

HOW TO STOP STOP & SHOP’S ANTI-COMPETITIVE LAND ACQUISITION TACTIC*

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Introduction

When I first moved to New Haven from Atlanta, I was shocked—not by the weather, nor by the lack of Southern cuisine, but by the dearth of grocery stores. In Atlanta, I had the luxury of choosing between Publix, Kroger, Sprouts, Walmart, Target, Trader Joe’s, Whole Foods, and the Fresh Market. In New Haven, the only national supermarket chain with a store in town is Stop & Shop. Many of my peers with cars make a weekly trek to the Trader Joe’s ten miles away. But the New Haven Stop & Shop is only half a mile away from my apartment, so I prefer to walk there for my groceries.

It was probably during one of my many trips to Stop & Shop that I began to wonder why New Haven—a city much smaller than Atlanta, to be fair, but much bigger than the Atlantan suburb that I actually inhabited—had only one true, full-service grocery store. My inquiry led me to learn about a tactic that numerous grocery store chains, including Stop & Shop, employ in order to block out competition.¹ For decades, these chains have been purchasing vacant properties that are close in geographic proximity to their own stores and are well-suited to the sale of groceries. Instead of moving into these properties, however, the chains have either kept

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¹ See, e.g., Al Norman, *Wal-Mart Store Sits Empty Thanks to Wal-Mart*, SPRAWL-BUSTERS (Feb. 21, 2010), <https://sprawl-busters.com/wal-mart-store-sits-emptythanks-to-wal-mart>, [https://perma.cc/SBT6-EM6Q]; Steve Farrell, *Locked Out: Behind the Supermarket Restrictive Covenant Scandal*, THE GROCER (Mar. 9, 2020), <https://www.thegrocer.co.uk/property-and-planning/locked-out-behind-the-supermarket-restrictive-covenant-scandal/602585.article>, [https://perma.cc/A3AF-JHR5] (“It will come as no surprise to anyone who has observed the food retail market over the years, as restrictive covenants have been a known feature of supermarket strategies for decades.”); and Steve Holt, *How Leaving Stores Closed for Years Helps Grocery Chains and Hurts Communities* (Jan. 29, 2018), <https://theworld.org/stories/2018-01-29/how-leaving-stores-closed-years-helps-grocery-chains-and-hurts-communities>, [https://perma.cc/RR6J-XSSV].

them empty or sold them with deed restrictions that prohibit the sale of produce, dairy, meat, and other groceries.

The negative ramifications of these restrictive covenants are clear. Such covenants can contribute to the continuation or emergence of food deserts, which remain a persistent problem for Americans, particularly low-income and non-white communities.² Lots restricted by these covenants often stay empty, sometimes for decades, which can reduce foot-traffic to adjacent stores.³ Perhaps most frustratingly, these restrictive covenants lack any pro-competitive justification. They specifically forbid competitors from leasing the restricted land, either by generally forbidding the use of the land by “a food supermarket, a food superstore, a food warehouse store, a specialty food store”⁴ or by forbidding a specific competitor from using the land.⁵ The language of these covenants implies that they are solely and wholly intended to hinder competition.

Due to their deleterious effects upon consumers, other businesses, and competition itself, restrictive covenants on grocery stores should be banned, either through FTC rulemaking or by local ordinances. In Part III of this essay, I will discuss potential solutions in greater depth.

For the sake of this essay, I will focus only on the grocery chain Stop & Shop’s use of restrictive covenants, which exemplifies the use of the tactic in general. Stop & Shop’s use of

² See Bruce Ziff & Ken Jiang, *Scorched Earth: The Use of Restrictive Covenants to Stifle Competition*, 30 WINDSOR YEARBOOK ON ACCESS TO JUSTICE 79, 81 (2012).

³ See, e.g., Joe Wojitas, *Stonington Seeks Legal Help in Stop & Shop Lease Issue*, THE DAY (Aug. 10, 2010), <https://www.theday.com/article/20100810/NWS01/30810989>, [<https://perma.cc/NE2N-32V6>] (“Bob Piccolo and his father before him have run O’Keefe’s Package Store in the shopping center for the past 44 years. He said he hopes Blumenthal can do something about the problem as his business has dropped 35 percent since the Stop & Shop closed. O’Keefe’s is next to the vacant Stop & Shop space.”).

⁴ See Robert Kuttner, *Rollups: All Monopolies Are Local*, THE AMERICAN PROSPECT (Jan. 14, 2022), <https://prospect.org/power/rollups-all-monopolies-are-local>, [<https://perma.cc/F5YK-53Q5>].

⁵ Mary C. Serreze, *Suspected Greenfield ‘Walmart Site’ Actually Held Defensively by Stop & Shop For a Decade*, MASSLIVE (Jan. 30, 2019), https://www.masslive.com/news/2018/01/secret_stop_shop_land_lease_re.html, [<https://perma.cc/V45Z-VHWT>].

this strategy has been primarily documented by local journalists,⁶ but it has also been analyzed in a research paper⁷ and in a recent *American Prospect* article.⁸ I will begin my own analysis by discussing the history of grocery store restrictive covenants and the scholarly discourse generated by these covenants. I will then focus primarily on one particular instance when Stop & Shop employed this tactic. In this section, I will also discuss the possible justifications for the approach and its harmful effects. Finally, I will discuss a solution that should be used to stop Stop & Shop from continuing to use these restrictive covenants.

Part I: A Brief History of Grocery Store Restrictive Covenants

Stop & Shop is far from the first grocery store chain that has employed restrictive covenants. For decades, grocery stores have been employing these deed restrictions, and courts have generally deemed them legally permissible. A 1959 article surveyed restrictive covenants in shopping center leases and found that, although courts generally construed such covenants strictly against lessors, they seldom held such covenants as unreasonable restraints of trade.⁹ In his conclusion, the author indicated that, although all leases are tailored to meet slightly different needs, courts' approach to these covenants was essentially correct.¹⁰

⁶ See, e.g., Madeleine List, *Stop & Shop's Land Grab on Cape Cod*, CAPE COD TIMES (Sept. 6, 2015); Wojitas, *supra* note 3; Bree Shirvell, *Town Has Few Options for Vacant Stop & Shop Building*, PATCH (Jan. 18, 2012), <https://patch.com/onnnecticut/stonington/town-has-few-options-for-vacant-stop-shop-building>, [<https://perma.cc/SR2R-DZQ4>]; Aviva Luttrell, *French King Big Box Site in Stop & Shop's Hands*, GREENFIELD RECORDER, (Jan. 22, 2018), <https://www.recorder.com/Stop-and-Shop-master-lease-Ceruzzi-big-box-property-Greenfield-15000577>, [<https://perma.cc/HGZ5-8ZYM>]; and Serreze, *supra* note 5.

⁷ See Ronald Coterill, *An Antitrust Economic Analysis of Stop & Shop's Proposed Acquisition of the Big V Shop Rite Supermarket Chain*, Food Mktg. Pol'y Ctr. 63 (2002).

⁸ See Kuttner, *supra* note 4.

⁹ Peter J. Sturtevant, *Restrictive Covenants in Shopping Center Leases*, 34 N.Y.U. L. REV. 940, 940 (1959).

¹⁰ *Id.* at 951 (“The lessor's covenant not to lease other property for a competing business use is not, under ordinary circumstances, an unreasonable restraint of trade, and may be enforced by the lessee or his assigns not only against the lessor but also against subsequent purchasers and tenants of the lessor's restricted land who have notice, actual or constructive, of the restriction.”).

An article published in 1951 made a similar argument.¹¹ The article primarily analyzed *Oliver v. Hewitt*, a case decided by the Virginia Supreme Court in 1950.¹² In *Oliver*, a grocery store operator (Plaintiff), sold two plots of land nearby to his store and applied restrictive covenants to the land. The purchaser of the plaintiff's land sold this land to the defendant. Although the purchaser's contract with the defendant did not mention the restrictive covenant, the defendant was aware of the covenant's existence. The defendant leased one lot to a lessee, and the lessee, unaware of the covenant, opened a grocery store on the land. Subsequently, the plaintiff sued the defendant. The Virginia Supreme Court ruled that the covenant was permissible and that, because the defendant was aware of its existence, it still applied to the land. The article's author agreed with the court's holding.

In 1965, David C. Baum proffered a more nuanced but ultimately similar argument.¹³ Baum agreed with the observations of Sturtevant and Martin that courts had long permitted stores and shopping centers to employ restrictive covenants. Unlike Sturtevant and Martin, however, Baum expressed trepidation that such covenants would negatively impact smaller competitors and the public as a whole. Nevertheless, he concluded that, without adequate information about these impacts, he could not wholeheartedly claim that shopping center deed restrictions should be illegal.

In recent years, courts have generally continued to permit the use of deed restrictions by grocery chains.¹⁴ However, scholars have become more openly critical of the practice.¹⁵ In 2002,

¹¹ Thomas G. Martin, *Enforcement of Personal Covenants against Subsequent Grantees*, 1 WM. & MARY REV. VA. L. 92 (1951).

¹² *Oliver v. Hewitt*, 191 Va. 163 (1950).

¹³ David C. Baum, *Lessors' Covenants Restricting Competition*, 1965 U. ILL. L.F. 228 (1965).

¹⁴ See, e.g., *Davidson Bros. v. D. Katz & Sons*, 121 N.J. 196 (1990); and *Winn Dixie Stores Inc. v. Dolgencorp Inc.*, 964 So.2d 261 (2007).

¹⁵ See, e.g., Nairne Cameron et al, *Cornering the Market: Restriction of Retail Supermarket Locations*, 28 Environment and Planning C: Politics and Space 905 (2010), Bruce Ziff & Ken Jiang, *Scorched Earth: The Use of*

Ronald Cotterill wrote specifically about the anticompetitive tactics employed by Stop & Shop. One of the tactics that Cotterill described was Stop & Shop's land acquisition tactic.¹⁶ In this essay, I seek to demonstrate that Stop & Shop's land acquisition tactic is even more widespread and pernicious than Cotterill suggested. For, in the intervening years between the publication of Cotterill's paper and the presentation of this one, there have emerged many more occurrences of Stop & Shop's land acquisition scheme.¹⁷

Part II: Stop & Shop's Tactic in Action

In 2009, Stop & Shop employed its land acquisition tactic in Stonington, Connecticut.¹⁸ In many ways, this particular instance was similar to other instances of the land acquisition tactic. In other ways, however, it was not: it appears to have been the only such instance that effected a formal state investigation. In April 2009, Stop & Shop vacated its location in Pawcatuck Shopping Center in favor of a new location on Route 49.¹⁹ Instead of selling its former location or leasing it to a competitor, Stop & Shop kept the store vacant, and, in the subsequent months, other businesses in the shopping center bore the consequences of the company's decision.²⁰ Bill Knotts, the owner of Christo's Pizza in the Pawcatuck Shopping Center, claimed that, as of August 10, 2010, his business was down ten percent since Stop &

Restrictive Covenants to Stifle Competition, 30 WINDSOR Y.B. ACCESS JUST. 79 (2012); and Sugandhi del Canto & Rachel Engler-Stringer, *Prohibitive Property Practices: The Impact of Restrictive Covenants on the Built Food Environment*, in A HANDBOOK OF FOOD CRIME: IMMORAL AND ILLEGAL PRACTICES IN THE FOOD INDUSTRY AND WHAT TO DO ABOUT THEM (Allison Gray & Ronald Hinch eds., 2019).

¹⁶ Ronald Cotterill, *An Antitrust Economic Analysis of Stop & Shop's Proposed Acquisition of the Big V Shop Rite Supermarket Chain 10* (Food Marketing Policy Center, Research Report No. 63, 2002) ("A recent and egregious example of this strategy is Ahold's anti-competitive land-banking strategy, where Ahold or Starwood Ceruzzi acquire shopping centers near existing Ahold markets and with sites suitable for supermarkets, but refuse to lease the site to a competitor of an Ahold chain.").

¹⁷ See sources cited *supra* note 6.

¹⁸ See Wojitas, *supra* note 3.

¹⁹ *Id.*

²⁰ *Id.*

Shop closed.²¹ Bob Piccolo, the owner of O'Keefe's Package Store, which occupied the storefront right next to the vacant Stop & Shop, reported that his business had dropped thirty-five percent since the Stop & Shop closed.²² In response, Stonington First Selectman Ed Haberek sent a letter to then-Attorney General of Connecticut Richard Blumenthal, and he asked for Blumenthal's assistance.²³

In his letter, Haberek described Stop & Shop's land acquisition tactic and explained how the tactic had negatively impacted the residents of Stonington.²⁴ "It has provided a negative effect on the entire shopping center and impacted the profitability of other tenants," he wrote.²⁵ "It also has impacted the neighboring community who routinely shopped there."²⁶ Citing Cotterill's Food Marketing Policy Center report, Haberek further claimed that Stop & Shop's behavior in Stonington was not an isolated incident.²⁷

On August 31, 2010, Blumenthal responded:

The standard for antitrust violations in this type of situation is very difficult and demanding. The primary tenets of our antitrust law are found in the Sherman Act and in the Connecticut Antitrust Act. Section 2 of the federal Sherman Act, and its Connecticut counterpart, forbid monopolization or attempted monopolization. For an entity to have "monopoly power," it must have the ability to raise prices or exclude competition in a relevant geographic market. In your town's situation, the relevant geographic market would likely be defined by a court as an area broader than the town of Stonington and may well extend as far as an area encompassing sections of Groton, Ledyard, New London and Westerly, Rhode Island. Within that geographic area Stop & Shop faces existing competition from the Big Y, C Town, Shaw's stores, and other grocery stores. Stop & Shop would not appear to have sufficient monopoly in grocery sales in this geographic market.²⁸

²¹ *Id.*

²² *Id.*

²³ *Id.*

²⁴ Letter from Edward Haberek, Jr., First Selectman of Stonington, Conn., to Richard Blumenthal, Att'y Gen. of Conn. (undated) (on file with the Office of the Conn. Att'y Gen.).

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.*

²⁸ Letter from Richard Blumenthal, Att'y Gen. of Conn., to Edward Haberek, Jr., First Selectman of Stonington, Conn. (Aug. 31, 2010) (on file with the Office of the Conn. Att'y Gen.).

At the very end of his letter, Blumenthal directly addressed Stop & Shop’s land banking strategy, writing, “Practically and conceptually I agree that it would be easier for a new supermarket to open on property that has previously been a supermarket, but the law does not require Stop & Shop to sublease the premises to a direct competitor.”²⁹

From a positive standpoint, Blumenthal was right. It is true that the law does not require and historically has not required a company like Stop & Shop to sublease its premises to a direct competitor. Because Stop & Shop’s land acquisition practice is not *per se* illegal, the rule of reason would require plaintiffs to establish that Stop & Shop has the ability to raise prices or exclude competition in a relevant geographic market. In order to do so, plaintiffs would have to demonstrate that Stop & Shop’s tactic has an anticompetitive effect, typically in the form of a price increase, output reduction, or market power. As Blumenthal explains, this is a difficult, demanding standard for plaintiffs.

Plaintiffs typically bear the burden of demonstrating an anticompetitive effect, but, in this particular case, it does not seem necessary that they do so. The anticompetitive effect of Stop & Shop’s tactic is inherent in the language of its deed restrictions. These restrictions specifically forbid competitors from leasing Stop & Shop’s land. Most often, the language of these restrictions is fairly general, forbidding use of the land by “a food supermarket, a food superstore, a food warehouse store, a specialty food store.”³⁰ However, on at least one occasion, Stop & Shop has used a deed restriction to prevent a specific competitor, Walmart, from selling groceries on land owned by Stop & Shop.³¹ It is self-evident from these restrictions that Stop &

²⁹ *Id.*

³⁰ *See* Kuttner, *supra* note 4.

³¹ *See* Serreze, *supra* note 5.

Shop’s tactic is solely and wholly intended to hinder competition. The actual anticompetitive effect of these restrictions is evinced by Stop & Shop’s continual use of them. If the restrictions failed at deterring competition, Stop & Shop would not go to the costly lengths of employing them.

There is evidence that Stop & Shop’s tactic is incredibly costly—both to the company itself and to the people who live nearby the land that Stop & Shop controls. Stop & Shop has generally succeeded at keeping its lease agreements out of the public eye, but a 2013 lawsuit revealed documentation of a 2006 agreement that Stop & Shop made with Greenfield Property Development to control a piece of land in Greenfield, Massachusetts.³² According to this agreement, Stop & Shop said that it would pay Greenfield Property Development \$42,500 per month for the land.³³ Because Stop & Shop has maintained control of this land for over a decade, it must have spent millions of dollars on this plot of land alone. It is telling that Stop & Shop was willing to invest millions of dollars to prevent Walmart from moving into the land. The company would not have done so if it had not valued the suppression of Walmart as worth more than the money that they had paid.

Part III: Solutions

As Robert Kuttner writes, it seems likely that neither the FTC, Justice Department, nor a state attorney general’s office would consider Stop & Shop’s land acquisition tactic significant enough to justify the use of scarce staff resources.³⁴ Even without the aid of these agencies and offices, however, there are alternative solutions that disgruntled citizens can pursue to prevent

³² *Id.*

³³ *Id.*

³⁴ *See* Kuttner, *supra* note 4.

Stop & Shop from using its harmful strategy. For example, their cities can enact ordinances that forbid the use of restrictive covenants by grocery stores. Several cities, including Washington, D.C., Bellingham, Washington, and Chicago, Illinois, have already done this.³⁵ D.C.'s prohibition on grocery store restrictions is especially thoughtful and fair to both citizens and grocery chains. The ordinance makes it

unlawful for the owner or operator of a grocery store or a food retail store to agree to the inclusion of a restrictive land covenant or other use restriction in a contract for the sale, lease, or other transfer of real property that prohibits the use of the real property as a grocery store or a food retail store or that prohibits the use of any property within one mile as a grocery store or a food retail store.³⁶

However, it also includes a provision that the

prohibition imposed by this section shall not apply to an owner or operator of a grocery store or food retail store that terminates operations at a site for purposes of relocating the grocery store or food retail store to a comparable or larger site located in the District of Columbia within one-half mile of the site where the prior operations were terminated; provided, that relocation and commencement of the operation of the new grocery store or food retail store at the new site occurs within 2 years of the sale, transfer, or lease of the prior site, and that the restrictive covenant or other use restriction agreed upon with respect to the prior site does not have a term in excess of 3 years.³⁷

This provision ensures that, if a grocery store moves to a new location, it will have ample time to establish itself in its new location without the fear that a competitor will move into its old location and drive it out of business. Taken as a whole, the ordinance would prevent Stop & Shop from behaving as it did in Greenfield, Massachusetts, where it held a deed-restricted piece of land for over a decade, but it would provide them the opportunity to change locations without the threat of competition for a limited amount of time.

³⁵ See Wash., D.C., Code § 2-1212.61 (2018); Bellingham, Wash., Code § 20-10-027 (2021); and Chi., Ill. Code § 17-1-1004 (2005).

³⁶ Wash., D.C., Code § 2-1212.61.

³⁷ *Id.*

Although local ordinances provide a satisfyingly simple solution to grocery store deed restrictions, they are vulnerable to several criticisms. First, they take longer to enact than many citizens would prefer. The D.C. grocery store ordinance was first proposed in 2014, and it was not made into law until 2018. Disgruntled citizens might become frustrated that change cannot come sooner, but four years is a much shorter length of time than the decades that federal antitrust cases can take. Further, many cities, including Stonington and Greenfield, have endured Stop & Shop’s deed restrictions for decades; in contrast with a decade, four years seems relatively bearable.

Second, one could argue that, if grocery store restrictive covenants are clearly anticompetitive, they should be *per se* illegal and that it would thus be inefficient for cities to pass individual ordinances in order to ban such covenants. This criticism seems to be in accordance with scholars’ suggestions that rulemaking supplement antitrust adjudication.³⁸ With Lina Khan as Chairperson of the Federal Trade Commission (FTC), these suggestions now seem more viable than ever. Even so, it would likely take much longer for, say, the FTC to pass a rule forbidding grocery store restrictive covenants than for a city to pass an ordinance doing so. Time is not the only factor that weighs against the favor of federal antitrust enforcements. Local ordinances allow cities to tailor their laws to their particular needs. Some cities might want to provide exceptions for certain uses of grocery store restrictive covenants, and other cities might want to provide no exceptions at all. A federal rule forbidding grocery store restrictive covenants would force all cities to conform to one particular rule, even when that rule does not best accommodate the needs of all cities.

³⁸ See, e.g., Rohit Chopra and Lina M. Khan, *The Case for “Unfair Methods of Competition” Rulemaking*, 87 U. CHI. L. REV. 357 (2020); and Tim Wu, *Antitrust via Rulemaking: Competition Catalysts*, 16 COLO. TECH. L. J. 33 (2017).

A third and somewhat more troubling flaw of local ordinances is that they tend to not take a retroactive effect. The ordinances in D.C., Bellingham, and Chicago are all careful to specify that they only forbid grocery store restrictive covenants that take effect after the enactment of the ordinance. These ordinances reflect legislators' reluctance to enact *ex post facto* laws. It is important to note, however, that takings can be justified by legitimate governmental interests. In this case, it seems valuable for the government to increase the general public's welfare by nullifying any existing grocery store restrictive covenants and providing just compensation to affected grocery chains.

In light of the deficiencies of local ordinances, some might argue that an FTC rule would, despite its own flaws, be a better solution than local ordinances. It is true that the issue of grocery store restrictive covenants converges well with the FTC's current goals. In fact, FTC Commissioner Kelly Slaughter has made it very clear that one of the goals of antitrust enforcement should be what she calls "antiracism"—the protection of Black people and Black communities.³⁹ Food deserts, to which grocery store restrictive covenants contribute, disproportionately affect Black communities.⁴⁰ An FTC rule prohibiting grocery store restrictive covenants would serve the goals of progressives like Slaughter, and, because grocery store restrictive covenants are so clearly anticompetitive, such a rule would likely be palatable to moderates and conservatives. However, before the FTC does so, it should learn from the mistakes of the U.K.'s 2010 Groceries Market Investigation (Controlled) Lands Order, an order that prohibited grocery stores' use of restrictive covenants.

³⁹ See, e.g., Kelly Slaughter (@RKSLaughterFTC), Twitter (Sept. 9, 2020, 1:28 PM), <https://twitter.com/rkslaughterftc/status/1303762113001926656>, [<https://perma.cc/26LK-SBN3>].

⁴⁰ See, e.g., James D. Wright, Amy M. Donley, Marie C. Gaultieri & Sara M. Strickhouser, *Food Deserts: What is the Problem? What is the Solution?* (2016).

Conclusion

None of my research has dissuaded me from frequenting Stop & Shop. It remains the most convenient, affordable grocery option for me and for many other residents of New Haven. My research has, however, made me cognizant of the consequences that residents can face if Stop & Shop employs its land acquisition tactic in New Haven. If Stop & Shop relocates to a new storefront several miles away from its current New Haven location, it might choose to place a deed restriction on the land that it currently occupies. Such a covenant can last for decades. New Haven residents suffered greatly during the one year before Stop & Shop moved into its current location.⁴¹ Had the lot been vacant for ninety-nine years, as a deed restriction might stipulate, residents' suffering would have been far more immense.

For these reasons, I would urge the City of New Haven to consider enacting an ordinance that forbids grocery stores from using restrictive covenants to block their competitors from moving to certain lots of land. I also urge other cities to enact similar ordinances. And if these local solutions prove to be ineffective, the FTC should exercise its rulemaking authority to ban these covenants outright. Stop & Shop is merely one of many grocery chains that utilizes restrictive covenants to block out competitors. Without proper regulation, it will be the most vulnerable Americans—low-income individuals, people of color, and small-business owners—who will have to pay the price.

⁴¹ See, e.g., Janice Podsada, *Stop & Shop Opens in Former Shaw's in New Haven*, HARTFORD COURANT (Apr. 15, 2011), <https://www.courant.com/business/hc-xpm-2011-04-15-hc-new-haven-stop-and-shop-opens-20110414-story.html>, [<https://perma.cc/7XAA-BA9J>].