Community Land Trusts and Commercial Land Use

I. CLT for Commercial Uses - Overview

Community Land Trusts are a legal mechanism that, when used effectively, may empower communities to control and protect local property conditions and values. This legal mechanism was used historically by community groups to protect low-income families and individuals from being inequitably priced out of their communities (comparable to a type of rent control). In the last several decades, however, government and community leaders have discovered that controlling property value is not the only way to encourage a stable and healthy community. In addition to maintaining fair-housing costs, functional communities must be able to assure long-term access to commercial services for their residents and visitors alike.

A CLT can be an effective tool for promoting local ownership and control over commercial resources. Rather than restrict property prices through government regulation, a CLT empowers residents and shareholders to make real estate decisions that best serve the needs of their community. In some cases, this will be an affordability requirement, but in others it may be to allow for upward price pressures and the subsequent increased rents flowing to the CLT.

The legal mechanisms discussed below are available to property owners, regardless of whether the ownership is divided into a CLT. A community group might find the CLT model useful for securing financing, providing local wealth development strategies, or simply offering a mechanism for local control and decision-making.

II. Commercial Use Restrictions and Covenants

The most common means for assuring long-term access to commercial services is by regulating commercial land use via: (1) lease agreements or (2) building and use restrictions.

<u>**Leases:**</u>

A simple yet effective way for a community to protect and regulate commercial services is by purchasing commercial property and incorporating desirable regulations directly into commercial lease agreements. The advantages of decentralizing a property-control plan in this manner is that it provides communities flexibility. The shorter the terms on a community's lease agreements, the more a community can respond to changing social conditions in subsequent leases. And, because leases are such a simple legal mechanism for controlling a property's use, they are tools that can easily be adopted by Community Land Trusts. Under this structure, a CLT can use a commercial lease to control the cost of rent, help businesses hold down operating costs, and incentivize commercial activity, while also restricting undesirable business types. In addition, a CLT could obligate its commercial tenants to limit pricing or to rebate some or all its profits or revenues above a certain level (much as percentage rent operates in the traditional retail or restaurant lease) as a way of assuring community access to services at affordable prices or of funding the CLT's operations. Further, for-profit retail businesses typically do not want to own the property in which they operate because rent is deductible against income taxes and tends to exceed the value of depreciation (which a property owner can take on its tax return). For this reason, businesses often form a partnership or limited liability company for the sake of owning the real estate and of leasing it to the business. In this way, the company collects its rent deductions and the newly formed entity can claim the depreciation on its tax return. Such a corporate structure is not readily adaptable to a CLT unless the CLT wants to operate a business. Therefore, leasing property provides tax incentives to the tenant and the CLT. With that said, relying exclusively on leases to assure long-term access to commercial services comes with disadvantages because it is hard to maintain a set of values over time. The beliefs held by today's leaders might not be the same beliefs held by tomorrow's leaders. In other words, because the regulations and protections on a property lapse at the end of the lease, one cannot guarantee that a community's values will be protected into the future in future leases.

Deed Restrictions:

To protect a set of values more permanently, a property owner can also regulate the uses of its commercial property by attaching building and use restrictions directly to the property. This is a helpful device for CLTs not interested in maintaining commercial property as it allows a CLT to permanently control the use of its commercial properties but also to sell the property and to return it to the free market. To attach a deed restriction, a CLT must acquire the property and, prior to selling it, file the deed restriction with the County Register of Deeds in the County where the property is located. Upon this filing, the restriction is generally permanent and will bind all current and future owners of the land. These "deed restrictions" can be used to (1) prohibit certain commercial or business activities (i.e. property may not be used for the sale of tobacco or alcohol), (2) affirm and mandate certain activities (i.e. property must be used "for the selling of books"), or to create obligations (i.e. property owners must pay a monthly fee of $100 to the Save the Owl Foundation etc.) Regardless, deed restrictions provide some level of guarantee that certain matters will or will not occur and these guarantees will bind all current and future property owners. See *Bloomfield Estates Improvement Ass'n, Inc v City of Birmingham*, 479 Mich. 206 (2007). Although a powerful tool for protecting commercial use in a community, building and use restrictions often create unpredictable effects. As time passes

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and a community changes, recorded restrictions become less effective and often become an obstacle to healthy communities - especially considering drafters cannot envision all the ways in which communities, land owners, and businesses will change with time. This is especially a concern because once a deed restriction has attached, it is very difficult for it to be removed. Therefore, a CLT, before placing a building or use restriction on commercial properties in its community must weigh the risk of unintended consequences against the certitude of protecting its community.

This publication was made possible with grant funding from the Michigan State Bar Foundation. The Foundation's funding does not constitute an endorsement of content or opinion expressed in it.