



JOINT CITY COUNCIL & PLANNING COMMISSION WORK SESSION MEMO

DEPARTMENT	PRESENTED BY	DATE
Community Development	Bill Almquist - Community Development Director Read McCulloch – Chaffee Housing Trust	July 31, 2023

ITEM

Presentation from Read McCulloch, Executive Director – Chaffee Housing Trust, regarding ground leases as affordability mechanisms for use in projects such as the South Ark Neighborhood Plan.

BACKGROUND

As a corollary to the preceding presentation on draft preferred alternative site plans for the South Ark Neighborhood (and related discussion of phasing and development options), Read McCulloch will provide information regarding the potential use of ground leases to accomplish affordability in housing projects and how they compare and contrast to deed restrictions. The objective is to inform Planning Commission and Council about one of the City's options to ensure levels of housing affordability while still retaining ownership of the underlying land.

Attachments:

Brief Summary of Deed Restrictions & Ground Leases – Read McCulloch, Chaffee Housing Trust
Article Comparing Deed Restrictions and Ground Leases – David Abromowitz and Kirby White

Publicly owned land is an invaluable asset for a community that should be stewarded for the highest and best use in perpetuity. When such properties are considered for development, the immediate need and purpose should be weighed against the very long-term needs of the community that the government body (landowner) serves. If land is disposed of (conveyed or sold) it can be restricted to a particular use for a set term. Deed restrictions (DR) are the most common means of achieving this. The issue with DR's is that when the term of restriction expires, the landowner is no longer compelled to adhere to the intended use and can develop the property as they wish or sell it at market-value, potentially realizing a windfall gain on what was previously a public asset. Similarly, if a property (land or improvements) is financed and goes into foreclosure, all DR's are exterminated, and the subsequent entity holding title can dispose of the land as they please, without restriction. In both cases, the public benefit is lost, and a private entity stands to gain from a public asset.

Alternately, the use of a Ground Lease (GL) allows for similar restrictions on the use of land (theoretically to benefit the public) with a stated term (up to 99 years). This allows the lessor (public owner) to convey development and ownership rights to an entity (an individual or company, for-profit or nonprofit developer, etc.) as the lessee, who can then develop the property for its intended purpose as defined in the GL. The lessor retains ownership of the land, the lessee has the freedom to develop and own any improvements and can sell or lease those to another entity or individuals.

Ground Leases are critical instruments of site control for several reasons:

- If the improvements are foreclosed upon, control of the underlying land is maintained by the lessor, who can then establish a new GL with the new owner of the improvement (bank or investor). This helps discourage foreclosure on public benefit development and provides an opportunity to negotiate an outcome.
- When the life of buildings or improvements is realized, and the improvements need to be removed (scrapped), the GL terminates, and the lessor (public entity or government) is left holding title to vacant land retained for the next public benefit.

Imagine a scenario in which a public entity that owns land wants to see it developed for public benefit. By employing a Ground Lease instead of a Deed Restriction, that public entity retains a future development option. 100 years from now, when whatever was developed on that land is no longer useful (life of building) and it is removed, and the owner of the improvement has realized their desired return-on-investment, the landholder entity (government, nonprofit, etc.) Lessor can decide what is the next best and highest use of that land. Development that is needed now can be realized AND public control of the invaluable public asset is retained. This is especially important in communities where there is limited developable land available and increasing demand for development for public or private benefit.

Deed Restrictions are useful for buildings or improvements and can be deployed in addition to a Ground Lease if need be.



Deed Restrictions and Community Land Trust Ground Leases: Protecting Long Term Affordable Homeownership

BY DAVID ABROMOWITZ AND KIRBY WHITE

THE NATURE OF THE RESTRICTIONS

Before discussing deed restrictions and community land trust ground leases as methods of establishing affordable homeownership restrictions, let us first note the features that are common to affordable homeownership programs. In general, these programs employ public and charitable subsidies to reduce the cost of homeownership to an affordable level for lower income households. They commonly impose three types of restrictions: price, buyer eligibility, and occupancy and use. These restrictions can range in duration from as little as five years to as much as 99 years, and can, in effect, be perpetual in some cases.

Price Restrictions. Resale restrictions limit the price at which a home can be sold. The goal is to keep the price affordable for households of a designated income level (generally identified as “income-eligible” or “income-qualified” households), but in practice only control the price itself. These limitations on resale prices are usually established through formulas that allow the seller to recoup her original investment plus some amount of appreciation. What are perhaps the most common formulas – generally known as “appraisal-based formulas” – limit the price to the original purchase price plus a specified percentage (e.g., 25 percent) of total market appreciation as determined by the difference between appraised value at the time of purchase and at the time of resale.

Other types of formulas include:

- “Itemized formulas,” which add to the original purchase price such factors as the value of improvements made by the owner and adjustments for monetary inflation; and
- “Indexed formulas,” which allow resale prices to exceed the original purchase price only in proportion to increases in indexes such as the consumer price index or area median income.

Buyer Eligibility Restrictions. These restrictions focus first on the income categories of people permitted to buy a home when the owners want to sell it. Programs designed to provide homeownership opportunities for lower income households typically limit subsequent, as well as initial, buyers to those households that have incomes in the range targeted by the program (or to public or nonprofit sponsors that will see that the homes will be resold to income-qualified households). Maximum incomes for eligible buyers are usually defined in terms of percentages of median household income for the geographical area in question, adjusted for household size by the U. S. Department of Housing and Urban Development (HUD).

Occupancy and Use Restrictions. Resale restrictions of either type are commonly accompanied by occupancy and use restrictions. Programs designed to provide homeownership opportunities for lower income households have reason to require that owners (subsequent as well as initial owners) occupy the homes they own as their primary residences. Occupancy restrictions thus prohibit absentee

ownership and require that an owner who moves out of a home must sell it. Other types of use restrictions include those that require proper maintenance and prohibit uses that would diminish the quality of the homes for future residents or that would be detrimental to the surrounding community. In the case of homes that include one or more rental units in addition to the units occupied by the owners, restrictions may require that tenants be income-qualified and that the rents not exceed an affordable amount.

VEHICLES FOR RESTRICTIONS: DEED RESTRICTIONS AND CLT GROUND LEASES

Deed Restrictions. Deed restrictions (or deed covenants) are restrictions that are written into the deed conveying a property and that “run with the land,” binding subsequent as well as present owners. The restrictions themselves can vary from very simple requirements to very elaborate and complex requirements. They can be and have been established for various types of property and to serve a wide variety of purposes. For many years, such covenants have been typical in planned communities and in subdivisions where developers prevent buyers from modifying their homes in ways that might offend the aesthetic (or at least conventional) sensibilities of their neighbors.

The same covenant technique has also become increasingly common as a means to preserve affordability and other intended effects of affordable homeownership programs. But deed restrictions are not as “self enforcing” as their drafters may assume them to be, and require someone or some organization to monitor compliance. Restrictions written into the deeds of homes developed or sponsored by such programs can give a preemptive option to the developer or sponsoring agency, allowing it to purchase the home for a limited price when the owner wants to sell or to see that the home is sold to another income-qualified household for a price not exceeding the purchase option price. The other common types of affordable homeownership restrictions noted above are also often established as deed restrictions.

CLT Restrictions. Community land trust homeownership programs allow people to buy houses on land that is leased to them by the CLT through very long-term ground leases (typically, renewable and inheritable 99-year leases). The lessee/homeowners pay a modest (usually subsidized) monthly ground rent to the CLT for the use of the land. The terms of the ground leases give the homeowners most of the rights of conventional homeownership, but also impose certain key restrictions on the use and resale of the houses.

The CLT itself as ground lessor retains a preemptive option that allows it to buy the house when the lessee/homeowner wants to sell, to assign the option to another income-qualified household, to oversee the sale of the home directly to another income-qualified household for a price not exceeding the purchase option price. The other types of common affordable homeownership restrictions are normally written into the CLT ground lease as well.

In its role of overseeing the resale of affordable homes, the CLT makes sure that the buyer is income-eligible and that the price does not exceed the limit established by the “resale formula.” Most CLTs also play an active role in helping lower income buyers to qualify for mortgage financing, and often play a role in negotiating with lenders to see that appropriate mortgage financing is available to these CLT homebuyers. CLTs may also provide a variety of training and support services to these households once they have become homeowners. The costs incurred by the CLT in carrying out this work can be defrayed in part by the lease fee that is collected, and can also be defrayed by a mark-up of the resale price or transfer fee added to the price paid by the new homebuyer.

STRENGTHS AND WEAKNESSES OF DEED RESTRICTIONS

When compared to CLT ground leases, deed restrictions are sometimes seen as the “simpler and easier” means of establishing restrictions, though not necessarily as the most effective means of implementing restrictions over the long term.

Their advantages include the following:

- They do not require the creation of separate ownership interests in land and buildings,
- They are likely to be more acceptable to homebuyers who have a preconceived idea that homeowner means wanting to “own the land as well as the house.”
- They avoid the complication of separate tax assessments on land and buildings.
- They appear, on the surface, to require less oversight. The assumption is that any resale in violation of the resale restriction (sale to a non-income-eligible buyer or for a price in excess of the stated limit) would compromise a buyer’s title to the property (and a mortgagee’s claim to the property as collateral) and would therefore not happen.

Most deed restrictions are designed to last for relatively short periods of time – typically for periods ranging from 5 to 20 years, rarely for more than 30 years. If a program strives to preserve affordability only for a relatively short

time, the deed restriction is a simple and perhaps economical way of doing so. The long-term enforceability of deed restrictions, however, is more problematic, depending on a number of factors, both legal and practical. Some states specifically limit deed restrictions to a certain period (e.g., 30 years), and in almost every state, “perpetual” deed restrictions are considered invalid as a “restraint on alienation” or potentially even a violation of the “rule against perpetuities.” Generally, the longer the duration of the restriction and the farther the party imposing the restriction is removed from the property, the less defensible is the restriction. (In many traditional English common law-influenced states, enforceability rests on meeting legal tests of “privity,” “touch and concern,” and benefit to a nearby parcel owned by the same party who is imposing the restriction). Some states have enacted laws explicitly sanctioning “perpetual” deed restrictions for purposes such as the preservation of affordable housing, but not many states have done so.

Even if all the legal obstacles to enforcement of the deed restriction are satisfied, as a practical matter, they are often not effectively enforced. The supposed self-enforcement process may not work in practice. If the difference between the allowable “purchase option price” and the subsequent market price is great, the owner of the property has a great financial incentive to seek ways to avoid the terms of the deed covenants. There may well be a speculative purchaser who would be willing to pay more than the purchase option price but less than the property’s market value, with the difference serving as either the reward for the risk that the restriction will ultimately be enforced or the incentive to spend substantial sums on a legal challenge to enforceability. Such speculative practices may also succeed if the necessary title work was not done carefully enough at the time of resale and the existence of a restriction written into a deed decades previously is missed.

Indeed, often because they are assumed to be sufficient just by clouding title, deed restrictions generally have not been actively monitored. Programs have generally not been funded or put in place to support monitoring. At least this has been true until relatively recently. As the failure of self-enforcement becomes more apparent, a growing number of programs are now being established to monitor and enforce deed restrictions established through state and municipal efforts to subsidize affordable homeownership (or to require its creation through “inclusionary” ordinances). It is important to note, too, that, although price and eligibility restrictions may be self-enforcing to a degree, occupancy and use restrictions are not self-enforcing at all. Unless these restrictions are monitored and enforced by some

authorized agency, there is nothing to prevent the owner of an affordable home from moving out and becoming an absentee landlord, or allowing the public investment in the home to be wasted by abuse and inadequate maintenance of the physical structure.

Since the sponsoring agencies that put deed restrictions in place do not usually have a continuing relationship with the homeowner, the homeowner is on her own for better and for worse. Not only will monitoring and enforcement be limited or absent; support services for the lower income, first-time homeowner will also be lacking. If the owner gets into financial trouble, the sponsoring agency will not be aware of it and will not provide assistance. If the financial trouble results in a mortgage foreclosure, any deed restriction that has been subordinated to the mortgage (as has usually been required by the lender) will be wiped out. Not only will the homeowner lose her home, but also the public will lose the investment it has made in the affordability of the home.

STRENGTHS AND WEAKNESSES OF CLT RESTRICTIONS

The CLT model is a more complicated approach to homeownership. It requires more effort by the CLT as sponsoring agency and is less familiar (and sometimes initially less acceptable) to the majority of homebuyers, but it also provides a stronger basis for the enforcement of restrictions, a better basis for the support of economically vulnerable homeowners, and a more complete set of tools for preserving the public’s investment in the home even in situations where a mortgage is foreclosed.

Restrictions established through a CLT ground lease are more enforceable for both legal and practical reasons. The fact that the lease represents an agreement between parties with continuing ownership interests in the property provides a strong legal basis for the CLT’s enforcement of resale and use restrictions. The CLT’s preemptive right to purchase the house for a restricted price (and thereby to assure that it will be passed on to another income-eligible household) is a part of this ongoing agreement. Further, its enforceability is strengthened by the fact that the house is located on land that the CLT owns and by the fact that the lessee’s ownership of the house is explicitly subject to the terms of the lease.

Although in the early years of the CLT model development theoretical questions have been raised as to whether the 99-year term of the CLT’s preemptive option might be held to violate the rule against perpetuities (potentially exceeding the traditional common law measure of a “life in being plus

21 years”), the CLT option to our knowledge has never been challenged in court in several decades of CLT operations. Moreover, there are strong reasons to believe that such a challenge would not succeed. Notwithstanding this presumed long-term enforceability of the option, most CLT ground leases contain a backup provision, which, as expressed in ICE’s Model CLT Ground Lease, states, “It is the intention of the parties that their respective options to purchase and all other rights under this Lease shall continue in effect for the full term of this Lease and any renewal thereof, and such options and other rights shall be considered to be coupled with an interest. In the event any such option or right shall be construed to be subject to any rule of law limiting the duration of such option or right, the time period for the exercising of such option or right shall be construed to expire twenty (20) years after the death of the last survivor of the following persons...” [e.g., all children born in a specified local hospital in the year the lease is executed].

The CLT ground lease also provides a strong basis for enforcing the CLT’s occupancy and use restrictions. The legal mechanism for this enforcement is the relatively familiar process of declaring a default under the terms of the lease. IF the default remains uncured, the CLT as lessor can expect to obtain judicial relief through typical landlord-tenant summary process. The exact procedural details and substantive requirements will differ from jurisdiction to jurisdiction, but much can be said of elements in common. The ground lessee’s rights of possession of the land depend upon compliance with the lease terms. Failure to comply gives rise to the right of the landlord to evict the ground lessee or seek other remedies, such as damages or injunctive relief, where appropriate.

On the practical level, the likelihood that the CLT’s restrictions will be enforced in practice is supported by the necessary ongoing interaction between the parties. The homeowner is responsible for making monthly lease fee payments to the CLT. If payments are not received, the CLT will contact the homeowner and, in so doing, may learn of other violations or problems (e.g., the homeowner may no longer occupy the home and may have rented it to others, or may have lost a job and may be approaching a mortgage default.) When the homeowner eventually wants to sell, the possibility that the sale could be carried out in

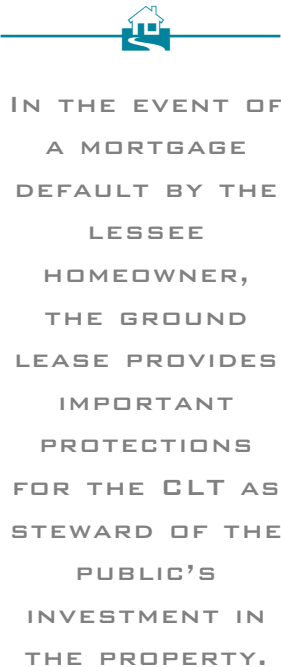
violation of the lease’s resale restrictions is extremely limited. Any but the most woefully ill-informed and ill-advised buyers would understand that they could not buy the land from the existing homeowner and would have to deal with the CLT landowner. In this sense, ground-lease-based resale restrictions are more truly self-enforcing than are deed restrictions.

In the event of a mortgage default by the lessee homeowner, the ground lease provides reasonable protections of the lender’s interests, but also important protections for the CLT as steward of the public’s investment in the property. Although different terms may be negotiated with different lenders, CLT ground leases typically provide for notification of the CLT in the event of a mortgage default and, thereupon, give the CLT an opportunity to cure the default (as well as to help the homeowner herself to work out the problem). In the event that the problem does result in foreclosure, the CLT often has an option to buy the house back from the mortgagee. In the worst case scenario, if the house is not repurchased by the CLT subsequent to foreclosure and the resale restrictions are removed from the lease (as CLT leases normally permit in such situations), then the CLT normally has the right to charge a higher ground rent to the new owner of the now-less-restricted home. Thus, the property will continue to provide significant support for the CLT’s affordable homeownership program.

It should also be noted that the CLT ground lease provides an opportunity for flexibility and adaptability that is usually lacking with long-term deed restrictions. If, at some point in the future, certain ground lease restrictions no longer serve the community’s interest, the parties to the lease can negotiate reasonable modifications. And if, at some point, the community’s interest is better served by an altogether different use of the property, then when the then-current owner wants to sell, the CLT can exercise its option and dedicate the property to that different use.

Finally, it should be said that the CLT’s approach to ownership brings a kind of perspective and understanding to CLT homeownership programs that is less clearly and emphatically present with homeownership programs that utilize deed restrictions. The community land trust model embodies a commitment to

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Employer Assisted Housing *Continued from page 8*

The Bonita Bay Group, a large employer in Lee County, supplemented SHIP down payment and closing cost assistance with \$5,000 so that ten employees were able to purchase homes in Silverado East, a single family subdivision developed by the Bonita Springs Housing and Community Development Corporation.

proposed condominium development. While the development will have both state and local subsidies, the initial plan is to request that the employers provide additional subsidy to employees wishing to purchase a home in the development. This will make the homes affordable to lower income households.

Although employer assisted housing will not solve Florida's housing affordability problems, it brings employers into the public-private partnership that every community relies upon to deliver affordable housing. It can be a great benefit to the employer as an important piece of its incentive package to recruit employees. Employer assisted housing can also provide a program for retaining employees through the stability created by homeownership or a secure housing environment. 🏠

References

Hoffman, Daniel. "How Employers View Employee Assisted Housing". <http://policy.rutgers.edu/eah/employers.html>
Jennings, Stephanie. "Reinventing the Company Town", in Housing Facts and Findings, Summer 2000.

Housing America's Workforce Act of 2005

The Housing America's Workforce Act of 2005 was introduced in Congress last June. Its Senate sponsors are Senators Hillary Rodham Clinton (D-NY), Gordon Smith (R-OR), and Mel Martinez (R-FL); its House sponsor is Rep. Nydia Velázquez (D-NY). The Act provides incentives to increase private sector investment in housing solutions in three important ways.

First, this legislation offers a tax credit of 50 cents for every dollar that an employer provides to eligible employees, up to \$10,000 or six percent of the employee's home purchase price (whichever is less) or up to \$2,000 for rental assistance.

Second, to ensure that employees receive the full value of employers' contributions, the Act defines housing assistance as a nontaxable benefit, similar to health, dental and life insurance.

Finally, the Act establishes a competitive grant program available to nonprofit housing organizations that provide technical assistance, program administration, and outreach support to employers undertaking Employer Assisted Housing initiatives.

The last action on the Senate's version of the bill (S. 1330) was on June 29, 2005, when it was read twice and referred to the Committee on Finance. The last action on the House bill (H.R. 3194) was on Aug. 24, 2005, when it was referred to the Subcommittee on Housing and Community Opportunity.

Deed Restrictions and Community Land Trust Ground Leases *Continued from page 10*

the principle that a community has an interest in the way that its land base is used and in the way that its land is allocated to individual members of the community. The CLT directly expresses and acts upon this principle when it enters into a ground lease as steward of the community's land and guardian of the community's interests. Through the ground lease, the community's interests are affirmatively stated and are balanced with the stated interests of the individual. Deed restrictions are more likely to be perceived as negative. The community is not as visibly and affirmatively present in the deed-restricted deal. 🏠

David Abromowitz is a partner and member of the Executive Committee of Goulston & Storrs, a law firm with national real estate finance and development expertise. He has been working with long term affordability issues for community land trusts, neighborhood organizations such as the Dudley Street Neighborhood Initiative, and for-profit and non-profit developers for over 20 years.

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Kirby White is a founder of the Capital District Community Loan Fund and the Albany Community Land Trust and has written numerous manuals and publications to support Community Loan Funds and Community Land Trusts across the country. Kirby is a staff member of the Equity Trust, based in Greenfield, Massachusetts. www.equitytrust.org.