful that a left-leaning Orange County Supervisor, Robert Battin, (unsuccessfully) proposed that the county form a service area covering only the Irvine Ranch, advocating that all county planning department costs associated with plans for the future City of Irvine should be paid by the Irvine Company.³⁹

A legal memorandum prepared in 1970 illustrates the difficulties in dealing with a private company acting like a sovereign government.⁴⁰ The memo investigates legal avenues to force the University of California, Irvine and the Irvine Company to develop the university and surrounding area in accordance with William Pereira's original plan. The memorandum addresses the difficulty the public faced in bringing a legal claim against the UC Regents and the Irvine Company for deviating from the original plans made for the University of California, Irvine and the surrounding areas. The memo states that the original plan "seemed to be in the best interest of the University community and the altered plans seems [sic] to be detrimental to the University community," explaining that the alterations to the plan appear to have been made for the economic benefit of the Irvine Company.⁴¹

Without procedural protections for the public to review land use decisions these citizen concerns lack a legal vehicle.⁴² Though the memo acknowledges that its legal research is preliminary, the primary legal theories it develops are weak in comparison to the robust procedural protection for

³⁸ *Irvine Officials Opposing Request for NB Annex By Collins Radio*, THE REGISTER, July 1, 1970 (microfiche at Ayala Science Library, University of California, Irvine).

³⁹ *Battin's Irvine Co. Proposal Stuns County Supervisors*, THE REGISTER, July 1, 1970 (microfiche at Ayala Science Library, University of California, Irvine). For discussion of Battin's political leanings, see his obituary: Christian Berthelson, *Robert W. Battin, 1929 – 2008—O.C. supervisor was a Democratic maverick*, L.A. TIMES, April 30, 2008, articles.latimes.com/2008/apr/30/local/me-battin30.

⁴⁰ See Memorandum from Stan Levy to Ron Brutuco Re: University of California and the Irvine Company (c. April 1970, exact date unknown) (on file with author) (illustrating the difficulties members of the public have had in influencing land use decisions in University Town Center).

⁴¹ Memorandum at 1.

public land use decisions, and largely center on the University of California Regents as a party with a duty to serve the public interest.⁴³ Neither of the legal theories the memo addresses mentions the Irvine Company as violating any duty to the public. The memo's strongest strategic recommendations involve public opinion pressure or the state legislature. Although this memo's very existence evinces citizen interest in holding the university and the Irvine Company legally accountable in following Pereira's plan, Pereira's vision of a University Town Center where "town" and "gown" merge into a unified community was not achieved.⁴⁴ Because the Irvine Company has continued to hold land as a private property owner, continuing its policy of only leasing space to the businesses and residents in Irvine, it is able to control land uses without public participation.

One similar example of the lack of opportunity for public input is the Irvine Company's decision not to renew its long-term lease with the Wild Rivers Water Park in 2011.⁴⁵ Rather than owning its space, the water park rented land from the Irvine Company for more than 25 years before the Irvine Company decided to begin construction on a new residential development. Although the project involves several levels of public approval before the planning commission, zoning commission, and city council, the decision not to renew the lease was solely the Irvine Company's to make.⁴⁶ Furthermore, many of the processes were driven by the Irvine Company: its

⁴² Procedural protections for public land use decision-making include the public comment required under the California Environmental Quality Act, or public hearings often required for planning commission recommendations to the city council, or open meeting requirements required by the California Brown Act.

⁴³ The first legal theory that the memo develops is a suit demanding that the Regents' approval of modifications to the plan be rescinded on behalf of the public, similar to a consumer protection suit. The second legal theory is a suit to remove regents from office for a breach of fiduciary duty to the public. Memorandum at 3.

⁴⁴ Memorandum at 13-14. Although portions of the contemporary shopping center do seem to be "patterned more after older towns in both Europe and America where shops, civic buildings, offices and housing are closely grouped in intimate pedestrian scale," today's University Town Center is also home to massive parking lots, Taco Bell, In-N-Out, and Trader Joe's, and is difficult to walk to from campus because of protective hedges. *Id.*

⁴⁵ Wild Rivers Water Park is planning to relocate to the Orange County Great Park and will reopen in Summer 2014. *When will this well-loved Orange County, California water park open again?* WILD RIVERS WATER PARK, <http://www.family-vacation-getaways-at-los-angeles-theme-parks.com/Wild-Rivers-Hours-and-Attractions.html> (last visited Mar. 3, 2012).

⁴⁶ The local zoning commission recently approved the Irvine Company's plans for a 1,750-unit multifamily housing construction project called Los Olivos. Jon Lansner, *Irvine OKs 1,750 rentals at Wild Rivers*, OC REGISTER: LANSNER ON REAL ESTATE, <http://lansner.ocregister.com/2011/09/16/irvine-oks-1750-rentals-at-wild-rivers/122986/> (last visited Mar. 3, 2012).

affiliate the Irvine Community Development Company filed a 2006 change to the master plan that re-zoned the area for residential development.⁴⁷ The process followed was similar to traditional zoning, with little public participation or consideration for multiple interests, differing only in that a private party prepared and submitted the zoning changes for approval. According to Irvine Company spokesperson Erin Freeman, “Over the past several years, the Irvine Co. has worked with the city and community on a land use plan for this area that would ensure the city's long-term economic health – providing more housing near major employment centers.”⁴⁸ In this statement, the Irvine Company sounds like a government, with the company asserting that it seeks to provide for the public good in strengthening the city’s long-term economic health.⁴⁹

One member of the public attempted to insert his voice into the discussion, advocating before the Planning Commission as it reviewed the Irvine Company’s plans for residential construction.⁵⁰ Burke Mucho, an Irvine resident, “[S]poke on Wild Rivers and asked the Planning

⁴⁷ Irvine, California, Division 3-37: Zoning Ordinance, § 9-39-5, updated by Ord. No. 06-05, § 6, 6-27-06 (rezoning area to 2.4/2.4H Medium-High Density Residential); *see also* Irvine City Council Meeting Jun. 27, 2006, Agenda Item 3.13 ORDINANCE NO. 06-05 - ZONE CHANGE FOR PLANNING AREAS 18, 33 (LOT 109), 34, AND 39, *available at* <http://www.irvinequickrecords.com/SIREPUB/mtgviewer.aspx?meetid=717&doctype=MINUTES> (last visited Apr. 23, 2012) (adopting “ORDINANCE NO. 06-05 - AN ORDINANCE OF THE CITY COUNCIL OF THE CITY OF IRVINE APPROVING ZONE CHANGE 00382341-PZC TO ALLOW FOR RESIDENTIAL DEVELOPMENT LOCATED IN PLANNING AREAS 18, 33 (LOT 109) AND 39 AND TO REDUCE THE NON-RESIDENTIAL INTENSITY BY 2,340,500 MILLION SQUARE FEET IN PA 34; FILED BY THE IRVINE COMMUNITY DEVELOPMENT COMPANY.” The filer of this document is the Irvine Community Development Company, an affiliate of the Irvine Company. As the agenda notes, “All matters listed under Consent Calendar are considered to be routine and all will be enacted by one roll call vote. There will be no discussion of these items unless members of the City Council request specific items to be removed from the Consent Calendar for separate discussion.” The item was not removed from the consent calendar and was approved with one vote and no public comment. *See* meeting video at this web address at timestamp 1:14:00-1:16:08. Given that the process took only two minutes, it is likely that the process was designed to favor time efficiency over full public participation.). The public outcry over the Wild Rivers lease termination reported by the *Orange County Register* was completely absent from the ordinance approval process.)

⁴⁸ *Wild Rivers' final season: No new site lined up*, OC REGISTER, <http://www.oregister.com/articles/park-301593-wild-rivers.html> (last visited Mar. 3, 2012).

⁴⁹ As expressed in the germinal land use case *Euclid v. Ambler Realty*, the goal of land use decision-making is conflict resolution: to promote the public welfare by reducing the degree to which private property owners detrimentally interfere with each other (under the maxim *sic utere tuo ut alienum non laedas*, or “use your own so as not to injure that of another”). *Village of Euclid, Ohio v. Ambler Realty Co.*, 272 U.S. 365, 377 (1926); for a discussion of this idea, *see also* William Novak, *THE PEOPLE’S WELFARE: LAW AND REGULATION IN NINETEENTH-CENTURY AMERICA*, 1996.

⁵⁰ *Minutes, Planning Commission, Regular Meeting*, September 15, 2011 *available at* <http://www.ci.irvine.ca.us/civica/filebank/blobload.asp?BlobID=18652>.

Commission about the possibility of extending their lease until a new location could be found.”⁵¹ On first glance this is not a rational request, since the Planning Commission did not have the power to force the Irvine Company to extend the lease. However, this resident is exercising public participation in the best way possible given the Irvine Company’s control and lack of procedural requirements in decision-making. The Planning Commission approved the Irvine Company’s plans 4-0. Had the public had an opportunity to participate more fully in this decision, the outcome would likely have been different.⁵² This example represents the risks of allowing a private company to control land use regulation.

Irvine is a dangerous model. Patterned after colonial models of territorial domination, its large private landholdings do not provide for the public participation, accountability, and democratic legitimacy that are inherent in the idea of a “public” city. The degree of the company’s control reaches far beyond that of the average private property owner: those who want to live or do business in the area almost certainly must bargain with the Irvine Company. The public/private distinction, which has become so basic in law that it determines which body of law will be applied to a particular event, does not apply effectively to decisions made in communities like Irvine. Although courts have addressed concerns about the private governing power of homeowners associations as well as gated communities, shopping centers, and company towns (what geographers call “massive

⁵¹ *Id.*

⁵² To the extent local newspapers are a measure of public opinion, the *Orange County Register* reported that the water park was “forced” to close down. Brian Martinez, *Wild Rivers to rebuild on nearby county land*, OC REGISTER, <http://www.ocregister.com/articles/park-344932-wild-rivers.html> (last visited Apr. 23, 2012). Given the water park’s importance to the community, fuller public participation might have extended the water park’s lease until construction at the new site could be completed, allowing the water park to continue to operate instead of closing for two years. The water park was a popular, unique land use, and will be closed for two summers. A local summer camp, Camp James, was required to relocate to Newport Beach. All of the water park’s slides were demolished, and it will cost \$30 to 35 million to rebuild the park. The park provided 1,200 local jobs, which is a significant number given that Irvine’s population is just over 200,000 and that the hit to local jobs comes during an economic recession. Theresa Walker, *Better economy? Summer camps could benefit*, OC REGISTER, <http://www.ocregister.com/articles/camp-345880-kids-summer.html> (last visited Apr. 23, 2012); Brian Martinez, *Wild Rivers to rebuild on nearby county land*, OC REGISTER, <http://www.ocregister.com/articles/park-344932-wild-rivers.html> (last visited Apr. 23, 2012); *Summer jobs return to Wild Rivers in 2014*, OC REGISTER, <http://economy.ocregister.com/2012/03/17/summer-jobs-return-to-wild-rivers-in->

private space”),⁵³ there is not yet a robust jurisprudence covering communities like Irvine where a private company is able to make local government-like decisions on a citywide scale.

Similar “new town” communities are appearing across the country, run by non-government entities or are built on large parcels of privately owned land. In Reston, Virginia, the nonprofit Reston Association provides municipal services rather than a city.⁵⁴ The Rouse Company created Columbia, Maryland as a planned city and it has never been incorporated into a city government.⁵⁵ The Walt Disney Company founded Celebration, Florida, which is patterned after small towns but remains unincorporated, despite growing to more than 9,000 residents in the last 15 years.⁵⁶ These communities share important characteristics with Irvine, and may be even more vulnerable without a public city body to provide even perfunctory procedures for public participation. Without legal limitations, these communities and others like them will suffer from the same problems experienced in Irvine.

2014/105898/ (last visited Apr. 23, 2012); *Irvine (city), California*, U.S. CENSUS BUREAU, <http://quickfacts.census.gov/qfd/states/06/0636770.html> (last visited Apr. 23, 2012).

⁵³ For examples of existing jurisprudence, see Ron Levi, *Gated Communities in Law's Gaze: Material Forms and the Production of a Social Body in Legal Adjudication*, 34 LAW AND SOC. INQUIRY 635 (2009) (describing many state court opinions striking down exclusionary policies of gated communities); *Amalgamated Food Employees Union v. Logan Valley Plaza*, 391 U.S. 308 (1968) (holding that privately owned shopping center could not exclude striking laborers from picketing a store within it); *Marsh v. Alabama*, 326 U.S. 501 (1946) (holding that company-owned town could not exclude Jehovah's Witnesses that wished to distribute literature); *Lloyd Corp. v. Tanner*, 407 U.S. 551 (1972) (holding that privately owned shopping center could exclude anti-Vietnam War protestors from distributing literature on its premises); *Hudgens v. National Labor Relations Board*, 424 U.S. 507 (1976) (overruling *Lloyd* expressly, holding that the law cannot permit a distinction based on the content of the speech); *PruneYard Shopping Center v. Robins*, 447 U.S. 74 (1980) (holding that states can recognize a state constitutional right of access to speak freely in shopping centers).

⁵⁴ *Reston Association*, <http://www.reston.org/default.aspx?qenc=HzT9ACzZbNs%3d&fqenc=HzT9ACzZbNs%3d> (last visited 29 Apr. 2012).

⁵⁵ *Columbia Association*, <http://www.columbiaassociation.org/> (last visited 29 Apr. 2012).

⁵⁶ *Official Website of the Community of Celebration | Located next to Walt Disney World*, <http://www.celebration.fl.us/> (last visited 29 Apr. 2012).