

chicago curbs

RESTRICTIVE LAND USE COVENANTS

By Peter Skosey and Amy Kish



A portion of this former Osco Drug in Chicago's 49th Ward is being leased to Family Dollar, as the site cannot operate as a drugstore until August 2024.

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Imagine a neighborhood where a national grocery chain has opened a new store, usually to much fanfare. At the groundbreaking ceremony, the local alderman and community development group congratulate one another on their business acumen, and residents quickly become accustomed to the convenient full-service shop. But in just a few years, the grocer decides that the store isn't profitable enough to keep in its national portfolio, so it closes its doors. The neighborhood is upset, but rallies around the idea of marketing the site to a smaller, inde-

pendent grocer with less stringent corporate profitability requirements.

Then the neighborhood discovers the fine print: the national chain placed a restrictive land use covenant on the land deed, prohibiting other grocery store operators from using the space forever.

This type of restrictive land use covenant, intended to control markets and foil the competition, is commonplace in many retail industries, including among grocery and drugstore chain proprietors such as Albertson's, Inc., The Great Atlantic and Pacific Tea Company, Inc., Safeway, Inc., and Stop & Shop Supermarket Company, Inc. Communities often fail to notice such covenants when developments are approved because they rear their ugly heads only after stores go bust. Then surrounding neighborhoods are left "high and dry" - stripped not only of immediate access to food and medicine, but also of the legal right to attract similar retailers to the site, sometimes forever.

Snap back to reality, where in Chicago's 39th Ward, a Dominick's closure at 4014 W. Lawrence left many residents - including seniors, the disabled, and people dependant on public transportation - wondering where they would do their grocery shopping.

"As aldermen, we are responsible for the public welfare of our communities," said Ald. Margaret Laurino (39th Ward). "If a grocery store leaves a community, it puts the entire neighborhood in a tailspin. When the Dominick's closed at 4014 W. Lawrence, I received petitions signed by hundreds of senior citizens for another grocery at this location. Because of the restrictive covenant, I was left without options."

BANS GROCERS AND DRUGSTORES FROM USING COVENANTS TO FOIL COMPETITION

Although restrictive land use covenants are not uniformly harmful to communities, it has become common around the country, and even in Canada, for supermarket and drugstore proprietors to use restrictive covenants in an anti-competitive manner. To gain control of the market, many industry leaders use restrictive covenants to prevent competitors from using formerly occupied groceries and pharmacies. This practice has resulted in two neighborhood redevelopment challenges: dangerously limited access to fresh food and vegetables not offered at the "corner store;" and blight caused by stubbornly vacant retail parcels designed and best suited for grocery and drugstores. Recently, the Chicago City Council unanimously approved an ordinance that severely limits the ability of supermarkets and drugstores to use restrictive land use covenants for this purpose. The ordinance, believed to be the first of its kind, is expected to serve as an international policy model.

Laurino's frustration mounted when she learned that she had no legal recourse against the covenant. She began talking with her fellow aldermen and discovered that the 39th Ward was not alone: several Chicago communities had run up against restrictive covenants as they worked to redevelop shuttered sites, and similar restrictions plague dozens of cities nationwide and even in Canada.

For instance, in Chicago's predominantly middle-class West Lawn neighborhood, a Dominick's grocery store pulled out more than a year ago from a site at 7000 S. Pulaski Road. All that remains today is some 50,000 square feet of vacant retail space. Most residents must catch the bus or carpool to other neighborhoods for necessities such as fresh meats and produce.

Across town in East Village, Ald. Manuel Flores (1st Ward) was preparing to welcome a Dominick's to the neighborhood. He started researching Dominick's and parent company, Safeway, Inc., and learned that their business forecast included the possibility of store closures.

"That motivated me to ask the question: from a land planning perspective, what happens when you have a store that closes?" said Flores. What he learned was that the company regularly places restrictive covenants on the site, complicating redevelopment for communities.

"People want and need a full-service grocery store, and such an amenity speaks well for the development of the community. I didn't want to lose a grocery store," says Flores, echoing Laurino's concerns. Yet neither did he want to stifle competition. "Competition ensures that these companies do a good job of maintaining their property and providing quality customer service," he said. "If you undermine competition, you're at the mercy of whoever is left."

Together, Laurino and Flores decided that enough was enough. On May 11, 2005, they introduced a citywide ordinance to curb the use of restrictive land use covenants by grocery and drug-store proprietors. On Sept. 14, 2005, the Chicago

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"This ordinance is an issue of making sure we have healthy competition in the marketplace, and that we're promoting the best and most efficient use of property, balanced with the need to provide residents with important retail products, such as food and medicine," Flores said.

"This is as much a public service issue as it is an economic development issue," added Denise M. Casalino, commissioner of the City of Chicago Department of Planning and Development. "The lack of grocery stores within communities not only impacts redevelopment efforts in those areas but the quality of life of residents, many of whom may be elderly, sick or without the necessary means to travel longer distances."

EXCEPTIONS TO THE RULE

It is important to note that most restrictive covenants are fully legal under federal and state constitutions. However, it is also important to note that not all restrictive land use covenants are created equally.

By the broadest definition, restrictive covenants allow landowners - for a nominal recording fee - to limit the use of their property for an infinite amount of time, even after the land is sold or transferred to a new owner. The vast majority of restrictive covenants are put to good use in communities across the country. For instance, in newly established residential subdivisions, neighborhood associations use restri-



This former Dominick's grocery store in Chicago's 39th Ward has a restrictive covenant that "runs with the land." In other words, it can never again be occupied by a supermarket or grocery store.

From a community development perspective, the problem with restrictive covenants arises when the private sector uses them to dangerously limit who can participate in the free market. Deprived of access to food and medicine – and with no legal avenue for overturning the restriction on attracting similar stores to the site – a neighborhood is bound to suffer.



Formerly a Jewel grocery store, this building in Chicago's 28th Ward is being demolished because a restrictive land use covenant prohibits the site from being redeveloped as a supermarket or pharmacy larger than 20,000 square feet until June 2012.

tive covenants as a regulatory tool to preserve property values. Covenants common in residential developments dictate density, building setbacks and materials, vehicle storage, minimum square footage, and even the types of lawn fertilizer permitted. While private landowners lose some control, they willingly trade it for a well-maintained, predictable neighborhood. Covenants of this nature tend to supplement, rather than supplant, local zoning regulations; however, the city of Houston, Texas – often cited as the “wild west” of the development frontier for its lack of a zoning code – has the local right to enforce private restrictive land use covenants just as other cities enforce zoning codes. (Elsewhere, municipalities do not enforce private covenants. That responsibility remains with the private party, who may opt to file a lawsuit against anyone violating the restrictive covenant.)

Some restrictive covenants also serve very important public benefits. For example, occasionally a family estate will bequeath land to a local forest preserve or park district with a restriction stating that the land may never be sold or developed. Such restrictions protect the open space benefits of that property for the community for generations to come.

Certain retail industries use restrictive covenants to guard their investments. However, unlike the covenants being targeted by Chicago, these covenants do not adversely affect public well-being. Shopping center developers, for instance, often

ensure exclusivity and minimize competition for anchor tenants by allowing covenants that limit or rule out specific types of retail. From a community development perspective, safeguarding the investment of a shopping mall anchor is logical and even preferable: such agreements help establish retail centers and lead to economically healthy neighborhoods. Furthermore, these types of restrictive covenants affect only willing lessees, who are enticed by the limits on direct competition that the covenants provide. And, such covenants are null and void once the anchor tenant departs.

A recent court case illustrates this final distinction. In 1983, Kroger closed all of its stores in Tippecanoe County, Indiana, and assigned its lease to Pay Less Super Market. Pay Less opened outlets at most of the former Kroger sites, but left the store at Sagamore Shopping Center vacant. Thirty years later, Pay Less took action to enforce the restrictive covenant against the owner of Sagamore Shopping Center, who planned to lease a vacant Target in the shopping mall to a grocer. However, on June 23, 2005, the Indiana Supreme Court ruled in favor of the defendant in the case *Tippecanoe Associates v. Kimco Lafayette*. The court ruled that, since Pay Less subleased the space to a furniture proprietor and no longer occupied the space, it effectively extinguished its right to protect the space.

Indeed, most restrictive land use covenants operate in the best interest of both the public and private sectors. However, restrictive covenants legitimately earned a bad rap during the first half of the 20th century, when private landowners used them as a way to legally discriminate against minority races and religions. The Supreme Court's decision in a 1926 case, *Corrigan v. Buckley*, upheld this manipulation of private covenants. The Court determined that private covenants did not mandate state action; thus, despite a party's motivation, private covenants were not in violation of the Fourteenth Amendment's Equal Protection Clause. It was not until 1948, in the case *Shelley v. Kramer*, that discriminatory private covenants were deemed unconstitutional. In this case, the judge reasoned that using the courts to enforce private covenants does qualify as state action, and state action cannot and will not enforce discriminatory dealings.

A COMMON MENACE

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Though the discriminatory motivations tied to restrictive covenants in the early 20th century differ sharply from the anticompetitive nature of

covenants used today by grocery stores and pharmacies, both practices undermine public protections provided under law. Yet corporate legal departments operate within the gray areas of the law to narrowly maintain the legality of these covenants. Overly zealous grocers have gone as far as luring other businesses to place restrictive covenants on their property in exchange for money. For instance, in Northampton, Massachusetts, a large chain paid another land owner to place a restriction on property across the street from one of its sites. (This same company is currently being investigated for unfair restrictions on trade by the attorney general in neighboring Connecticut.)

Additionally, it is common for grocers to purchase a vacant store, record a covenant to the deed, and place it back on the market, with no intention of ever opening its doors for business - all to lock a competitor out of a potential marketplace. Ald. Tony Zielinski (14th Ward) of Milwaukee, Wisconsin, has experienced this practice first hand. Zielinski was originally happy when Jewel-Osco purchased a vacant Piggly Wiggly in his ward; his feelings changed after years passed, and Jewel-Osco made no indication that they planned to open an outlet at the site. Frustrated by the neighborhood's scarcity of fresh food markets and the deadening effect the vacancy had on the commercial strip mall, Ald. Zielinski met with Jewel-Osco representatives, who conceded that they would no longer "sit" on the vacant store. Indeed, Jewel-Osco sold the site; but what Zielinski didn't know was that the company added a restrictive covenant to the deed before making the sale. As a result, the site can never be used as a grocery store. The space has since been subdivided and a portion remains vacant, while the remainder houses a Family Dollar and a Blue Kangaroo Coin Laundry. The alderman and his residents must leave the ward to buy groceries.

In the Tippecanoe, Indiana, case, presiding Judge Sullivan cited a similar situation in his opinion. The plaintiff, Pay Less Super Market, "cheerfully concedes that it never intended to operate a grocery store in its Sagamore Center and acquired the Sagamore lease for the purpose of excluding competitors of its nearby stores." It is quite clear in these cases retailers never intended to open stores on the sites they purchased - their sole objective is to restrict competition.

Many cities are feeling the negative effects of restrictive covenants; the examples are endless. In Chicago's Rogers Park neighborhood, a national drugstore chain closed, but not before placing a restrictive covenant on the site, barring another pharmacy from opening there until August 2024. Half of the former building is occupied by Family Dollar, the rest is vacant, and the corridor to this day lacks a local pharmacy.

Toronto City Councilor Shelly Carroll began documenting the number of vacant stores in Vancouver with restrictive land use covenants. Only three stores remain to serve the 112,000 residents in her community. In one area, which used to be served by a full-line store, most residents now shop at a local drugstore, where just a few aisles hold all their grocery options.

In Vancouver, British Columbia, a grocery store in City Councilor Anne Roberts' neighborhood closed, and the restriction on the site left her and her neighbors without access to fresh groceries. She worked with city lawyers in an attempt to overturn the restriction, but to no avail. The city even tried to use its master plan as justification for removing the covenant, because the plan calls for grocery uses in every community and identifies the site in question



This former Jewel in Chicago's 7th Ward cannot operate as a supermarket, drugstore, liquor store, pharmacy or photo processing store until March 2010. It is currently being leased to Family Dollar.

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as a location for retail use. A report by city lawyers acknowledged the predicament, but concluded there is nothing that can be done: "The covenants restricting food sales placed on former supermarket properties are preventing diversification of food retailing businesses," reads the report "However, no legal resources are available to the City to remove these covenants."

FIGHTING BLIGHT

Indeed, when land use covenants are wielded like bully clubs to assert monopolistic and exclusionary power over the free market, a system of inequities is embedded into communities. The solution lies in ensuring that restrictive covenants serve a regulatory function only among willing participants.

The Metropolitan Planning Council (MPC) is one of Chicago's longtime planning advocates and became a natural ally in Ald. Laurino and Flores' battle against restrictive covenants. The Council actively supported the Chicago City Council ordinance, just as it championed banning racial covenants in the early part of the century. Much as racial covenants were banned to protect the common good, MPC and the Chicago City Council believe that grocers' and pharmacies' use of restrictive covenants to foil competition is another instance where the public good must outweigh private property rights.

"Restrictive land use covenants are not uniformly bad, but in this case, they present an onerous challenge to communities," said MarySue Barrett, MPC president. "It's difficult enough to find a suitable buyer to adapt an empty big box because of its size and retailers' strict design guidelines; preventing similar stores from using the site makes redevelopment much more difficult. In the case of grocery and drugstores, the negative effects go far beyond the fiscal hardship caused by blight; the lack of fresh food and medicine can be truly life threatening."

Despite the overwhelming arguments in favor of the ordinance, the Chicago Chamber of Commerce challenged the City Council at an August 2005 preliminary hearing. The chamber argued that banning such covenants created an unfair burden on local businesses. However, 16 out of 50 City Council aldermen showed up to voice their support for the ordinance, and chastised the chamber for speaking against it.

MPC and other supporters believe that, should anyone challenge the ordinance in court, it will be upheld for the same reasons *Shelley v. Kramer* was upheld in 1948. Also, to help ensure that the ordinance would survive a legal challenge, the aldermen

opted to modify a first, more stringent draft of the ordinance. The proposal that ultimately was put to a vote before the full City Council allows restrictive land use covenants for a very limited duration under specified circumstances. Legal counsel reasoned that this approach - rather than an all-out ban - is likely to prove more friendly to the courts.

At the Sept. 14 meeting of the Chicago City Council, where the ordinance passed with a major-

ity, most aldermen agreed that the decision was a no-brainer. Indeed, they were all too eager to recount their own horror stories of how a shuttered store wreaked havoc in their ward. They told of seniors taking two busses to a neighboring ward, sometimes even out of the city, to access the next closest store due to a restriction on a site in their ward. And they recounted the frustrations of local



When this Dominick's grocery store in Chicago's 39th Ward closed, Ald. Margaret Laurino received a petition signed by hundreds of senior citizens asking for another grocery store on this site. However, Laurino's hands were tied: due to a restrictive land use covenant, this site can never again be occupied by a grocery store.

merchants and interested grocery store chains who were barred from providing much-needed services to their community because the restriction prevented them from doing business on the site.

"Regulating restrictive covenants puts Chicago ahead of the rest of the country," said Ald. Laurino. "My City Council colleagues and I hope that this ordinance will become a national model for public policy."

Certainly, the costs of these exclusionary and dangerous practices are high and fall entirely on the community. When a landowner uses covenants to restrict the future use of his or her property, the value of the land to others is diminished. Also, in many cases, the city is stuck with the cost of making the land more attractive, effectively financing grocers' greed. Buildings and land can remain vacant for years because few viable options for adaptive reuse of a 50,000-square-foot building exist - other than another grocery store. Vacancies of such magnitude blight communities, as well as deprive them of access to fresh food and medicine sometimes for generations to come. Furthermore, the blight is not limited to the store itself. Nearby retail establishments that depended on traffic generated by the anchor grocery store also are harmed. The net effect: the entire community loses tax revenue and vibrancy as a result of the blighted mall or retail corridor.