

Restrictive Covenants in Mature Neighbourhoods that may be a Barrier to Grocery Retail

Recommendation:

That the October 19, 2011, Sustainable Development report 2011SPE035 be received for information.

Report Summary

This report comments on the extent to which restrictive covenants limit new grocery stores in the same location as former grocery store.

Previous Council/Committee Action

At the June 29, 2011, Executive Committee meeting, the following motion was passed:

That Administration return to Executive Committee with a report outlining information on the restrictive covenants in mature neighbourhoods that may present a barrier to grocery retail use as a part of the Mixed Use redevelopments imagined for neighbourhood commercial sites.

Report

Restrictive covenants may be registered on land titles, for variable periods of time, by vendors to control specific uses relating to the particular parcel. Restrictive covenants may be applied to commercially zoned properties to prohibit, or restrict the size of future specific commercial use opportunities. Grocery retailers that close an outlet

may register restrictive covenants on this basis to prevent competitors using the site (and structures) and thereby protect market share relative to their nearby operating outlets. Depending on the distribution of the grocer's other operating outlets and the relative absence of competitor outlets near the site of the closed outlet, some mature areas of the city may have a relative scarcity of grocery outlets. This will affect resident access to the mix of commercial uses that meet their daily needs to some degree. As grocery outlets sometimes perform an anchor function for smaller commercial nodes, these covenants may also impact the viability of these nodes.

Attachment 1 contains an April 2008 report, "Community Report on Restrictive Covenants on Supermarket Sites in Edmonton." An earlier version of this report was attached to a February 20, 2008, Executive Committee report (Planning and Development 2008PDP002). The report found 18 (30%) of the 60 grocery stores closed between 1970 and 2007 had restrictive covenants registered on title. Associated information for these 18 sites includes land use, and date or conditions (if any) of expiry of the covenant. Fourteen of these 18 sites still had covenants in effect in 2007. Six of these sites had no operating grocery outlet within 800 metres (10 to 15 minutes walk) and all are within mature neighbourhoods. Three of these six sites are located in areas of targeted intensification; one near the Belvedere LRT Station and a second in the Oliver Neighbourhood within three blocks of a planned west line LRT station.

The presence and impact of restrictive covenants has been the focus of several

previous inquires. Two Executive Committee reports (2005PDP127 – January 25, 2006, and 2007PDP037 – August 22, 2007) reviewed a restrictive covenant applied to 6633 – 118 Avenue in the Highlands Neighbourhood.

2005PDP127 noted that while the Courts may order a restrictive covenant to be discharged or amended if it conflicts with a land use bylaw or statutory plan and it would be in the public interest to do so, there have been at least seven cases in Alberta where challenges on this basis were refused. In these cases the Courts noted the restrictive covenants did not prevent the owner from obtaining a development permit for other permitted or discretionary use opportunities under the applicable Land Use Zone, or a permit for a smaller grocery outlet. “[A] conflict with a bylaw has been ruled to exist only where the bylaw mandates rather than simply permits the land use specified in the covenant”¹.

2007PDP037 outlined options for amendments to provincial legislation that would apply time limits on restrictive covenants and/or allow restrictive covenants to be removed if they violate the goals of an applicable plan. At the time, the Law Branch noted concerns with each option and recommended that none be pursued.

¹ OLRC, 1989, “Report on covenants affecting freehold land” Ontario Law Review Commission, Ontario Ministry of the Attorney General, Toronto, ON, as cited in “Cornering the market: restriction of retail supermarket locations”, *Environment and Planning C: Government and Policy* 2010, v. 28, p. 917, by Nairne Cameron, Carl G. Armhein, Karen E. Smoyer-Tomic, Kim D. Raine and Lee Yen Chong.

Council subsequently directed the Mayor to write to the Minister of Municipal Affairs requesting an amendment to the *Land Titles Act* such that a 10-year time limit be placed on restrictive covenants for properties such as the former Safeway site in Highlands Neighbourhood (see Attachment 2).

Attachment 3 contains the Minister of Service Alberta response to the Mayor. The letter notes the Highlands restrictive covenant still allows commercial uses on the former Safeway site and that the covenant in question would expire if Safeway ceased operations at all other nearby sites where it currently has stores. It also noted the opportunity for the City to challenge a restrictive covenant on the basis that it conflicts with a land use bylaw or is in the public interest (as provided for under Section 48(4) of the *Land Titles Act*).

Policy

The Way We Grow, Edmonton’s Municipal Development Plan:

- 4.2.1.1 Support neighbourhood revitalization, redevelopment and residential infill that contributes to the livability and adaptability of established neighbourhoods.
- 6.2.1.1 Include retail development as a key component of planned mixed use centres that focus on LRT stations and transit centres.
- 6.2.1.4 Plan for retail centres that meet the daily needs of residents in area and Neighborhood Structure Plans.

Corporate Outcomes

The Way Ahead, Edmonton’s Strategic Plan 2009-2018:

- Transform Edmonton’s Urban Form

- Improve Edmonton's Livability
- Shift Edmonton's Transportation Modes

Attachments

1. Community Report on Restrictive Covenants on Supermarket Sites in Edmonton by Nairne Cameron and Lee Yen Chong, University of Alberta, April 24, 2008.
2. Letter from Mayor Stephen Mandel to the Honourable Ray Danyluk, Minister of Municipal Affairs and Housing, October 11, 2007.
3. Response Letter from Lloyd Snelgrove, Minister of Service Alberta, to Mayor Stephen Mandel, December 5, 2007.

Others Reviewing this Report

- D. H. Edey, General Manager, Corporate Services Department

Community Report on Restrictive Covenants on Supermarket Sites in Edmonton
by Nairne Cameron and Lee Yen Chong, University of Alberta, April 24, 2008.

**Community Report on Restrictive Covenants on Supermarket Sites in Edmonton
Nairne Cameron and Lee Yen Chong
University of Alberta**

April 24, 2008

Introduction

This summary reports on the prevalence of restrictive covenants pertaining to food sales on former supermarket sites in Edmonton between 1970 and 2007. These restrictive covenants are private legal agreements normally between a supermarket chain and the purchaser of the former supermarket site. Unless an expiry date is specified for the restrictive covenant, the agreements can continue for perpetuity. The closure of supermarkets, coupled with the prohibition of any other operating store on the sites, may have negative consequences for access to healthy food and the local communities. This situation may be particularly acute in mature neighborhoods, where it may be difficult, if not impossible, for another retailer to assemble sufficient land and obtain zoning to build another supermarket.

Research Methodology

First, historical telephone directories of Edmonton were searched for the addresses of grocery chain stores and supermarkets from 1970-2007. Then, a database of the store openings and closures was created. The land title for every single closed grocery store or supermarket was then checked using the Province of Alberta's electronic land registry system (SpinHost).

Results

From a database of 60 closed stores, 18 restrictive covenants were discovered (see Table 1). Of the 18 restrictive covenants, at least 14 are still in effect, and one has already expired. To evaluate the potential impact of the restrictive covenants on the surrounding community, an 800m buffer was created around the former supermarkets. The 800m radius represents a 10-15 minute walking distance. A total of six of the sites with restrictive covenants were found to have no other operating supermarkets within this walking distance radius (see Figure 1). Three out of the six serious sites are in the Northeast, and two are west of downtown, and one is on the Southside. This leaves local residents without an easily accessible supermarket – a source of healthy food.

Graph 1 shows that over the period 1970-2007, the bulk of stores having a restrictive covenant (RC) were closed starting in 1981, peaking in the 1991-1995 time period. Over 50% of the stores with restrictive covenants were closed between 1986 and 1995. Just over a quarter of the stores were closed after 1995.

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Table 1

Address	Date Enacted	Date Expired	Company Placing the Restrictive Covenant (RC)	Current Use (as of March 5, 2008)	Serious Potential Impact of RC
7541 144 Ave (Londondale)	22 Jan 1999	No expiry date, but the Restrictive Covenant (RC) is no longer in effect (under cancelled title dated 20 Dec 2004)	Safeway	Drugstore and Small Grocery and Café	No*
12910 Fort Trail	07 Jan 1998	Valid until all of the Dominant Tenements permanently cease to be food stores	Safeway	Car Parts and Accessories	Yes
67 St & 144 Ave (Londonderry Mall)	07, 09, 30 Jun 1995	Only one RC, registered in 30 Jun 1995 is still in effect, with multiple prohibited periods of separate ending dates on 45th, 36th, 27th, 18th and 9th anniversary of the effective date	Safeway	Supermarket	No
6633 118 Ave (Highlands)	21 July 1999	Valid until all of the Dominant Tenements permanently cease to be food stores	Safeway	Convenience Store/Gas Bar/Vacant Pending Redevelopment	Yes

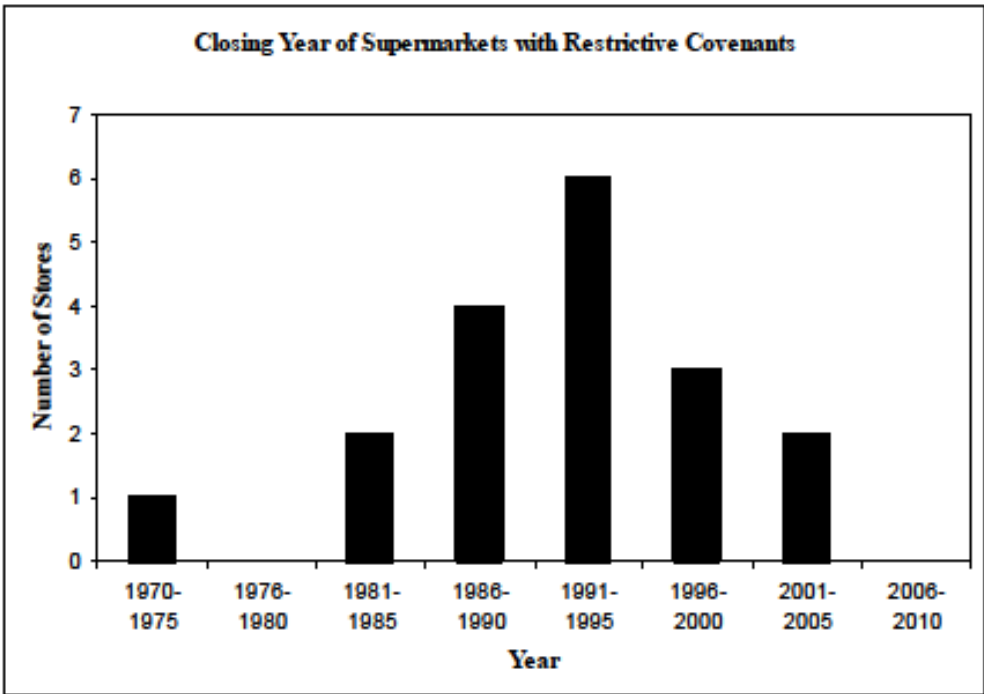
8930 118 Ave (Norwood)	05 Jan 1994	25 years from Dec. 1993	Safeway	Affordable Housing Rentals and City Government Office	Yes
13530 Fort Road	07 Feb 1998	Valid until all of the Dominant Tenements permanently cease to be food stores	Safeway	Vacant	No
8930 82 Ave	16 May 1990	Multiple prohibited periods with separate expiration dates in 1998, 1995, and 1992	Safeway	Secondhand Store	No
5720 111 St (Lendrum)	19 Jan 1990	Multiple prohibited periods with separate expiration dates in 2004, 2001, 1998, 1995, 1992, 1991, and 1990	Safeway	Small Grocery	No
40 Ave & 114 St Southwest Corner (Petrolia)	02 Jun 2006	31 Mar 2013	Safeway	Movie Rental/Sales	Yes
12328 102 Ave (Glenora)	06 May 1998	14 Jan 2023 or earlier if all of the Dominant Tenements permanently cease to be food stores	Safeway	Outdoor and Sports Store	Yes
130 St & 137 Ave	27 Mar 2003	31 Mar 2013	Safeway	House Accessories	No
38 Ave &	19 Jan	Multiple	Safeway	Hardware Store	No**

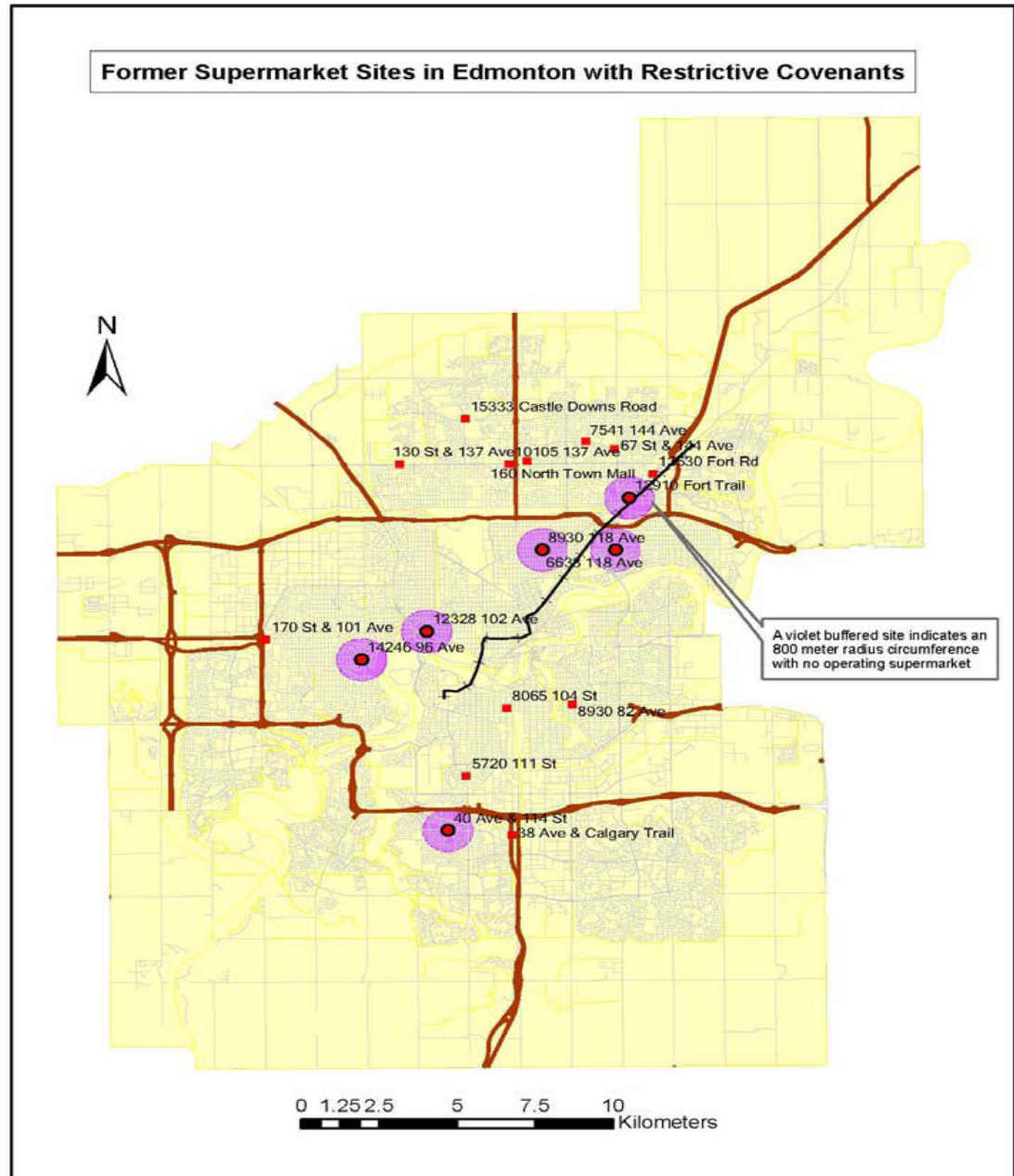
Calgary Trail	1990	prohibited periods with separate expiration dates in 2004, 2001, 1998, 1995, 1992, 1991, and 1990			
10105 137 Ave	15 Apr 2005	No expiry date	Sobeys Capital Incorporated	Supermarket	No
15333 Castle Downs Rd (Castle Downs)	12 July 2002	No expiry date	Sobeys Capital Incorporated	Supermarket	No
14246 96 Ave	12 July 2000	No expiry date	Great Pacific Industries Inc.	Redeveloped. Various Retail Stores.	Yes
8065 104 St (Strathcona)	19 Dec 2005	31 Oct 2015	Overwaitea Food Group Ltd	Pharmacy	No
160 North Town Mall	13 Mar 2007	31 Dec 2016	Overwaitea Food Group Ltd.	Vacant	No
170 St & 101 Ave (Centennial)	02 Jan 1985	No expiry date	Kelly Douglas and Company Limited	Bank	No

*A small convenience store is now operating at 7541 144 Ave. The restrictive covenant found on this site has already expired, leaving no restrictions on other grocery businesses moving to this site.

**This site (38 Ave. & Calgary Trail) is in a commercial area. Additionally, there is an operating supermarket just slightly outside the 800m buffer of this site, so the restrictive covenant does not exert a serious impact.

Graph 1





Acknowledgements

Nairne Cameron (Principal Investigator) and Lee Yen Chong from the University of Alberta (Department of Earth and Atmospheric Sciences and Centre for Health Promotion Studies) conducted the research between April and December, 2007. This study has been funded by a seed grant from the Centre for Urban Health Initiatives (CUHI). It is also supported by the following community partners: Highlands and District Community League, Edmonton Federation of Community Leagues, and City of Edmonton Councillor, Kim Krushell, and previously by former City of Edmonton Councillor, Janice Melnychuk.

Letter from Mayor Stephen Mandel to the Honourable Ray Danyluk, Minister of Municipal Affairs and Housing, October 11, 2007.



MAYOR STEPHEN MANDEL
CITY OF EDMONTON

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EDMONTON, ALBERTA, CANADA T5J 2R7
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11 October 2007

The Honourable Ray Danyluk
Minister of Municipal Affairs and Housing
Room 104, Legislature Building
10800 – 97 Avenue NW
Edmonton AB T5K 2B6

Dear Minister Danyluk:

At the Edmonton City Council meeting held August 28, 2007, strong concerns were expressed with respect to limitations placed on a property through restrictive covenants affecting the redevelopment of a commercial site. In response to Council's concerns, the following motion was passed:

"That the Mayor, on behalf of City Council, write a letter to the Province asking for a ten-year limit to be placed on restrictive covenants for properties such as the former Safeway site on the south side of 118 Avenue between 66 and 67 streets, and that, after ten years of the initiating owner vacating the premises, the restrictive covenant be removed."

To provide you with some context regarding the motion, what was once a thriving community grocery store on the above-mentioned site is currently restricted to uses such as a weekend flea market. The absence of conventional commercial uses on the site for the majority of the week has resulted in a negative impact on the neighbourhood. Essentially the municipality's policy and regulation to support strong communities has been limited by a business which no longer operates on the site.

While it is accepted business practice to use a restrictive covenant when a commercial business vacates a site and desires to protect themselves from other competing market interests, that goal must be balanced against the ongoing viability and desirability of a community. To encourage this balance of interests, we request that the Province of Alberta consider legislation enacting a 10 year time limit on this kind of use of restrictive covenants. This would give the previous owner the opportunity to establish themselves in a new location while providing the community with a measure of certainty that underutilized sites could be reasonably redeveloped in a timely manner.

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I look forward to hearing your positive response to proceeding with this proposed amendment to Provincial legislation.

Yours truly,

A handwritten signature in cursive script that reads "Stephen".

Stephen Mandel
Mayor

c: R. Gary Klassen, General Manager

Response Letter from Lloyd Snelgrove, Minister of Service Alberta, to Mayor Stephen Mandel, December 5, 2007.



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Office of the Minister

*Minister Responsible for Service Alberta and the Personnel Administration Office
MLA, Vermilion-Lloydminster*

AR 13481

DEC 05 2007

His Worship Stephen Mandel, Mayor
City of Edmonton
3 floor, City Hall
1 Sir Winston Churchill Square
Edmonton, AB T5J 2R7

DEC 10 2007

MC-07-01976

Dear Mayor Mandel:

Thank you for your recent letter regarding the registration of restrictive covenants on commercially zoned sites. I am pleased to address your comments.

The concept of restrictive covenants was not created from any statute, but rather from many years of case law history in Canada. The *Land Titles Act* only sets out basic requirements in order to register, modify or discharge a restrictive covenant within the Land Titles system.

However, I would like to draw to your attention the following:

- Our review of the restricted covenant registered on the title to which you refer shows that all commercial activity is not prohibited. The restrictive covenant specifically prohibits food or grocery stores of more than 2,950 square feet and drug stores of more than 3,000 square feet.
- The restrictive covenant is not perpetual, but will cease to be effective when all the dominant tenements are no longer being used as grocery stores. The purpose of the restrictive covenant is to protect current ongoing commercial interests.
- Section 48(4) of the *Land Titles Act* allows a court to modify or discharge a restrictive covenant if it is proved to be beneficial to the people interested in the condition or if it conflicts with a land use by-law or if it is in the public interest. You may wish to consult with a lawyer on proceeding with this course of action.

I appreciate your interest in this matter.

Yours truly,

Lloyd Snelgrove
Minister

cc: Honourable Ray Danyluk, Minister of Municipal Affairs and Housing

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