

ORDINANCE NO. 2019-12-041

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3
4 **AN ORDINANCE OF THE CITY OF BELLINGHAM, WASHINGTON RELATING TO**
5 **RESTRICTIVE COVENANTS THAT LIMIT OR PROHIBIT THE USE OF PROPERTY FOR**
6 **GROCERY STORES, PROVIDING FOR EXCEPTIONS, AND ADDING A NEW SECTION**
7 **20.10.027 TO THE BELLINGHAM MUNICIPAL CODE.**
8

9 **WHEREAS**, the City Council finds that restrictive covenants that preclude the use of property
10 for grocery store operations and sales, after a grocery store owner has vacated a parcel, have
11 negative impacts on the public health and welfare; and
12

13 **WHEREAS**, the City Council finds that residents of the City of Bellingham need access to
14 healthful food for home consumption, yet certain private restrictions on the use of property for
15 grocery stores inhibit such access; and
16

17 **WHEREAS**, the City Council finds that limitations on restrictive covenants related to grocery
18 stores are needed to promote public health, reduce restraints on trade, and limit the
19 inequitable, negative health impacts on all residents of Bellingham, and especially on certain
20 socio-economic groups; and
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22 **WHEREAS**, the City Council finds that limitations on restrictive covenants are necessary to
23 preserve the opportunity to use vacated, unused, underutilized, and other property as grocery
24 stores to foster and maintain economic and neighborhood vitality; and
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26 **WHEREAS**, the City Council finds that certain restrictive covenants and other use restrictions
27 related to grocery stores frustrate the goals, policies and land use plans of the City as a
28 municipality; have a serious blighting effect on the community's health, safety, and general
29 welfare; and should be limited; and
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31 **WHEREAS**, the City Council finds that private limitations on the use of property as grocery
32 stores lead to greater travel distances for accessing food resulting in a greater community
33 carbon footprint, which is contrary to the City's climate action policies and plans; and
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35 **WHEREAS**, the Whatcom County Health Board has as one of its policies the promotion of
36 healthful planning processes, including access to healthful food; and
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38 **WHEREAS**, the responsible official reviewed the proposed amendments under the procedures
39 of the State Environmental Policy Act, and a non-project Determination of Non-Significance
40 was issued on September 20, 2019; and
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42 **WHEREAS**, as required by RCW 36.70A.106, notice of the City's intent to adopt the proposed
43 amendments was sent to the Department of Commerce on September 13, 2019; and
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45 **WHEREAS**, after mailed and published notice as required by BMC 21.10.150, the Bellingham
46 Planning Commission held a public hearing on the proposed amendments on October 17,
47 2019; and
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49 **WHEREAS**, the Planning Commission determined that the proposed amendments comply with
50 and will implement the goals and policies of the 2016 Bellingham Comprehensive Plan; and
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52 **WHEREAS**, the Planning Commission considered the staff report and thereafter made
53 Findings of Fact, Conclusions and Recommendations to recommend approval of the proposed
54 amendments by a 4-2 vote on October 17, 2019; and
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56 **WHEREAS**, after mailed and published notice as required by BMC 21.10.150, the Bellingham
57 City Council held a public hearing on the proposed amendments on December 9, 2019; and
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59 **WHEREAS**, the City Council has considered the recommendation of the Planning
60 Commission, the staff report, the minor revisions made to this ordinance subsequent to
61 Planning Commission review and approval, and the public comment and hereby adopts the
62 Findings of Fact, Conclusions and Recommendations of the Planning Commission; and
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64 **WHEREAS**, the City Council finds that the proposed amendments to the municipal code are
65 consistent with the Growth Management Act, the Bellingham Municipal Code, and the 2016
66 Bellingham Comprehensive Plan.
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68 **NOW, THEREFORE, THE CITY OF BELLINGHAM DOES ORDAIN:**
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70
71 **Section 1.** A new section is hereby enacted and added to the Bellingham Municipal Code,
72 Section 20.10.027, as follows:
73

74 **BMC 20.10.027 Restrictive covenants related to grocery stores.**
75

76 A. Purpose.
77

78 The purpose of this legislation is to promote public health and welfare by limiting the
79 use of restrictive covenants that preclude the use of real property as a grocery store.
80 Except in particular circumstances, restrictive covenants that limit or preclude the use
81 of property as a grocery store are contrary to public policy, requiring regulation by the
82 City of Bellingham under its police powers.
83

84 B. Definitions.
85

86 For purposes of this section, the following definitions apply:
87

- 88 1. "Closure" of a store means the point at which a grocery store ceases the retail
89 sale of groceries.
90
- 91 2. "Grocery store" means any retail establishment or portion thereof that sells a
92 wide range of groceries intended primarily for home preparation and
93 consumption, including fresh, packaged, canned, dry, prepared or frozen food or
94 beverage products, and similar items. Grocery stores exclude drug stores,
95 convenience stores, liquor stores, gasoline stations, or other retail establishments
96 selling food products which are almost exclusively processed or prepared.
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- 98 3. "Impose" means to execute, sign, record, or seek to enforce a legal instrument
99 related to real property.

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4. "Owner" includes any owner, past or present, of real property, and any agents of such owners, and incorporates the definition of "owner" set forth in BMC 1.04.010.
5. "Restrictive covenant" includes restrictive land covenants, use restrictions, negative easements and other similar legal clauses or provisions contained in deeds, recorded documents, contracts, agreements, leases, and other legal instruments that are executed by a private party and seek to limit the use of property for a particular purpose or seek to impose a cost on the use of property for a particular purpose.
6. "Retail center" means a multi-tenanted or multi-owner retail development with at least one shared common area and which is subject to common management or common control through one or more restrictive covenants or easements.

C. Prohibition against restrictive covenants.

Except as set forth in subsections (1) and (2), it shall be unlawful for any owner to impose a restrictive covenant on real property that prohibits or restricts the use of said property as a grocery store beyond the time period during which the owner has an ownership interest in the property.

1. The prohibition in this section shall not apply to an owner or operator of a grocery store that discontinues operations at a site for the purpose of relocating the grocery store if the following conditions are met:
 - a. The relocated store is similar in size or larger and similar in the scope of products sold when compared to the discontinued site;
 - b. The relocated store is located within one-half mile of the discontinued site;
 - c. Relocation and commencement of operations of the relocated store at the new site occurs within two years following closure; and
 - d. The restrictive covenant imposed on the prior site does not have a term in excess of three years from the date of closure.
2. The prohibition in this section shall not apply to a restrictive covenant that is used to limit competition or conflicting uses within the confines of a retail center; provided, however, that it shall be unlawful for any owner or operator who discontinues grocery store sales at a site for a period exceeding one year to seek to enforce a restrictive covenant regarding grocery sales within said retail center.
3. The Director is authorized to adopt rules for the purpose of interpreting and applying the exceptions set forth in BMC 20.10.027(C)(1) and (2), consistent with BMC 20.24.010 for interpretations generally, provided that such rules shall be consistent with the purpose of this section.

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4. The Director shall have discretion to extend the distance limit in BMC 20.10.027(C)(1)(b) to no more than one mile; the time requirement in BMC 20.10.027(C)(1)(c); the term limit in BMC 20.10.027(C)(1)(d); and the time period in BMC 20.10.027(C)(2) upon written request of an owner or operator and such requesting party's presentation of evidence establishing extenuating circumstances that demonstrate good cause for the extension. Factors to be considered in evaluating good cause shall be: 1) maintaining or increasing food access in the surrounding area, including the area around the discontinued site; 2) needs related to financing and construction for the new location; and 3) promoting private investment in the surrounding area. The director shall issue a written determination on the request.

D. Application.

The provisions of this section do not apply to a restrictive covenant that becomes effective prior to the effective date of this section. The provisions of this section apply to restrictive covenants notwithstanding the provisions set forth in BMC 20.04.040(D) regarding agreements between private parties.

E. Director Determinations, Notice of Violation, and Appeal.

Before the City initiates any of the enforcement actions set forth in BMC 20.10.027(F), the Director shall make a determination that a violation has occurred and give the owner a written notice by personal service or by certified mail, return receipt requested, stating the existence of a violation, that enforcement action is contemplated, and that such person shall have a specified period of time in which to correct the violation.

Director determinations under the provisions of this section are Type I decisions under BMC 21.10.100 and appealable under BMC 21.10.250.

F. Enforcement.

1. Any restrictive covenant imposed in violation of this section is null and void and of no lawful force and effect.
2. To the extent allowed by law, enforcement of this section may be through a cause of action in a court of competent jurisdiction may include declaratory relief, injunctive relief, or other appropriate legal or equitable remedy as appropriate to carry out the purpose and intent of this section.
3. Any owner who imposes a restrictive covenant on real property that is prohibited by this section shall be subject to denial, suspension, or revocation of a business registration under Chapter 6.05 of the Bellingham Municipal Code.
4. In addition to any other remedy provided by this section or allowed by law, any owner who imposes a restrictive covenant that is prohibited by this section shall have committed a civil infraction and shall be punished by a fine not to exceed

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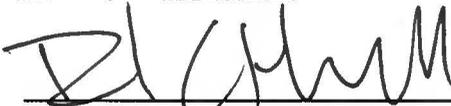
\$1,000. Each day that such restrictive covenant is of record or otherwise effective shall constitute a separate and distinct civil infraction.

G. Severability.

If any section, sentence, clause, or phrase (i.e., provision) of this section or its application to any person or circumstance is held invalid or unconstitutional by a court of competent jurisdiction, such invalidity or unconstitutionality shall not affect the validity or constitutionality of any other provision and the remainder of this section, or the application of such provisions to other persons or circumstances, shall not be affected.

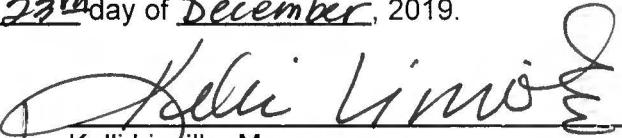
Section 2. The City Council agrees with and adopts the Findings of Fact, Conclusions and Recommendations of the Planning Commission attached as **Exhibit A** and incorporated by reference.

PASSED by the Council this 16th day of December, 2019.



Daniel Hammill, Council President

APPROVED by me this 22nd day of December, 2019.



Kelli Linville, Mayor

ATTEST: 

Andy Asbjornsen, Finance Director

APPROVED AS TO FORM:


Office of the City Attorney

Published: December 20, 2019

50 Companies ("ABS") operates a grocery supermarket within a 5-mile radius of the former
51 Albertsons site. The maximum duration of the use restriction is 20 years.

52
53 *Restrictive Covenant Types:*

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55 A real property restrictive covenant is an agreement or promise by the party acquiring land from
56 using the property in a certain manner. If the covenant meets certain requirements, the restriction
57 may apply to subsequent owners of the restricted land. These covenants may be used by property
58 owners to restrict certain business uses, and thereby restrict competition, even after the property
59 is sold. This type of covenant is one that "runs with the land" and is sometimes used by
60 supermarkets to limit competition.

61
62 A more common type of use restriction is one that is negotiated into a lease agreement, including
63 a retail center lease. A noncompetition covenant in this type of lease is used by supermarkets to
64 protect against competition within a retail center. However, this type of restriction usually
65 terminates when the term of the lease expires.

66
67 Both types of restrictive covenants - those that "run with the land" and those contained in lease
68 agreements - are generally upheld in Washington courts. With respect to restrictive covenants
69 and other non-compete agreements, Washington courts upheld them so long as they do not
70 unreasonably restrain trade. The courts tend to consider limitations as to place and duration when
71 considering whether a restriction is reasonable.

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73 *Timeline:*

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75 In response to the challenges facing the community precipitated by the Albertsons grocery store
76 closure, City Council initiated a series of discussions concerning food access issues and the City
77 of Bellingham's food policies. The following City Council meetings lead to the development of a
78 proposed ordinance limiting restrictive covenants related to grocery stores:

79
80 November 19, 2018: The Planning and Community Development Committee engaged in a
81 comprehensive discussion of food deserts, food systems, and restrictive covenants, including the
82 effect of such land restrictions on the redevelopment of certain properties. The discussion
83 included a motion to work toward food security and accessibility standards for Bellingham in the
84 first quarter of 2019.

85
86 February 25, 2019: As a follow-up to the previous discussion, the Planning and Community
87 Development Committee reviewed potential new policies related to food access and certain
88 legislative approaches to limit restrictive covenants with commentary regarding the practical
89 effects of such legislation. The committee carried a motion to develop an outline of a potential
90 ordinance including these three points: 1) narrow in scope to food and food access; 2) outlining
91 the negative impacts in the community and the needs for such an ordinance and 3) focuses on
92 injunctive relief.

93
94 March 25, 2019: City Attorney Peter Ruffatto presented the Planning and Community
95 Development Committee with an outline of several provisions that may be incorporated into an
96 ordinance.

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98 May 20, 2019: A subsequent discussion took place regarding the potential ordinance and a motion
99 was carried to review a draft version of the ordinance before it proceed with a Type VI process.

100

101 July 15, 2019: City Attorney Peter Ruffatto presented a draft detailed ordinance for restrictive
102 covenants related to grocery stores for discussion purposes.

103
104 **IV. ISSUE:**

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106 *Restrictive Covenant Impacts:*

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108 Following Albertsons' grocery store closure in the Birchwood neighborhood, subsequent City
109 Council discussions and staff research brought to light some of the key issues surrounding
110 restrictive covenants.

111
112 On the one hand, certain types of restrictive covenants are used as an inducement for grocery
113 stores to locate to a retail center. Exclusive clauses often serve as part of the foundation for the
114 symbiotic relationship between grocery stores, especially large grocery stores and retail centers.
115 (Halper, Emanuel B. (2001) "Supermarket Use and Exclusive Clauses," Hofstra Law Review: Vol.
116 30: Issue 2, Article 2, available at: <http://scholarlycommons.law.hofstra.edu/hlr/vol30/iss2/2>.)
117 Restrictive covenants are used to create a delicate balance among retail operators, and the
118 ongoing success of a retail center may depend on appropriate exclusive use provisions. (Marc
119 E. Rosendorf and Jill Reynolds Seidman, Restrictive Covenants – the life Cycle of a Shopping
120 Center, *Probate & Property Magazine, American Bar Association (2009).*)

121
122 At the same time, certain restrictive covenants that preclude the use of real property for grocery
123 store operations or sales after a grocery store owner has vacated a parcel are detrimental to
124 public health, safety, and general welfare. As evidenced by the case of Albertsons, this kind of
125 private restriction on the use of property inhibited Bellingham residents' access to healthy foods
126 and included the following negative impacts:

- 127
- 128 • Greater travel distances and a greater community carbon footprint for accessing fresh,
129 healthy, and affordable food options;
 - 130 • Inequitable, negative health impacts, especially on certain socio-economic groups;
 - 131 • Restraints on trade; and
 - 132 • Inhibited economic and neighborhood vitality associated with the vacant property.
- 133

134 Overall, certain restrictive covenants and other use restrictions related to grocery stores frustrate
135 the goals, policies, and land use plans of the City as a municipality, have a serious blighting effect
136 on the community's health, safety, and general welfare, and should be deemed commercially
137 unreasonable. At the same time, overly broad regulation in this area runs the risk of harming the
138 retail environment. Therefore, the proposed ordinance should allow a restrictive covenant that is
139 used to limit competition within the confines of a retail center which is subject to common
140 management and control. This type of use restriction has been recognized by other jurisdictions
141 as useful to support the success of grocery stores within a retail center. Additionally, the proposed
142 ordinance should also make exceptions for store relocations and renovations if certain conditions
143 are met.

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145 *Legislative Approaches:*

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147 Although there is little precedent, several other jurisdictions across the country have enacted
148 ordinances to address similar concerns over grocery store restrictive covenants. Madison,
149 Wisconsin, Chicago, Illinois, and Washington, D.C have all adopted ordinances to prohibit
150 restrictive land covenants or other use restrictions that limit the use of real property for grocery

151 stores after an owner or operator has terminated operations or sales. These ordinances are
152 summarized as follows:

153
154 Madison, Wisconsin:

- 155 • Declares certain negative use restrictions on grocery and drug stores as against public
156 policy, void, and unenforceable;
- 157 • Distinguishes negative use restrictions from non-compete clauses;
- 158 • Applies to a deed restriction, restrictive covenant, lease or memorandum of lease, or any
159 other recorded instrument;
- 160 • Applies to agreements created prior to the ordinance, but limits monetary civil penalties to
161 prospective violations; and
- 162 • References specific Wisconsin statutes for enforcement, including injunctive relief.

163
164 Chicago, Illinois:

- 165 • Declares certain negative use restrictions on grocery and drug stores as against public
166 policy, void, and unenforceable;
- 167 • Applies to a deed restriction, restrictive covenant, lease or memorandum of lease, or any
168 other recorded instrument;
- 169 • Exception is provided when a store operator relocates within one-half mile, commences
170 operations after two years, and the restriction term is limited to three years (Zoning
171 Administrator has some discretion to extend distance and duration);
- 172 • Applied from the date the ordinance was first introduced to City Council; and
- 173 • Enforcement includes monetary penalties and injunctive relief.

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175 Washington, D.C.:

- 176 • Declares certain restrictive covenants on grocery or food retail stores as unlawful, void,
177 and unenforceable; and
- 178 • Exception is provided when a store operator relocates within one-half mile, commences
179 operations after two years, and the restriction term is limited to three years.

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181 **V. PROPOSAL:**

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183 The proposed Section 20.10.027 to be added to the BMC aims to promote public health and
184 welfare while balancing private interests and avoiding barriers to private investment. The new
185 section includes the following elements:

186
187 A. *Purpose:* This section provides a statement of purpose for the legislation.

188
189 B. *Definitions:* Definitions are provided that pertain to the ordinance for the terms “closure,”
190 “grocery store,” “impose,” “owner,” “restrictive covenant,” and “retail center.”

191
192 C. *Prohibition against restrictive covenants:* Per the prohibition, it shall be unlawful for any owner
193 to impose a restrictive covenant on real property that prohibits or restricts the use of said property
194 as a grocery store beyond the time period during which the owner has an ownership interest in
195 the property. The prohibition contains two exceptions if: 1) a store relocates and certain size,
196 distance, duration, and other term limits are met; or 2) a restrictive covenant is used to limit
197 competition within the confines of a retail center.

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199 D. *Effective Date:* The ordinance only applies to restrictions created after the effective date of the
200 ordinance.

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 202 E. *Director Determination, Notice of Violation and Appeal.* The Director shall have the authority to
 203 determine and provide notice of violations, and appeals may be made to the Hearing Examiner.
 204
 205 F. *Enforcement:* The section outlines several enforcement provisions.
 206
 207 G. *Severability:* The ordinance concludes with a severability clause to ensure that if some
 208 provisions are held to be illegal or otherwise unenforceable, the remainder shall not be affected.
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210 The proposed section to be added to the BMC is shown in legislative format in the draft ordinance
 211 **Exhibit A.**

212
 213 **VI. COMPREHENSIVE PLAN GOALS AND POLICIES:**
 214

215 The Bellingham Comprehensive Plan identifies the guiding principles and goals for decisions
 216 regarding changes to the City’s land use and development code. The proposed legislation is
 217 consistent with and implements the goals and policies of the comprehensive plan, particularly
 218 those related to increasing access to healthy food and supporting the growth and retention of
 219 commercial businesses. Relevant goals and policies include the following:
 220

221 **Policy LU-9** Promote small-scale commercial uses (e.g. corner stores) within neighborhoods,
 222 particularly where these uses historically existed, to encourage walkability and
 223 provide opportunities for employment and placemaking.
 224

225 **Policy LU-11** As neighborhood plans are developed and updated, important priorities and
 226 issues should be identified, including: ...
 227

- Spaces for small-scale community gardens, healthy mobile food vendors,
 and other opportunities for healthy, local food; ...

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 231 **Policy LU-20** The Commercial designation includes a range of commercial development
 232 intensities, from small neighborhood commercial areas to large planned
 233 commercial areas. In general, commercial areas should provide a broad range
 234 of services, commercial uses, mixed commercial and residential uses, and
 235 personal service establishments. Many existing commercial zoning categories
 236 allow and encourage mixed-use development, particularly in urban centers.
 237

238 **Policy LU-81** Increase access to healthy food for all Bellingham residents by encouraging and
 239 supporting healthy food retail, farmers markets, and small-scale urban farms
 240 (e.g. residential and community gardens).
 241

242 **Policy CD-26** Successfully integrate mixed-use development within urban villages and along
 243 certain high-capacity transit corridors linking urban villages as outlined in the
 244 Land Use and Transportation Chapters, providing residents with shopping and
 245 employment within walking distance.
 246

247 **GOAL ED-1** Build and maintain a positive and competitive business-friendly climate that will
 248 retain, grow and attract high-quality businesses.
 249

250 **Policy ED-26** Review land use regulations, development standards and design guidelines to
251 ensure that the existing developed and remaining vacant or underutilized
252 employment lands are used as efficiently as possible.

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254 **GOAL ED-4** Foster vibrant urban villages.

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256 **Policy ED-51** Encourage locally-based food production, distribution and choice through the
257 support of community gardens, farmers markets, and other small-scale
258 initiatives.

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260 **VII. PUBLIC COMMENT:**

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262 Notice of the Planning Commission public hearing was mailed to neighborhood association
263 representatives and other parties with an interest in this topic. Notice was also published in the
264 Bellingham Herald. Notices were issued at least 30 days prior to the hearing date.

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266 As of October 3, 2019, no comment has been received regarding the proposed code
267 amendments.

268
269 **VIII. STATE ENVIRONMENTAL POLICY ACT (SEPA) DETERMINATION:**

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271 A non-project SEPA Determination of Non-Significance (DNS) was issued on September 20,
272 2019. Notice was mailed to the appropriate agencies and published in the Bellingham Herald and
273 on the City's website. No public comment was submitted on the DNS prior to publication of the
274 meeting packet. The DNS is attached as **Exhibit C**.

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276 **IX. STAFF RECOMMENDATIONS:**

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278 Staff hereby recommends approval of the draft ordinance as shown in **Exhibit A**. Restrictive
279 covenants that limit food access by the residents of the City of Bellingham are contrary to public
280 policy, requiring regulation by the City of Bellingham under its police powers. The proposed
281 legislation promotes public health and welfare by limiting the use of certain restrictive covenants
282 that preclude the use of real property for grocery stores. At the same time, the ordinance balances
283 private interests and avoids barriers to private investment by providing for exceptions to the
284 prohibition against restrictive covenants where certain conditions are met. Furthermore, the
285 proposed new Section 20.10.027 of the BMC is consistent with and will implement the goals and
286 policies of the 2016 Bellingham Comprehensive Plan. If the Planning Commission agrees, the
287 Commission should adopt the Findings of Fact, Conclusions and Recommendations as shown in
288 **Exhibit B**.

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290 **X. LIST OF EXHIBITS:**

291
292 ~~A. Draft Ordinance (See City Council Packet Attachment 2)~~

293 ~~B. Draft Findings of Fact, Conclusions and Recommendations (See City Council Packet Exhibit~~
294 ~~A to Draft Ordinance)~~

295 ~~C. SEPA Determination of Non-Significance~~
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BELLINGHAM PLANNING COMMISSION FINDINGS OF FACT, CONCLUSIONS, AND RECOMMENDATIONS

OCTOBER 17, 2019

SUMMARY

Following the public hearing and deliberation on the proposal to add a new Section 20.10.027 to the Bellingham Municipal Code (BMC) relating to grocery store restrictive covenants, the Bellingham Planning Commission has determined that the proposed changes are consistent with and will implement the goals and policies of the 2016 Bellingham Comprehensive Plan and should be recommended for approval.

I. FINDINGS OF FACT

1. Proposal Description:

This proposal would add a new Section 20.10.027 to BMC Title 20 to prohibit the use of restrictive covenants that preclude the use of real property for grocery store operations and sales, except in limited circumstances where certain conditions are met. The legislation aims to promote public health and welfare while balancing private interests and avoiding barriers to private investment. The complete ordinance is shown in legislative format in Exhibit A (Ordinance) of the staff report and contains the following elements:

A. *Purpose*: This section provides a statement of purpose for the legislation.

B. *Definitions*: Definitions are provided that pertain to the ordinance for the terms "closure," "grocery store," "impose," "owner," "restrictive covenant," and "retail center."

C. *Prohibition against restrictive covenants*: Per the prohibition, it shall be unlawful for any owner to impose a restrictive covenant on real property that prohibits or restricts the use of said property as a grocery store beyond the time period during which the owner has an ownership interest in the property. The prohibition contains two exceptions if: 1) a store relocates and certain size, distance, duration, and other term limits are met; or 2) a restrictive covenant is used to limit competition within the confines of a retail center.

D. *Effective Date*: The ordinance only applies to restrictions effective after the effective date of the ordinance.

E. *Director Determination, Notice of Violation and Appeal*. The Director shall have the authority to determine and provide notice of violations, and appeals may be made to the Hearing Examiner.

F. *Enforcement*: The section outlines several enforcement provisions.

G. *Severability*: The ordinance concludes with a severability clause to ensure that if some provisions are held to be illegal or otherwise unenforceable, the remainder shall not be affected.

2. Background Information:

In 2016, Albertsons closed its grocery store in Bellingham's Birchwood neighborhood. The store closure had a large impact in the community, especially in terms of limiting access to fresh and healthy foods.

This vacancy has been particularly problematic because the former Albertsons site has a restrictive covenant that precludes any other parcels within the retail center from operating as grocery stores. This restriction is contained in the Declaration of Restrictions and Grant of Easements that binds all property owners within the retail center. Additionally, as part of the land transaction through which the former Albertsons site was sold to another property, a use restriction running with the land was recorded on the parcel. This use restriction precludes the parcel from being used as a supermarket, a pharmacy, or a gas station so long as Albertsons Companies ("ABS") operates a grocery supermarket within a 5-mile radius of the former Albertsons site. The maximum duration of the use restriction is 20 years.

In response to the challenges facing the community precipitated by Albertsons' grocery store closure, City Council initiated a series of discussions concerning food access issues and the City of Bellingham's food policies. Relevant City Council meetings took place beginning in November, 2018 and continued throughout 2019. These discussions, along with staff research, brought to light some of the key issues surrounding restrictive covenants and culminated in the development of a proposed ordinance limiting restrictive covenants related to grocery stores.

Overall, certain restrictive covenants and other use restrictions related to grocery stores frustrate the goals, policies and land use plans of the City as a municipality, have a serious blighting effect on the community's health, safety, and general welfare, and should be deemed commercially unreasonable. At the same time, overly broad regulation in this area runs the risk of harming the retail environment.

Therefore, the City's proposed legislation prohibits restrictive covenants that preclude the use of real property for grocery store operations or sales after an owner or operator has terminated operations, but still allows restrictive covenants used to limit competition within the confines of a retail center and makes exceptions for store relocations and renovations if certain conditions are met.

Several other jurisdictions across the country have enacted ordinances to address similar concerns over grocery store restrictive covenants, including Madison, Wisconsin, Chicago, Illinois, and Washington, D.C.

On October 17, 2019 the Planning Commission held a public hearing on the proposal.

3. Public Comments:

Notice of the Planning Commission public hearing was mailed to neighborhood representatives, neighborhood associations, and other interested parties. Notice was also published in the Bellingham Herald 30 days prior to the hearing.

No public comments were submitted prior to the public hearing.

4. State Environmental Policy Act (SEPA) Determination:

A non-project SEPA Determination of Non-Significance (DNS) was issued on September 20, 2019. Notice was mailed to the appropriate agencies and published in the Bellingham Herald and on the City's website. No public comment was submitted on the DNS prior to publication of the meeting packet.

5. Consistency with the Bellingham Comprehensive Plan:

The Bellingham Comprehensive Plan identifies the guiding principles and goals for decisions regarding changes to the City's land use and development code. The proposed legislation is consistent with and implements the goals and policies of the comprehensive plan, particularly those related to increasing access to healthy food and supporting the growth and retention of commercial businesses. Relevant goals and policies include the following:

- Policy LU-9** Promote small-scale commercial uses (e.g. corner stores) within neighborhoods, particularly where these uses historically existed, to encourage walkability and provide opportunities for employment and placemaking.
- Policy LU-11** As neighborhood plans are developed and updated, important priorities and issues should be identified, including: ...
- Spaces for small-scale community gardens, healthy mobile food vendors, and other opportunities for healthy, local food; ...
- Policy LU-20** The Commercial designation includes a range of commercial development intensities, from small neighborhood commercial areas to large planned commercial areas. In general, commercial areas should provide a broad range of services, commercial uses, mixed commercial and residential uses, and personal service establishments. Many existing commercial zoning categories allow and encourage mixed-use development, particularly in urban centers.
- Policy LU-81** Increase access to healthy food for all Bellingham residents by encouraging and supporting healthy food retail, farmers markets, and small-scale urban farms (e.g. residential and community gardens).
- Policy CD-26** Successfully integrate mixed-use development within urban villages and along certain high-capacity transit corridors linking urban villages as outlined in the Land Use and Transportation Chapters, providing residents with shopping and employment within walking distance.
- GOAL ED-1** Build and maintain a positive and competitive business-friendly climate that will retain, grow and attract high-quality businesses.
- Policy ED-26** Review land use regulations, development standards and design guidelines to ensure that the existing developed and remaining vacant or underutilized employment lands are used as efficiently as possible.
- GOAL ED-4** Foster vibrant urban villages.

Policy ED-51 Encourage locally-based food production, distribution and choice through the support of community gardens, farmers markets, and other small-scale initiatives.

II. CONCLUSIONS

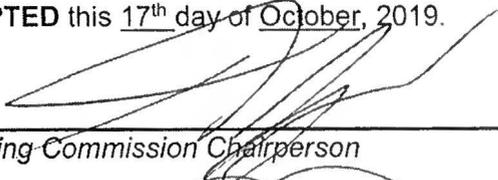
Based on the staff report and information presented at the public hearing, the Planning Commission concludes:

1. The proposed legislation promotes public health and welfare by limiting the use of certain restrictive covenants that preclude the use of real property for grocery store operations and sales;
2. The proposed legislation balances private interests and avoids barriers to private investment by providing for exceptions to the prohibition against restrictive covenants where certain conditions are met; and
3. The proposed legislation complies with and will implement the goals and policies of the 2016 Bellingham Comprehensive Plan.

III. RECOMMENDATIONS

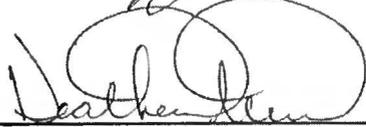
Based on the Findings and Conclusions, the Planning Commission recommends that the City Council approve the proposed amendments to the BMC as shown in the Ordinance.

ADOPTED this 17th day of October, 2019.



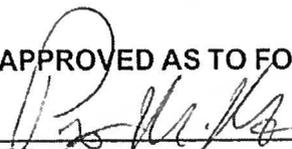
Planning Commission Chairperson

ATTEST:



Recording Secretary

APPROVED AS TO FORM:



City Attorney